**TASMANIAN INDUSTRIAL COMMISSION**

***Long Service Leave Act* 1976**

S14(1) appeal against decision

**S & L Bolter Pty Limited as trustee for the S & L Bolter Family Trust trading as Kols Cleaning Services**

(T14478 of 2017)

**and**

**Stacey Lee Brown**

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| PRESIDENT D J BARCLAY  DEPUTY PRESIDENT N M WELLS  COMMISSIONER N WILSON | HOBART, 26 April 2017 |

**Appeal against a decision handed down by a Commissioner on 30 January 2017 – T14424 of 2016 – jurisdiction – Long Service Leave Act s.14 - competency of appeal – threshold issue – absence of regulations prescribing manner of instituting, hearing and determining appeal – decision incapable of appeal – no appeal lies**

**DECISION**

1. On 20 February 2017 the Appellant filed a Notice of Appeal dated 19 February 2017 against a decision of a Commissioner ordering the Appellant to pay the Respondent a sum of money by way of pro rata long service leave.
2. The matter came before the Commissioner by referral pursuant to s.13 of the *Long Service Leave Act* 1976 (the Act). The Respondent had submitted a “complaint” to the Secretary of the Department of Justice. The Secretary caused the matter to be investigated. A report was produced and as the matter did not resolve the dispute was referred to the Commission.
3. On 21 February 2017 the Respondent advised that it wished to make “a jurisdictional objection based on the Appeal being brought under the wrong legislation”.
4. The objection was dealt with by way of written submissions. The Respondent filed her submissions on 10 March 2017 and the Applicant filed its submissions on 21 March 2017.
5. Subsequently it became apparent that the regulations required to be prescribed by s. 14(2) of the Act were repealed. On 22 March 2017 the parties were advised that the Full Bench would be assisted by the parties making written submissions regarding the effect of the absence of such regulations. The Applicant filed written submissions on 28 March 2017. The Respondent filed written submissions in 31 March 2017. This decision deals with the jurisdictional objection and the consequences of the repeal of the regulations.
6. For the reasons which follow we determine that the Appellant has no right to appeal the determination of the Commissioner in consequence of the repeal of the regulations.

**The regulation issue**

1. Section 14 of the Act provides as follows:

14. Appeals

* + 1. Subject to subsection (2), an employer or employee who is aggrieved by –
       1. a decision of the Secretary relating to the grant or refusal of an exemption under section 7 or the renewal or refusal to renew an exemption under that section; or
       2. a determination of a Commissioner under section 13 –

may appeal to a Full Bench.

(2) An appeal under this section shall be instituted, heard, and determined as prescribed.

(2A) A Full Bench shall cause a copy of its decision in relation to an appeal under this section to be served on all parties to the appeal.

(3) The decision of a Full Bench on the hearing of an appeal under this section is final.

(4) Where the decision of a Full Bench under this section requires the payment of a sum of money by an employer to an employee, the Full Bench may, without the necessity for any further application, order the employer to pay that sum to the employee.

It can be seen that the appeal is to be instituted, heard, and determined “as prescribed”.

1. On 11 December 2000 the Governor made the *Long Service Leave Regulations 2000.* Regulation 5 dealt with appeals.
2. By virtue of s.11(2) of the *Subordinate Legislation Act* 1992a regulation made after the commencement of that act (which commenced on 13 March 1995) ”is repealed on the tenth anniversary of the date on which it was made”*.* Accordingly the *Long Service Leave Regulations* 2000were automatically repealed on 11 December 2010.
3. There are no current regulations which prescribe the manner in which an appeal is to be instituted, heard, and determined. As such does a person aggrieved by a determination of a commissioner under s.13 of the Act have a right to appeal, and if yes can that right be exercised.

**Right to Appeal**

1. At first blush s.14 of the Act may give a person aggrieved by a decision of a commissioner under s.13 a right to appeal: “an employer or employee who is aggrieved……… may appeal to a Full Bench”. However that right is fettered by the opening words of s.14 of the Act which provide that “[s]ubject to subsection (2)”a person aggrieved may appeal.

Accordingly the right to appeal is arguably subject to the prescription to be set out in regulations made for the purposes of s. 14 of the Act.

*The parties’ submissions*

1. The Appellant in its written submissions submitted the following:

“The use of the words “as prescribed” are not limited to provisions prescribed in the Act, itself, and are not otherwise defined as being restricted, either to the Act itself or any regulations or rules relating thereto. The prescription can thus be as determined by other legislation or regulations.”

Accordingly the Applicant submits that the provisions of the *Industrial Relations Act* 1984can apply to hearing of appeals under the Act.

1. We do not accept the Applicants contention. No authority has been relied on for the submission. The effect of the submission is that one may cast around in any legislation or regulation for guidance on how to institute, hear and determine the appeal. That would be a surprising result. In effect the Applicant submits that the words “in any Act or Regulation” after “as prescribed” should be read into s.14(2) of the Act. There is no warrant to read in such words.
2. The submission also fails to acknowledge that the power of the governor to make regulations is contained in s.24 of the Act. The regulations required to be made are made under s.14 of the Act. The submission also overlooks the vast body of law relating to the power to make, and validity of, delegated legislation. Put simply the power to make regulations comes from the principal legislation (the Act) and its subject matter is specified (and limited to) matters pertaining to the Act.
3. Finally the submission overlooks, as is pointed out by the Respondent in her submissions, that sections 7 and 7A of the *Act Interpretation Act* 1931(AI Act) deals with the meaning of “prescribed” and references to Acts.
4. Section 7 of the AI Act provides:

In any Act, the expression prescribed –

(a) means prescribed by, or by regulations made under, the Act in which the word appears; and

(b) where reference is made to anything prescribed by an Act other than the Act in which the word appears, includes anything prescribed by any regulation made under that other Act.

1. The section is to the effect that “prescribed” means prescribed under the act in which the word appears unless the act refers to another act which in the present case it does not.
2. Section 7A (1) and (2) of the AI Act provide:

(1) Where in an Act reference is made to a Part, division, section, Schedule, or form without anything in the context to indicate that a reference to a Part, division, section, Schedule, or form of some other Act is intended, the reference shall be construed as a reference to a Part, division, section, Schedule, or form of the Act in which the reference is made.

(2) Where in a section of an Act reference is made to a subsection, paragraph, subparagraph, or other division without anything in the context to indicate that a reference to a subsection, paragraph, subparagraph, or other division of some other section or provision is intended, the reference shall be construed as a reference to a subsection, paragraph, subparagraph, or other division of the section in which the reference is made.

1. The respondent refers to and relies on subsection (1). However the reference in 14(1) of the Act is to another subsection of the Act and not a part, division, section, schedule or form. As such the correct provision of the AI Act engaged in these circumstances is subsection (2). Clearly therefore the reference to subsection (2) in s. 14(1) of the Act is a reference to s.14(2) only.
2. Accordingly we do not accept the Appellants submission and accept the respondent’s submission that the reference to regulations can only be a reference to regulations made under the Act.
3. While the Appellant, wrongly in our view, submitted the *Industrial Relations Act* assisted its case the Respondent simply submitted that the Commission had no power to deal with the matter as there were no regulations. However the Respondent referred to no authority to support her position.

*A question of construction*

1. The real question is whether as a matter of construction of s. 14 the right to appeal is conditioned by the existence of regulations or whether the right to appeal exists independently to the existence of regulations and can be exercised notwithstanding the absence of regulations.
2. In *Downey v Pryor[[1]](#footnote-2)* the High Court was considering the effect of the absence of prescription of the way in which a right to inspect local government documents was to be exercised. The issue was whether the absence of prescription meant that the right to inspect could not be exercised, or whether it could notwithstanding the precise way in which the inspection was to occur was not prescribed. The court split 2:1 in favour of the view that the inspection could take place. Given that the judges were not all in agreement, and the high authority of the case for present purposes we set out at some length the findings of each judge.
3. All the judges in *Downey v Pryor* treated the matter as a question of construction and looked to find the intention to be discerned from the relevant section to decide whether the absence of prescription was fatal to the right to inspect.

The relevant provision in *Downey* provided that

"Any elector may at the council's office inspect the books of account and the report of the auditor or of an inspector of local government accounts without fee as prescribed".

Dissenting McTiernan J said[[2]](#footnote-3)

In my opinion, the words “as prescribed” are an essential part of what s. 215 enacts for giving a right to an elector to inspect the books of account of the council and the reports mentioned in the section. *I think that the intention of the section is to give him* *a right to inspect such books and reports in accordance with the provisions of an ordinance to be made* *under s. 218 (m) and that no complete right of inspection arises until the ordinance is duly made*. *This means in effect that s. 215 is only an inchoate enactment.*

I do not agree with the view that the intention of s. 215 is to give a right of inspection which, if no ordinance is made, the elector is intended by the section to exercise in a reasonable manner. What the legislature has enacted is that the inspection is to be made in the manner prescribed, not that there should be a reasonable right of inspection. It is not the intention of the Act, in my opinion, that a member or servant of a council should be liable to a penalty under s. 217, if an elector should seek in his own manner to make an inspection of the books of a council and a magistrate were to consider the manner as reasonable. The right of inspection which s. 215 gives is one to be exercised in the manner prescribed by or under the Act, not in a manner which a magistrate may find to be reasonable.” (our emphasis)

Kitto J, in holding that the absence of prescription was not fatal to the right to inspect said[[3]](#footnote-4)

“Upon consideration of the words themselves, the context, and the nature of the provision, the intention may appear that a prescribed method is of the essence of the authority, so that there is no authority capable of exercise at any given time unless at that time a valid prescription of a method is in force: see, for example, *Cameron* v. *Deputy Federal Commissioner* *of Taxation (Tas.)* ; *Gramophone Co. Ltd.* v. *Leo Feist* *Incorporated*; *Browne* v. *Commissioner for Railways*; and *Ex parte Greenfield; Re McCulloch*. But on the other hand the meaning may be that the authority is to be subject to a power in the Executive to regulate its exercise and that in the reference to the prescribed method the words “if any" are to be implied: see *Commissioners of Inland Revenue* v. *Joicey* [No.1]. In the latter class of cases, a person exercising the authority must observe any method which is prescribed for the time being; but if none is prescribed the authority is exercisable by any appropriate method. Illustrations of this kind of provision may be found in *Commissioners* *of Inland Revenue* v. *Joicey* [No.1] and *Moate* v. *Dartnell*.

In my opinion the provision made by s. 215 is of the latter description. The broad intention clearly appears that a council's books of the kinds referred to shall be open to inspection by the electors. To the Executive is committed the responsibility of regulating the right of inspection, by making such provisions by ordinance as may seem proper. But there is no definable category of matters to be covered by ordinance, and the section can hardly mean that provided some aspect of inspection, however insignificant, is governed by a prescribing ordinance the right exists, and, save on that one aspect, is exercisable at large, but that unless there is some prescription there is no right of inspection at all. The view seems much sounder that the function of the expression “as prescribed" is to link an authority which the section intends by its own immediate operation to confer on electors with the power elsewhere entrusted to the Executive to regulate the exercise of that authority.” (references omitted)

And His Honour held[[4]](#footnote-5):

“The conclusion to which I come, therefore, is that the elliptical expression "as prescribed” means "observing any regulatory provisions which may be contained in the ordinances for the time being in force ".

Windeyer J in the same case said[[5]](#footnote-6):

“The question here is whether the legislature of New South Wales intended to give electors of local governing bodies in the State a right to inspect their accounts; or whether it intended only that the Government might permit them to do so if it chose.

In my view the words "as prescribed" that appear, somewhat clumsily, in s. 215 of the Local Government Act 1919 do not make that section depend for its effectual operation on something being prescribed. This is not, it seems to me, a case where a prescription of something pursuant to a statute is necessary to complete a statutory right. It is rather a case of the statute recognizing that a right given by it may be further defined, or its exercise regulated, by ordinance. The distinction between the two classes of cases is clear. But sometimes, as here, a question can arise as to which result the language of a particular enactment produces. Where it is said that something is to be done in a prescribed manner, and there are several ways in which that very thing can be done, then, prima facie, the enactment is ineffectual until one of those ways be prescribed (Browne v. Commissioner for Railways; Cameron v. Deputy Federal Commissioner of Taxation (Tas.). In such cases life and vigour is only given to the statute when what is to be prescribed has been prescribed-for example, a prohibition against travelling at a speed greater than the prescribed maximum could not be contravened until a maximum had been prescribed.” (references omitted)

In agreeing with Kittto J His Honour said[[6]](#footnote-7)

“The argument for the respondents that under s. 215 the right of an elector to see the books of account is established only when something in relation to it is prescribed may be tested by asking what would have to be prescribed-the manner in which the books or report were to be inspected, it was said. But there is really only one way to inspect a document that is by looking at it, examining it visually. What the argument really meant was that conditions or circumstances in which the right of inspection might be exercised must be prescribed. But what?

…………………….

In short, although counsel for the respondents contended that before a right of inspection under s. 215 could be availed of by an elector some conditions of its exercise would have to be prescribed, the argument did not reveal what sort of conditions these must be.”

1. In *Pearce and Argument[[7]](#footnote-8)* the authors noted after setting out a number of cases in which courts had found that regulations were or were not fatal to the operation of the relevant power or right:

“This essentially pragmatic approach of the courts unfortunately leads to some uncertainty. It becomes a matter of assessment whether a court will require regulations to have been made where there is an ‘as prescribed’ requirement or will rule that they are unnecessary. The cases do not lend much assistance in predicting the likely ruling, except perhaps that where a right is being given by the Act, regulations will probably not be regarded as essential: cf *Downey, Moate, Taylor* and *Turner.* Conversely, where an obligation is being imposed, the details of that obligation will have to be spelled out: cf *Gramophone Co* and *Browne.”*

At the end of the day however the task is one of statutory construction.

1. The purpose of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the Act. The meaning of the provision must be determined by reference to the language of the Act read as a whole. The context, the general purpose and policy of a provision and its consistency and fairness are better guides to its meaning than the logic with which it is constructed. The process of construction must always begin by examining the context of the provision that is being construed.[[8]](#footnote-9)
2. In construing a statutory provision meaning must be ascribed to every word of the provision wherever possible.[[9]](#footnote-10) All words must prima facie be given meaning and effect and words are not to be considered superfluous or insignificant unless there is clear reason to do so.[[10]](#footnote-11)

*Construction of section 14 of the Act*

1. The purpose to the Act is to provide for the granting of long service leave to Tasmanian employees. Sections 13 and 14 of the Act deal with settlement of disputes including appeals from determinations of commissioners.
2. Appeals are creatures of statute. Accordingly the right to appeal, from what decision or determination one may appeal, how the appeal is to be instituted and heard and the bases upon which the appellant tribunal or court may determine the appeal must all be specified in legislation[[11]](#footnote-12). As such there are no common law rights which may be affected by a particular construction of the statute. Rather the statute grants a right which does not otherwise exist. As such there is no warrant to read down or otherwise construe the provision on the basis that the provision affects an existing common law right.
3. In our view therefore the words of the section must be read so as to give meaning and effect to each word and there is no basis to construe any words as superfluous or insignificant.
4. The plain reading of the text of s.14 of the Act is in our view that the right to appeal is made subject to subsection (2). To hold otherwise would be to give the words “[s]ubject to subsection (2)” no work to do.
5. Accordingly the right to appeal is a right to appeal subject to (and in accordance with) subsection (2). As such the right to appeal is subject to the regulations to be made under s.14(2) of the Act. Section 14(1) is to be read as “subject to the regulations prescribing the way in which the appeal is to be instituted, heard, and determined an employer or employee who is aggrieved by ….a determination of a commissioner under section 13 may appeal to the Full Bench”.
6. We agree with McTiernan J in *Downey* that the words “as prescribed” are essential for giving a right to an aggrieved person to appeal.
7. To use the words of Kitto J set out above, a prescribed method is of the essence for the exercise of the right to appeal.
8. We are fortified in that view as the regulations are not only to prescribe how the appeal is to be heard and determined (matters which might have been left up to an individual Full bench[[12]](#footnote-13)) but how the appeal is to be instituted and what powers the Full Bench has in deciding the appeal. Contrary to the answer to Windeyer J’s question in *Downey* regarding what is left to prescribe, in the present case there are many matters. For example a time limit within which an aggrieved person may appeal; what the form of appeal is to contain; who the parties to the appeal are; and particularly significantly the powers of the Full Bench when hearing the appeal. Add to that that there is no guidance elsewhere in the Act as to procedure which might be adopted by a Full Bench, the content of the right to appeal, without regulations, is vague and uncertain in its form and substance.
9. It is of particular significance that the powers of the Full Bench on hearing the appeal are not prescribed. The Full Bench is a creature of statute and it has no inherent jurisdiction. Accordingly it can only exercise the powers it is specifically given by the statute. No powers have been prescribed by regulations.
10. The matters to be prescribed are significant and fundamental to the exercise of the ability to appeal.

In *Browne v Commissioner for Railways[[13]](#footnote-14)* it was said:

“So far as Courts are concerned, it has been held that if jurisdiction is conferred upon a Court, it may and should exercise that jurisdiction ; and if no procedural machinery has been provided, it is for the Court to provide such machinery as best it : Regina v. Justices of the Central Bailiwick, Ex McEvoy (7 V.L.R. Law 90 at pp .. 93-4); In the Will of Todd (13 V.L.R. 185 at p. 189); A.-G. for Ontario v. Daly ([1924] A.C. 1011 at p. 1015). If it is provided by Statute that an application may be made to a Court within the time and in the manner and on the conditions directed by rules of Court, this is regarded as creating a right in the applicant to make, and a duty in the Court to hear, the application, irrespectively of whether any rules have been made. In such a. case, there is a power in the Court to prescribe conditions by rules, but until it does so, the Court must deal with applications as justice and common sense demand: Inland Revenue Commissioners v. Joicey ([l913] 1 K.B. 445 at 451, 454-6) ; H.M.S. Archer ([1919] P. 1 at p. 5); White Transit Co. Ltd. v. Metropolitan Transport Trust (Cor. Harvey J. 5-6-31). It has been said also that where an Act provides that something is to be done by a public officer of a judicial or quasi-judicial nature, and no machinery is provided, he must do the best he can with the means he has available: Edgar v. Greenwood ([1910] V.L.J ... 137 at pp. 144-5).”

1. However we are of the view that the present provision clearly provides that the right to appeal itself is subject to prescription such that the Full bench is not conferred with jurisdiction and that procedure is a matter for the Full Bench.
2. It is unlike, for example the case of *Moate v Dartnell[[14]](#footnote-15)* where a provision in legislation gave a right to issue what is now known as a third party notice. The following provision in the act provided that the way in which the third party procedure was to be carried out was to be the subject of rules of court. There were no rules. The statute there however granted the right in a separate and distinct provision (from that of the procedure) so that the party could exercise that right notwithstanding the absence of rules.
3. Adopting the principles referred to in *Brown* the court held the absence of rules was not fatal to the right to issue the third party notice. Here however the very “right” to appeal is subject to the making of regulations. Accordingly we are of the view that the line of authority referred to in *Browne* is of no assistance.

**Conclusion on the Right to Appeal**

1. In our opinion the right to appeal under section 14 of the Act is subject to regulations prescribing the manner in which an appeal is to be instituted, heard, and determined. In the absence of such regulations the Appellant has no right to appeal.
2. Accordingly we are unable to proceed to hear and determine the appeal.

**The Jurisdictional Point**

1. Whist is it is unnecessary to decide, we will say a few words about the application to dismiss the Appeal for want of jurisdiction.
2. Had the Appellant had an exercisable right to appeal we would have found that it had properly invoked the jurisdiction. The error in the Notice of Appeal is that it refers to the *Industrial Relations Act* and not the Act.

However the Notice otherwise properly:

1. Identifies the determination from which the appeal is made; and
2. Specifies in its grounds that the appeal relates to issues under the Act.
3. The Respondent is not prejudiced in any relevant way by the mistake in referring to the wrong legislation. The point sought to be raised is putting form over substance. It is also noted that the absence of regulations is to the effect that there is no time limit applying to this appeal. Accordingly the Appellant could have applied to amend the Notice at any time. The Respondent could hardly argue any relevant prejudice if the amendment was allowed given that the pith and substance of the Notice would not be amended.
4. The only point of significance which the Respondent makes is that it is asserted any amendment ought not to be allowed because the Appeal is without merit. In our view, given the nature of the error in the Notice and the fact that there is no discernable prejudice to the Respondent, that it would have been inappropriate not to allow the amendment and allow the Appellant to proceed. The Appellant should not have been locked out of its argument on the basis of a submission which essentially amounts to an application to summarily dismiss the appeal.

**Conclusion and disposition**

1. The Appellant has no exercisable right to appeal. As such we are unable to entertain the matter and the file will be closed.

David Barclay

**PRESIDENT**

1. (1960) 103 CLR 353 [↑](#footnote-ref-2)
2. Ibid at p. 359 [↑](#footnote-ref-3)
3. Ibid p. 361 - 2 [↑](#footnote-ref-4)
4. Ibid p 363 [↑](#footnote-ref-5)
5. Ibid p 634 [↑](#footnote-ref-6)
6. Ibid p 365 [↑](#footnote-ref-7)
7. Delegated Legislation in Australia, 4th Ed. p. 183 [↑](#footnote-ref-8)
8. *Project Blue Sky Inc & Ors. V. Australian Broadcasting Authority (1998) 194 CLR 355 at 381* [↑](#footnote-ref-9)
9. Ibid at p. 382. [↑](#footnote-ref-10)
10. See Pearce and Geddes Statutory Interpretation in Australia, 8th Ed. Par 2.26 [↑](#footnote-ref-11)
11. See for example Part 5-1, Subdivision E of the *Fair Work Act 2009 (Cwlth)* [↑](#footnote-ref-12)
12. See further paragraphs [29] – [31] [↑](#footnote-ref-13)
13. (1935) 36 SR (NSW) 21 [↑](#footnote-ref-14)
14. (1948) 65 WN (NSW) 9 [↑](#footnote-ref-15)