FEDERAL COURT OF AUSTRALIA

Transport Workers' Union of New South Wales v Australian Industrial Relations Commission

[2008] FCAFC 26

Gray, North and Gyles JJ

29-30 October 2007, 6 March 2008

Industrial Action — Order of Australian Industrial Relations Commission that industrial action stop, not occur and not be organised — Finding only that industrial action was happening — Workplace Relations Act 1996 [Post Work Choices] (Cth), s 496(1).

Industrial Action — Order of Australian Industrial Relations Commission directed at union registered solely under State law and not transitionally registered association — Whether union outside scheme of federal legislation — Workplace Relations Act 1996 [Post Work Choices] (Cth), ss 16, 496(1).

Industrial Action — Order of Australian Industrial Relations Commission directed to employees not members of union but eligible to be members — Workplace Relations Act 1996 [Post Work Choices] (Cth), s 496(10).

Prerogative Writs — Application for writs of mandamus and certiorari — Order of Australian Industrial Relations Commission exceeding jurisdiction in some respects — Possibility that other errors made — Parts of order valid — Essential effect of order long since spent — Writs not granted.

Words and Phrases — "Person".

Words and Phrases — "Organisation".

The applicant union sought remedies pursuant to s 75(v) of the *Constitution*. The Australian Industrial Relations Commission had made orders against the applicant that industrial action stop, not occur and not be organised. These proceedings were instituted on the grounds: (a) that the orders exceeded the jurisdiction of the Commission in that the Commission did not find the necessary jurisdictional facts to found the orders; (b) s 496(1) of the *Workplace Relations Act 1996* (Cth) did not empower the Commission to make orders binding the applicant because it was a State-registered union and not a transitionally registered association; (c) the orders were onerous and oppressive.

Held: (1) The Commission found only that industrial action, not being protected action, was happening. It had no power to go beyond the making of an order that the action stop. It had no power to order that the action not occur or be organised.

(2) There is no manifestation in the *Workplace Relations Act 1996* (Cth) of an intention that State-registered associations should stand wholly outside the scheme of the Act. The constitutional focus of the Act on corporations and their employees may lead to the conclusion that some provisions of the act apply to State-registered associations. The use of the word "person" in s 496(10) is sufficient to include an organisation. The applicant was not immune from orders under s 496(1) of the Act.

Williams v Hursey (1959) 103 CLR 30 at 52, applied.

(3) The Commission made no finding as to the nature of the industrial action, save the fact that it was occurring. There was no evidence to the court providing any further detail as to the nature of the industrial action taking place. This made it difficult to determine whether the Commission's order exceeded its power. The likelihood is that it did. The order not only required each employee to stop industrial action immediately, but also not to engage or threaten to engage in industrial action. The order expressed it to be binding on employees who were members, but also employees eligible to be members. It does not appear that any notice of the proceedings was given to any employees individually. The applicant could not represent the interests of employees who were not its members. An order under s 496(1) now carries with it the possibility of civil penal consequences for which a non-member employee could be held liable.

(4) The Commission appeared to have exceeded its jurisdiction in some respects and perhaps made errors within its jurisdiction in others. There remains some of the order which may amount to a valid exercise of its power but the essential effect of the order is long since spent. Mandamus should not be granted. Grant of certiorari would be futile. Order nisi granted but discharged.

Cases Cited

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 94 LGERA 330.

Associated Newspapers Ltd v Wavish (1956) 96 CLR 526.

Attorney-General v Great Eastern Railway Co (1880) 5 App Cas 473.

Australian Securities Commission v Bell (1991) 32 FCR 517.

BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union [2000] FCA 1614; (2000) 102 IR 275.

Dunkel v Commissioner of Taxation (1990) 27 FCR 524.

Fenton v Hampton (1858) 14 ER 727.

Gillespie v Ford (1978) 46 FLR 297.

Harrison, Re; Ex parte Reid (1995) 62 IR 280.

Johns v Connor (1992) 35 FCR 1.

Kioa v West (1985) 159 CLR 550.

Licensing Ordinance, Re (1968) 13 FLR 143.

McGowan v Migration Agents Registration Authority [2003] FCA 482; (2003) 129 FCR 118.

Plaintiff S157/2002 v Commonwealth [2003] HCA 2; (2003) 211 CLR 476.

Pryor v Coal & Allied Operations Pty Ltd (1997) 78 IR 300.

R v Cook; Ex parte Twigg (1980) 147 CLR 15.

R v Gough; Ex parte Australasian Meat Industry Employees Union (1965) 114 CLR 394.

Refugee Review Tribunal, Re; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82.

Saitta Pty Ltd v Commonwealth [2000] FCA 1546; (2000) 106 FCR 554.

Sterling, Re; Ex parte Esanda Ltd (1980) 44 FLR 125.

SZBYR v Minister for Immigration and Citizenship [2007] HCA 26; (2007) 81 ALJR 1190.

Trolly, Draymen and Carters Union of Sydney and Suburbs v Master Carriers Association (NSW) (1905) 2 CLR 509.

Williams v Hursey (1959) 103 CLR 30.

Zuijs v Wirth Brothers Pty Ltd (1955) 93 CLR 561.

Application for judicial review

M Einfeld QC and *A Hatcher*, for the applicant.

R Goot SC and *S Prince*, for the first respondent.

Cur adv vult

Gray and North JJ.

The nature and history of the proceeding

1 Orders made by the first respondent, the Australian Industrial Relations Commission (the Commission), on the application of the second and third respondents, TNT (Australia) Pty Ltd (TNT) and Riteway Transport Pty Ltd, which trades under the name Riteway Express (Riteway), in reliance on s 496(1) of the *Workplace Relations Act 1996* (Cth) (the WR Act) are the subject of this proceeding. The Transport Workers' Union of New South Wales (the TWU NSW) sought remedies pursuant to s 75(v) of the *Constitution* on three grounds: that the orders exceeded the jurisdiction of the Commission in that the Commission did not find the necessary jurisdictional facts to found all of the orders; s 496(1) did not empower the Commission to make orders binding the TWU NSW because it was a State-registered union not participating in the scheme of the WR Act; and the orders were onerous and oppressive, and framed in terms rendering them incapable of compliance, so that no reasonable decision-maker exercising power under s 496(1) could have made them.

2 On 7 April 2006, TNT and Riteway filed an application in the Commission, seeking orders pursuant to s 496(1) of the WR Act in respect of industrial action by employees of TNT and Riteway, in relation to work regulated by the TNT Australia-TWU New South Wales (Employees) Heads of Agreement 2005 (the TNT-TWU NSW Agreement). The application set out in detail the orders that were sought. Notice of the application was given to the TWU NSW. The Commission, constituted by Senior Deputy President Hamberger, conducted a brief hearing on the afternoon of 7 April 2006. TNT and Riteway were represented by lawyers. The TWU NSW was represented by two of its officers. At the conclusion of the hearing on that day, Senior Deputy President Hamberger made an order largely in the terms sought by TNT and Riteway, but with some modifications that had been the subject of submissions in the course of the hearing. The order was in the following terms:

> 1. *Title*
>
> This Order will be known as the TNT April 2006 Industrial Action Order.
>
> 2. *Persons Bound and Application of Order*
>
> This Order is binding upon:

(a) the Transport Workers' Union of New South Wales and theTransport [sic] Workers Union of Australia (TWU) and their officers, employees, agents and delegates;

(b) TNT Australia Pty Limited (TNT);

(c) Riteway Transport Pty Ltd (together with TNT the Company); and

(d) employees of the Company who are:

(i) members, or eligible to be members of the TWU; and

(ii) employed by the Company;

(iii) as transport workers at depots at Mascot, Enfield, Chullora, Homebush, Newcastle, Gosford and Wollongong (the sites); and

(iv) engaged in work which is regulated by the TNT Australia - TWU New South Wales (Employees) Heads of Agreement 2005 (Agreement).

(Employees).

3. *Definition*

For the purposes of this Order, *industrial action* has the meaning prescribed by s 420 of the *Workplace Relations Act* and includes:

(a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work; and

(c) a failure or refusal by Employees to attend for work or a failure or refusal to perform any work at all by Employees who attend for work,

but excludes:

(d) protected action within the meaning of the *Workplace Relations Act 1996* (Cth) (Act);

(e) action by an Employee that is authorised or agreed to by the Company; and

(f) action by an Employee if such action was based upon the Employee's reasonable concern about an imminent risk to the Employee's health or safety, and the Employee did not unreasonably fail to comply with the directions of the Company to perform other available work, whether at the same or another workplace, that was safe and appropriate for the Employee to perform.

4. *Industrial Action to Stop or not Occur*

(a) Each Employee must immediately stop, and not engage in or threaten to engage in, industrial action.

(b) Each Employee must immediately be available for work, and perform work as required by the Company in accordance with the Agreement.

(c) The TWU and its officers, employees, agents and delegates must:

i. stop, not organise and not recommence any ban, limitation or restriction on members of the TWU attending for and performing work in accordance with the Agreement;

ii. not organise, aid, abet, direct, procure, induce, advise or authorise its members to engage in industrial action, or stop performing work in accordance with the Agreement;

iii. immediately advise the relevant TWU delegates and the members at the sites that any direction, advice or authorisation to its members to engage in industrial action or stop performing, or ban, work, is withdrawn and that such action must cease;

iv. take all steps that are necessary, reasonable and available to ensure that the Employees comply with this Order including, but not limited to, advising each Employee of the terms of this Order, and writing to the Company by 9.00am on 8 April 2006 to advise what steps have been taken in compliance with this clause.

5. *Service of Order*

Without limitation as to other means of service, it will be sufficient service of this Order:

(a) upon the TWU and its officers and employees if:

(i) a copy of this Order is sent by facsimile (or otherwise provided) to the registered office of the TWU, or to an officer of the TWU who has dealings with the Company in relation to any of the Employees; or

(ii) a copy of this Order is handed to or read in the presence of an officer or employee of the TWU.

(b) upon each of the Employees if:

(i) a copy of this Order is served on the TWU as provided in clause 5(a); or

(ii) a copy of this Order is placed on the notice board(s) usually used for the purpose of communicating with Employees by 5.00pm on 7 April 2006.

6. *Term and Date of Effect*

This Order will come into effect from 5.00pm on 7 April 2006 and will remain in force for a period of 1 month.

3 On 10 April 2006, the Senior Deputy President issued what was described as a supplemented version of the reasons provided for his decision to make the orders. Relevantly, those reasons were as follows:

[4] There are three jurisdictional prerequisites to the Commission issuing an order under s 496(1).

(1) The Commission must form the view that it appears that industrial action is happening, is threatened, impending or probable, or is being organised;

(2) This industrial action is by an *employee* or *employer* as defined by the Act,

(3) This industrial action is not *protected* as defined by the Act. With the commencement of the Workplace Relations Amendment (WorkChoices) Act there is no need to determine that the industrial action is "illegitimate", as was the case for section 127 applications under the unamended Act.

[5] If these conditions are met, then the Commission must make an order that the industrial action stop, not occur and not be organised.

[6] It was common ground in the hearing that unprotected industrial action was occurring and that the employees undertaking the action were employed by a "constitutional corporation" (and therefore were "employees" as defined by the Act). Accordingly the Commission is bound to make an order under s 496(1).

> [7] The terms and conditions of employment of the employees of the Company are governed by a preserved collective State agreement with a nominal expiry date of 31 December 2007. The draft order proposed by the Company was directed *inter alia* to the Transport Workers Union of New South Wales, which is a party to the preserved collective State agreement. The representative of the Transport Workers Union questioned whether a s 496 order could be made against an organisation registered under the NSW *Industrial Relations Act 1996*.
>
> [8] The Act does not explicitly indicate against whom an order can be made, though s 496(10) reads; [sic]
>
> (12) The Court may, on application by a person affected by an order of the Commission under subsection (1), (2) or (6), grant an injunction on such terms as the Court considers appropriate if it is satisfied that another person:
>
> (a) has engaged in conduct that constitutes a contravention of subsection (10); or
>
> (b) is proposing to engage in conduct that would constitute such a contravention.
>
> [9] This implies that an order can apply in relation to any "person" if that is relevant to stopping or preventing the industrial action. Section 4 of the Act specifies that "*person* includes an organisation". Elsewhere in section 4 an "organisation" is defined as "an organisation registered under the Registration and Accountability of Organisations Schedule". Clearly this is not an exhaustive definition. Section 22 of the Acts Interpretation Act indicates that the term "person" includes both individuals and corporate bodies. This would include organisations registered under the NSW Industrial Relations Act.
>
> [10] Accordingly I have determined that the order should be binding upon the Transport Workers Union of NSW as well as the Transport Workers Union of Australia.

4 On 18 April 2006, the Transport Workers' Union of Australia filed a notice of appeal. On 21 April 2006, the Commission, constituted by its President, Giudice J, made an order staying the operation of the order of 7 April 2006 in so far as it purported to bind the Transport Workers' Union of Australia. On 27 April 2006, the TWU NSW also lodged a notice of appeal against the order made on 7 April 2006. On 15 June 2006, a Full Bench of the Commission allowed the appeal of the Transport Workers' Union of Australia by consent and ordered that the order of 7 April 2006 be amended by deleting from cl 2(a) the words "and the Transport Workers' Union of Australia".

5 The Full Bench heard the appeal by the TWU NSW on 19 June 2006. On 31 July 2006, the Full Bench dismissed the appeal (*Transport Workers Union (NSW) v TNT Australia Pty Ltd* (2006) 154 IR 256). In its reasons for decision, the Full Bench said:

> [8] We deal first with the submission based on the need for findings of jurisdictional fact with respect to the appellant.
>
> [9] The submission fails at the outset. It is based on too narrow a view of the operation of s 496. All that is necessary to attract the Commission's jurisdiction is, relevantly, that it appears to the Commission that industrial action by employees, that is or would not be protected, is happening, threatened, impending or probable or being organised. Once one of those conditions is fulfilled the Commission may make an order which has a rational or logical tendency to stop or prevent the industrial action and/or its organisation.

[10] In this case it was clear that industrial action was occurring. It was also clear that the appellant had been involved in negotiations with TNT concerning a new industrial agreement and that the industrial action was related to those negotiations. In the circumstances it was not unreasonable that the Senior Deputy President should make an order binding on the appellant.

[11] Mr Hatcher submitted on the appellant's behalf that s 496 ought not be construed generously in favour of an applicant for an order because of the penal consequences attaching to any contravention of such an order, the removal of the discretion previously available to the Commission under s 127 of the unamended Act and the fact that s 496 is confined to industrial action by employers and employees and does not extend to industrial action by organisations.

[12] In our view no issue of generosity to the applicant in the construction of the section arises. It is simply a question of construing the relevant terms according to their ordinary and natural meaning. Subject to one specific textual issue we deal with below, there is no interpretation issue of substance. On the ordinary meaning of the words used it is clear that the section authorises the making of an order against a relevant trade union once the pre-condition of industrial action by employees has been fulfilled.

[13] The specific textual issue which arose concerns the use of the word "and" in the penultimate line of s 496(1). It was contended that "and" should be read distributively. Read in that way the section provides for three distinct types of orders: when industrial action by employees is happening, an order that the action stop; when industrial action by employees is threatened, impending or probable, an order that the action not occur; and, when industrial action is being organised, an order that the action not be organised. It was submitted that it is only an order of the third type which can be directed at an organisation and only where a finding has been made that the organisation is "organising" relevant industrial action.

[14] The use of the word "and" is, in the context, problematic. Given the history of the provision one might have expected the word "or" to appear. Nevertheless it is unlikely that it was intended that the Commission's discretion should be circumscribed in the way suggested by the appellant. It would be artificial to limit the issue of an order against a trade union to cases in which there is a finding that the union is organising the action. If in a particular case a union has been representing employees in negotiations and otherwise active in representing their interests, and unprotected industrial action is occurring or threatened, there is no good reason why an order that industrial action stop or not occur should not be buttressed by an order against that union. It is a matter for the discretion of the member of course, but there is no reason of construction or policy to limit the Commission's discretion in that respect. A party to a s 496 order which breaches or fails to observe the order thereby becomes liable to a civil penalty. That fact ought condition the exercise of discretion as to whom the order should be made to bind. But it should be borne in mind that it is only if the order is breached or not observed that liability arises. The potential for civil liability is not, therefore, a reason for importing into the words of s 496(1) pre-conditions for the making of an order which do not clearly appear in the section.

6 The Full Bench then dealt with the question whether a state-registered union of employees was amenable to an order under s 496, holding that it was. Finally, the Full Bench turned to the question of the terms of the order made by Senior Deputy President Hamberger. The Full Bench said:

[25] The definition of industrial action in cl.3 of the order repeats the definition in s 420 of the Federal Act so far as that definition is applicable to employee action. No specific findings were made that the appellant, its officers, employee agents or delegates were connected with the industrial action. The appellant contended that in these circumstances the Senior Deputy President should not have made an order binding on persons specified at the commencement of cl.4(c) of the order in relation to the full breadth of the definition of industrial action in the Federal Act.

[26] In our view, and although the appellant's counsel submitted to the contrary, s 496(9) is relevant to the issue. It provides that in making an order that industrial action stop, not occur and not be organised the Commission does not have to specify the particular industrial action. It follows from this provision that no specific finding concerning the nature of the industrial action is necessary. As long as there is some industrial action which is or would not be protected action there is a proper basis for an order in broad terms. As we earlier indicated, in light of the uncontested assertions that the appellant had been involved in negotiations with TNT concerning an industrial agreement and that the industrial action was related to those negotiations, there was a basis for making an order against the appellant in the terms specified at the commencement of cl.4(c).

[27] The second class of appeal grounds concern the terms of the order as such. It was contended that the substantive terms of the order, particularly the requirements of cl.4(c), "were onerous, impracticable in terms of compliance and went far beyond that which was necessary…for the circumstances". Counsel drew our attention to expressions such as "necessary", "reasonable" and "available steps" as indicative of uncertainty and ambiguity. It was also contended that the requirement in cl.4(c)(iii) to immediately advise delegates and others was oppressive. Counsel also drew our attention to the context, including the liability attaching to breach of the order, in aid of his submission that we should quash the order on those grounds.

[28] As earlier indicated, it is our view that s 496 is primarily designed to protect industrial parties from industrial action which is not protected action. If it is common ground that such action is occurring, it is within the Commission's discretion to make an order which it considers will be effective. The terms on which counsel relied to demonstrate invalidity, are not so vague or uncertain as to impose obligations which are unfair or too onerous. It is of course undesirable that orders of this kind impose obligations which are general rather than specific because of the difficulties which can arise should proceedings be taken for enforcement. An order in the terms of cl.4(c)(iv) of the order in this case to "take all steps that are necessary, reasonable and available to ensure that the employees comply with this order" might be thought productive of uncertainty. Nevertheless it is not so uncertain as to be beyond discretionary bounds.

7 On the ground that the appeal raised questions about the construction and application of s 496 which were important in the public interest, the Full Bench granted leave to appeal. It dismissed the appeal. At the conclusion of its reasons, the Full Bench said:

[30] Before concluding, there is a consideration of general significance which should be emphasised. The Commission's power to make orders pursuant to s 496 should be exercised in a practical way and in a way which is directed to the provision of effective relief for the party or parties entitled

to the benefit of the order. No one order or set of orders will be appropriate in all cases and a degree of tailoring will be required to ensure that the purpose of the section is achieved.

8 On 29 September 2006, the TWU NSW filed in the High Court of Australia an application for an order to show cause, in which the Commission is named as the first defendant, TNT as the second defendant and Riteway as the third defendant. At the same time, the TWU NSW filed a summons, seeking an order that the application to show cause be remitted to this Court for hearing. The Commission filed an appearance, submitting to any order the High Court may make, save as to costs. TNT and Riteway also filed appearances in the High Court and consented to an order remitting the matter to this Court, pursuant to s 44 of the *Judiciary Act 1903* (Cth), which order was made by consent on 13 February 2007. A draft order nisi, filed by TWU NSW, seeks a writ of certiorari, removing into the Court the decision of the Full Bench and the decision and orders of Senior Deputy President Hamberger, for the purpose of quashing those decisions and orders, and a writ of mandamus, compelling the Commission to determine the appeal of the TWU NSW against the decision and orders of Senior Deputy President Hamberger according to law.

The legislation

9 It is convenient to set out in full the provisions of s 496 of the WR Act:

> (1) If it appears to the Commission that industrial action by an employee or employees, or by an employer, that is not, or would not be, protected action:
>
> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the Commission must make an order that the industrial action stop, not occur and not be organised.
>
> (2) If it appears to the Commission that industrial action by a non-federal system employee or non-federal system employees, or by a non-federal system employer:
>
> (a) is:
>
> (i) happening; or
>
> (ii) threatened, impending or probable; or
>
> (iii) being organised; and
>
> (b) will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation;
>
> the Commission must make an order that the relevant industrial action stop, not occur and not be organised.
>
> (3) For the purposes of subsection (2), and other provisions of this Act as they relate to orders under that subsection:
>
> (a) *non-federal system employee* means a person who is an employee, within the ordinary meaning of that word, but who is not covered by the definition of "employee" in subsection 5(1); and
>
> (b) **non-federal system employer** means a person who is an employer, within the ordinary meaning of that word, but who is not covered by the definition of "employer" in subsection 6(1); and
>
> (c) section 420 (which defines **industrial action**) applies as if references in that section to employees and employers were instead references to non-federal system employees and non-federal system employers.

(4) The Commission may make an order under subsection (1) or (2) on its own initiative, or on the application of:

(a) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action; or

(b) an organisation of which a person referred to in paragraph (a) is a member.

(5) As far as practicable, the Commission must hear and determine an application for an order under subsection (1) or (2) within 48 hours after the application is made.

(6) If the Commission is unable to determine an application for an order under subsection (1) or (2) within the period referred to in subsection (5), the Commission must (within that period) make an interim order to stop and prevent engagement in, and organisation of, the industrial action referred to in subsection (1) or (2).

(7) However, the Commission must not make such an interim order if the Commission is satisfied that it would be contrary to the public interest to do so.

(8) An interim order is to have effect until the application is determined.

(9) In ordering under subsection (1), (2) or (6) that industrial action stop, not occur and not be organised, the Commission does not have to specify the particular industrial action.

(10) A person to whom an order under subsection (1), (2) or (6) is expressed to apply must comply with the order.

(11) Subsection (10) is a civil remedy provision.

(12) The Court may, on application by a person affected by an order of the Commission under subsection (1), (2) or (6), grant an injunction on such terms as the Court considers appropriate if it is satisfied that another person:

(a) has engaged in conduct that constitutes a contravention of subsection (10); or

(b) is proposing to engage in conduct that would constitute such a contravention.

(13) An order under subsection (1), or under subsection (6) that relates to an application for an order under subsection (1), does not apply to protected action.

10 Section 496 was effectively substituted for what was s 127 of the WR Act, by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (the Work Choices Act). Section 127(1) provided:

> If it appears to the Commission that industrial action is happening, or is threatened, impending or probable, in relation to:
>
> (a) an industrial dispute; or
>
> (b) the negotiation or proposed negotiation of an agreement under Division 2 of Part VIB; or
>
> (c) work that is regulated by an award or a certified agreement;
>
> the Commission may, by order, give directions that the industrial action stop or not occur.

11 By the combination of subss (5A) and (8), s 127(1) did not apply to protected action, as that term was then defined for the purposes of the WR Act. It is also significant that, by s 127(4), the powers conferred on the Commission by subs (1) were expressed to be in addition to, and not in derogation of, the powers conferred on the Commission by the rest of the WR Act.

A comparison of the legislation

12 Counsel for TNT and Riteway submitted that s 496(1) cannot have been intended to confer on the Commission powers narrower than those formerly conferred by s 127(1). The explanatory memorandum to the bill that became the Work Choices Act expressed the purpose of what became s 496 as being to reflect the changed constitutional basis of the WR Act, and as being:

> designed to strengthen and enhance pre-reform section 127, consistent with the Government's policy intention of providing effective and timely relief in respect of unprotected industrial action.

There is no doubt that the goal of strengthening and enhancing the provisions of the former s 127 has been met in some respects. Most importantly, the Commission now has a mandatory duty, instead of a discretionary power, to make orders. As far as practicable, it must hear and determine an application to make the orders within 48 hours of the application being made, instead of being required to do so as quickly as practicable. The range of orders is broadened to include orders that industrial action not be organised. Also significantly, subs (11) has now been added. In conjunction with other provisions of the WR Act, this provision produces the result that non-compliance with an order made under s 496(1) is punishable by a civil pecuniary penalty.

13 These changes aside, it is not necessarily safe to make the assumption, which counsel for TNT and Riteway appear to have made, that s 496 is broader in all respects than the former s 127. No longer does the Commission have the opportunity to resort to any of its other powers, perhaps to supplement the required orders, as it had under s 127(4). Section 496(1) now specifies the orders that are to be made, whereas s 127(1) previously described those orders as giving directions to the effect specified. The introduction of a mandatory requirement that orders be made, and of monetary penal consequences for non-compliance with them, may be reasons why Parliament may have intended to narrow the scope of the required orders, when compared with those that could be made under s 127(1).

14 It was suggested to the Court that the order made by Senior Deputy President Hamberger was in the form of a template, derived from the practice of the Commission in relation to the exercise of the powers previously given to it by s 127(1) of the WR Act. There is some support for this proposition in a comparison of the order the subject of this proceeding with that quoted in *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2000] FCA 1614; (2000) 102 IR 275 at [10]. It is necessary to bear in mind that the differences between s 127(1) and s 496(1) may be such as to require close attention to the question whether the Commission any longer has power to make orders in the same form as those it used to make.

The jurisdictional fact issue

15 The TWU NSW contended that the Full Bench of the Commission was wrong in [9] of its reasons for decision. The contention is that an order that industrial action stop can only be made if the Commission finds (as a jurisdictional fact) that it appears to the Commission that the industrial action is happening. Likewise, the jurisdictional fact that the Commission must find before it can make an order that industrial action not occur is that it appears to the Commission that the industrial action is threatened, impending or probable, and an order that industrial action not be organised can only be made if the

Commission finds that it appears to the Commission that the industrial action is being organised. In other words, the TWU NSW contended that s 496(1) should be read distributively, so that each of the three elements of the orders that must be made is related to the equivalent fact that must appear to the Commission before the requirement to make an order can be activated.

16 One disturbing aspect of the Full Bench's reasoning is that, although it acknowledged in [11], in its summary of the submission put on behalf of the TWU NSW, that the change of legislation involved the removal of the discretion previously available to the Commission, the Full Bench continued to reason as if s 496(1) conferred discretionary powers on the Commission. In [9], it said that "the Commission may make an order". In [10], it described it as "not unreasonable" that the Senior Deputy President should make an order binding on the TWU NSW. In [14], the Full Bench used the word "discretion" four times with reference to the Commission's powers. It is plain, however, that if the specified circumstance or circumstances appear to the Commission to be present, the Commission has no discretion at all as to whether to make an order. An order answering the specified description must be made. It may be true that the Commission has to select the person or persons on which its order will be binding. It may also be the case that the Commission must choose a form of order appropriate to answer one or more of the specified descriptions of the orders that must be made (as to which see [37]-[39] below). It is not clear, however, that these choices involve the exercise of discretion in the same way as the Commission formerly exercised its discretion under s 127(1). An order must be made. It must be an order that is designed to be effective to stop the industrial action, to ensure that the industrial action not occur, or to ensure that the industrial action not be organised, as the case may be. The choice of the target of the order will be dictated by the requirement that the order be made, and that it achieve one or more of these purposes, not by the exercise of any discretion on the part of the Commission. To approach the construction of s 496(1) as if it involved the exercise of broad discretions is erroneous.

17 The Full Bench of the Commission took the view that the presence of the conjunction "and" in the list of orders that must be made in s 496(1) refuted the TWU NSW's submission, especially when compared with the use of "or" in the list of events giving rise to the requirement to make orders, and the use of "or" in the former s 127(1). The Full Bench said at para [14] of its reasons for decision that the use of the word "or" might have been expected. There are many instances of statutory provisions in which, although the cumulative conjunction "and" is used in a list of items, other words in the same provision, or the context of the lists, make it clear that the items in the list are to be read as alternatives. Examples are found in *Associated Newspapers Ltd v Wavish* (1956) 96 CLR 526 at 528 and *Gillespie v Ford* (1978) 46 FLR 297 at 301, in which Forster CJ referred to Blackburn J's analysis of the principle in *Re Licensing Ordinance* (1968) 13 FLR 143 at 147. Other examples are referred to in Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (6th ed, Lexis Nexis, 2006) at [2.26]. Section 496(1) of the WR Act appears to be another example. The use of the word "or" in the list of circumstances in which orders must be made is capable of providing an indication that the items in the list of orders are to be read as alternatives, despite the use of the word "and". Only by reading the list of orders in that way can a sensible interpretation, which accords with the purpose of the section, be given.

18 The mandatory nature of s 496(1) is the most important factor that governs its construction. A literal reading of the subsection would result in the proposition that the Commission was required to make orders of all three kinds specified if any one of the specified events appeared to the Commission to be taking place. This would lead to absurd results. It cannot be supposed that Parliament would compel the Commission to make an order that industrial action stop, if it had not yet begun, but was threatened, impending or probable. Nor can it be assumed that Parliament would compel the Commission to make an order that industrial action not be organised if it was not being organised, but was taking place spontaneously. To require the Commission to engage in the making of futile orders would be to bring the Commission, and more likely the provisions of s 496(1), into disrepute. By contrast, perfect sense can be made of the provision if it be accepted that an order that the industrial action stop must be made if it appears to the Commission that it is happening, an order that the industrial action not occur must be made if it appears to the Commission that it is threatened, impending or probable, and an order that the industrial action not be organised must be made if it appears to the Commission that it is being organised.

19 The argument that, once the Commission's powers have been activated by any one of the events specified in paras (a), (b) and (c) appearing to the Commission, the Commission may then choose which of the orders it might make is inconsistent with the mandatory nature of the provision. It is impossible to comprehend the Commission having a duty to make orders, but being at liberty to choose which of the available orders it will make. Such a construction involves an inherent inconsistency. To adopt it would be in effect to extend the provisions of s 496(1), by regarding it as conferring on the Commission a discretion, as well as a duty. The words of the subsection do not permit such an extension.

20 This is not to say that the Commission is limited to making only one of the three kinds of orders in response to any application made to it. There will be cases, very likely many, in which it will appear to the Commission that industrial action is happening, and is being organised, and that the same industrial action, or industrial action in another form, is threatened, impending or probable. In such cases, it is easy to see that the Commission will be required to make an order that the industrial action stop and not be organised, and that whatever industrial action is threatened, impending or probable not occur. There will be other cases, however, in which it will appear to the Commission that only one or two of the three conditions specified in s 496(1) is present. For instance, there may be an application in respect of a strike for a single day, organised by a union. If the application is made in advance of the day on which the strike is to occur, the Commission may well find that it appears that industrial action is threatened, impending or probable and is being organised, and must make orders accordingly. If the application were to be made on the day on which the strike was occurring, it may only appear to the Commission that the industrial action is happening, the strike already having been organised and no longer being threatened, impending or probable. In such a case, the Commission would be limited to performing its duty to make an order that the industrial action stop.

21 In the present case, it appeared to Senior Deputy President Hamberger that industrial action, not being protected action, was happening. So much is evident

from [6] of the Senior Deputy President's reasons. There was no finding that it appeared to the Commission that industrial action was threatened, impending or probable, or was being organised. On that basis, the Commission was limited to making an order that the industrial action stop. Of course, Senior Deputy President Hamberger was required, so far as practicable, to hear and determine the application before him within 48 hours after it was made. Even though the reasons he gave for the order were published on the Monday following the Friday on which the order was made, s 496(5) did not provide much opportunity for detailed consideration of the issues that might have arisen. This was not the case when the Full Bench dealt with the matter. Once again, the Full Bench found (in the first sentence of [10] of its reasons) that industrial action was happening. It did not express any finding that industrial action was threatened, impending or probable, or that it was being organised. The basis on which the Full Bench felt that an order against the TWU NSW was justified was not a finding that the industrial action was being organised by the TWU NSW, but that it was open to the Senior Deputy President to make an order against the TWU NSW because it had been representing the employees in negotiations, unprotected industrial action was occurring in relation to those negotiations, and there was no good reason why an order that that industrial action stop should not be buttressed by an order against the TWU NSW. So much appears from [10] and [14] of the Full Bench's reasons.

22 Manifestly, the kind of industrial action to which s 496(1) is directed is not industrial action that a union can engage in by itself. The subsection is directed to "industrial action by an employee or employees, or by an employer". Section 496(1) also does not say anything about the identity of any person or entity against whom or which the orders required must be made. It directs itself to the nature of the orders, rather than to the targets of them. It is easy to see how an order that industrial action not be organised can be made against a union, if it is that union that is organising the industrial action. It is more difficult to see how an order can be made against a union, in the absence of a finding that the industrial action is being organised. A suggestion that arose in argument before the Court, which did not find its way into the reasons of Senior Deputy President Hamberger or the Full Bench, was that reliance could be placed on s 4(5) of the WR Act, which provides:

> In this Act, a reference to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the conduct.

23 If it could be said that s 496(1) contains a "reference to engaging in conduct" (a question which was not argued comprehensively in the present case), and if it were found that a union was directly or indirectly a party to or concerned in that conduct, an order against the union might be possible, without a finding that the industrial action is being organised. At least, an order that industrial action that is happening stop might be made against a union, on the basis that industrial action by employees, or an employer, amounts to engaging in conduct. A finding that industrial action is threatened, impending or probable, creates greater difficulty in finding that anybody is engaging in conduct referred to in s 496(1), but the possibility that such a finding could be made cannot be excluded altogether. All that can be said is that there may be cases in which s 4(5) of the WR Act might justify an order under s 496(1) against a union (whether an employee or an employer union) found to be directly or indirectly a party to, or concerned in, the engagement by another party in conduct referred to in

s 496(1). For reasons that appear in [58]-[60] below, in the discussion about whether to grant or withhold orders in the present case, it is unnecessary to determine whether the findings made in the present case amount to findings invoking s 4(5) in relation to the TWU NSW.

24 For present purposes, it is enough to say that, in the absence of any finding other than that industrial action, not being protected action, by employees was happening, the Commission had no power to go beyond the making of orders that the industrial action stop. Without it appearing to the Commission that industrial action was threatened, impending or probable, the Commission was under no duty, and had no power, to make any order that the industrial action not occur. Similarly, in the absence of a finding that the industrial action was being organised, the Commission had no duty, and no power, to make an order that the industrial action not be organised.

Orders against a State-registered union

25 The argument on behalf of the TWU NSW was that no order could be made against it under s 496(1), because it is registered solely under the laws of New South Wales. Counsel for the TWU NSW contended that a union registered solely under State law stands entirely outside the area of operation of s 496(1) of the WR Act, and outside the scheme of the WR Act itself. Although s 496(1) does not specify the persons or entities against whom or which orders can be made, both Senior Deputy President Hamberger and the Full Bench relied on the use of the word "person" in s 496(10). They took the view that, if a person to whom an order was expressed to apply was required to comply with the order, on pain of penalty pursuant to s 496(11), it was reasonable to conclude that an order under subs (1) could be made against a person. This reasoning is unexceptionable, but counsel for the TWU NSW argued that the TWU NSW is not a "person" for the purposes of the WR Act. They conceded that, pursuant to s 22(1)(a) of the *Acts Interpretation Act 1901* (Cth) (the *Acts Interpretation Act*), in the absence of a contrary intention, a reference to a "person" in any Act includes a body politic or corporate as well as an individual. They contended that the WR Act discloses a contrary intention.

26 To understand this argument, it is necessary to refer to certain other provisions of the WR Act. Among the definitions in s 4(1) is a provision that "person" includes an organisation. In turn, the word "organisation" is defined to mean an organisation registered under Sch 1 to the WR Act. Section 16 of the WR Act provides, so far as is relevant, as follows:

> (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law
>
> …
>
> (2) However, subsection (1) does not apply to a law of a State or Territory so far as:
>
> …
>
> (c) the law deals with any of the matters (the *non-excluded matters*) described in subsection (3).
>
> (3) The non-excluded matters are as follows:
>
> …
>
> (m) regulation of any of the following:
>
> (i) associations of employees;

(ii) associations of employers;
(iii) members of associations of employees or of associations of employers.

…

(6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

27 Although understanding this provision requires some mental gymnastics, it appears that the legislative intention is that the regulation of associations of employees, associations of employers, and members of associations of both kinds, is intended to continue to be dealt with by State law. Counsel for the TWU NSW contended that s 16 manifested a legislative intention to treat State-registered associations that did not become transitionally registered associations as falling entirely outside the scheme of the WR Act, and therefore not amenable to orders made under s 496(1).

28 Schedule 10 to the WR Act contains a legislative scheme dealing with what are called transitionally registered associations. Effect is given to that scheme by s 9 of the WR Act. The relevant provisions of Sch 10 are as follows:

1 Definitions

(1) In this Schedule:…

State-registered association means a body that is:

(a) an industrial organisation for the purposes of the *Industrial Relations Act 1996* of New South Wales…

2 Application for transitional registration

(1) A State-registered association may apply to a Registrar for transitional registration under this Schedule if:

(b) [sic] immediately before the commencement of this Schedule, it had at least one member who was:

(i) an employee whose employment was subject to a State award, a State employment agreement or a State or Territory industrial law; or

(ii) an employer in relation to such an employee; and

(c) immediately before the commencement of this Schedule, it was entitled to represent the industrial interests of the member in relation to work that was subject to the State award, the State employment agreement or the State or Territory industrial law; and

(d) on the reform commencement, the employee will become bound by, or the employment of the employee will become subject to, a preserved State agreement or a notional agreement preserving State awards if he or she continues in that employment; and

(e) it is not also an organisation, or a branch of an organisation.

…

(6) A State-registered association is taken to be registered under this Schedule when the Registrar grants the application.

3 Application of this Act to transitionally registered associations

The provisions of this Act apply, on and after the reform commencement, in relation to a transitionally registered association:

(a) in the same way as they apply in relation to an organisation; and

(b) as if a transitionally registered association were a person.

29 It was common ground in the present case that the TWU NSW has not applied to become, and has not become, registered as a transitionally registered association. Counsel for the TWU NSW contended that the provisions of cl 3 of Sch 10 demonstrated that the definition of "person" in s 4(1) manifest a contrary intention, for the purposes of the application of s 22(1)(a) of the *Acts Interpretation Act*.

30 In determining whether the definition of "person" in s 4(1) and the provisions of cl 3 of Sch 10 manifest a contrary intention, so as to exclude the normal meaning of the word "person", it is instructive to refer to some legislative history. The WR Act was preceded by the *Industrial Relations Act 1988* (Cth) (the IR Act), which was in turn preceded by the *Conciliation and Arbitration Act 1904* (Cth) (the C&A Act). From the earliest days of the C&A Act, it was common to find in the legislation provisions using the phrase "person or organization" or "organization or person", or some variant of those phrases. Thus, in its original 1904 form, the C&A Act contained, for example, s 6(1) ("No person or organization"), s 29(c) ("all organizations and persons"), s 38(e) ("any organization or person"), s 38(f) ("all persons and organizations" and "all such persons and organizations"), s 40 ("all persons and organizations" and "all such persons and organizations"), s 44(1) ("any organization or person"), s 60(3) ("any organization or person") and s 87 ("Every person who, or organization which"). The same usage persisted in the C&A Act, up to the time of its repeal and replacement by the IR Act. For instance, in the C&A Act as it stood immediately prior to its repeal, were s 46(1) ("An organization or other person"), s 47(1) ("an organization or person"), s 50(1) ("an organization or person"), s 61(e) ("all organizations and persons"), s 62(1) ("an organization, a person interested"), s 109(1)(b) ("an organization or person"), s 110(2) ("an organization or person"), s 110(3) ("all organizations and persons"), s 119(1), (1A) and (1B) ("organization or person"), s 172 ("with any other organization or with any person"), s 173 ("any organizations or persons"), s 177(1) ("Any organization or person"). There are other similar provisions, for example, ss 21(1), 36(2) and 70K(2).

31 This usage continued in the IR Act, in its original form and subsequently, and in the WR Act, in its original form and up until the definition of the word "person" was added by the Work Choices Act. It is unnecessary to make further detailed reference to provisions of those Acts. The only change appears to have been the adoption of the letter "s" instead of "z" in the spelling of the word "organisation", which occurred with the passage of the IR Act. Even after the enactment of the Work Choices Act, there are still provisions in the WR Act, many of them carried over from earlier legislation, which use the time-honoured formula. See, for instance, s 101 (formerly s 43(1)), s 120(3)(a) and (g) (similar to former s 45(3)(a) and (d)), s 120(5) (formerly s 45A(5)), s 658(8)(b) (apparently derived from former s 170CJ), s 841(b) (similar to former s 356), s 848(1)(b) (formerly s 413(1)(b)) and s 849(1)(b) (formerly s 413A(1)(b)), all of which appear to involve the earlier drafting practice being carried forward into new, or newly numbered provisions. In addition, there are new provisions, inserted by the Work Choices Act, in which the earlier drafting convention has been followed, despite the insertion of the definition of "person". See s 119(1) ("An organisation, a person interested or the Minister"), s 119(6)(a) ("a particular organisation or person") and s 487(1) ("the organisation or person" and "an organisation or person" in (b)).

32 The point is that the historical usage, of referring to organisations and persons in the same provision, has persisted long after 1959, when the High Court made it clear that an organisation registered under the C&A Act was a body corporate for all purposes. See *Williams v Hursey* (1959) 103 CLR 30 at 52 in the judgment of Fullagar J, with whom Dixon CJ and Kitto J agreed. On the basis of that authority, it became clear that the use of the word "person" would have been sufficient to include an organisation, by reference to the ordinary rule of construction of the word "person", contained in s 22(1)(a) of the *Acts Interpretation Act*. To the best of my knowledge, the continuance of the traditional usage has not led to any authority suggesting that the references to an organisation, in conjunction with references to a person, should be taken to establish a contrary intention, so as to oust the effect of s 22(1)(a) of the *Acts Interpretation Act*. Such an argument would have had startling consequences. It would have led to the conclusion that a contrary intention was established, so that the word "person" did not comprehend any corporation at all. Ordinary business entities would have been excluded from the operation of numerous provisions of the legislation. Further, the argument would have fallen foul of s 22(2) of the *Acts Interpretation Act*, which provides:

> Express references in an Act to companies, corporations or bodies corporate do not imply that expressions in the Act of the kind mentioned in paragraph (1)(a) do not include companies, corporations or bodies corporate.

This subsection operates to ensure that express references to organisations (which were bodies corporate) should not be taken to imply that references to the word "person" were not intended to include references to corporations generally.

33 With the legislative history in mind, it becomes apparent that the insertion of the definition of "person" into the WR Act by the Work Choices Act amounts to nothing more than a continuance of the traditional usage, although now in a shorthand form. Even though not wholly consistently, rather than including a reference to an organisation along with a reference to a person in every provision in which such a reference was previously considered appropriate, the draftsperson has chosen to ensure that the word "person" will be recognised as including an organisation, unless the WR Act itself manifests a contrary intention in a particular provision. The change accomplishes nothing other than to facilitate convenience in reading the provisions of the WR Act. It is not intended to effect a change in the meaning of the word "person". In particular, it is not intended to demonstrate a contrary intention for the purposes of s 22(1)(a) of the *Acts Interpretation Act*. Section 22(2) of the *Acts Interpretation Act* is decisive on that issue.

34 The inclusion of cl 3(b) in Sch 10 to the WR Act appears to be nothing other than an extension of the traditional usage to entities that were being treated as the equivalent of organisations. Having inserted the definition of "person" in s 4(1), the draftsperson has made sure that it is clear that the word "person" when used in the WR Act includes a transitionally registered association, as well as an organisation. The provision has been inserted notwithstanding that it is probable that all of the State-registered associations that may become transitionally registered associations under the WR Act are likely to be bodies corporate by virtue of the provisions of the relevant State legislation. Clause 3(b) of Sch 10 does not amount to the manifestation of a contrary intention, for the purposes of the application of s 22(1)(a) of the *Acts*

Interpretation Act, so as to exclude State-registered associations that do not become transitionally registered associations under the WR Act from the ambit of the word "person" wherever appearing in the WR Act. It is more likely that cl 3(b) is a redundant provision, inserted simply out of caution, or because of a desire to continue in effect the traditional pattern of usage. Section 22(2) of the *Acts Interpretation Act* is equally applicable to this argument.

35 Nor do the provisions of s 16 of the WR Act have the effect for which counsel for the TWU NSW contended. All that s 16(3)(m) accomplishes is to leave in operation the provisions of the laws of the various States that regulate the registration, the rules and the conduct of the affairs of associations, as the registration, rules and affairs of organisations are regulated by the provisions of Sch 1 to the WR Act. To the extent that the acts or omissions of State-registered associations, other than in relation to their internal affairs, fall within the provisions of the WR Act, s 16(3)(m) does not exclude the operation of those provisions in relation to those acts or omissions. There is certainly no manifestation of an intention that State-registered associations should stand wholly outside the scheme of the WR Act. The constitutional focus of the WR Act on corporations and their employees, instead of on the prevention and settlement of industrial disputes extending beyond the limits of any one State, may lead to the conclusion that some provisions of the WR Act apply to State-registered associations, whether or not they have become transitionally registered associations under the WR Act.

36 For these reasons, the TWU NSW was not immune from orders under s 496(1) of the WR Act by virtue of being a State-registered union, which had not applied to become a transitionally registered association under Sch 10.

The form of the Commission's order

37 The orders that s 496(1) of the WR Act commands the Commission to make are orders that industrial action stop, not occur and not be organised. Of course, the Commission is not restricted to making orders in precisely these terms. There is an ancient legal maxim, the Latin expression of which was Quando lex aliquid alicui concedit, concedere videtur id. sine quo res ipsa esse non potest. This is translated in *Wharton's Legal Maxims* (3rd ed, "Law Times" Office, 1903) at p 141 as "When the law gives anything to any one, it gives also all those things without which the thing itself would be unavailable." This principle has long been recognised as applicable to the exercise of powers conferred by statute. The conferral of such powers is said to carry with it powers that are "necessary" for, "incidental" to or "consequential" upon the exercise of the power granted. See *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 at 478 per Lord Selborne LC; *Trolly, Draymen and Carters Union of Sydney and Suburbs v Master Carriers Association of NSW* (1905) 2 CLR 509 at 516-517 per Griffith CJ and 523-524 per O'Connor J; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 574 per Dixon CJ, Williams, Webb and Taylor JJ; *R v Gough; Ex parte Australasian Meat Industry Employees' Union* (1965) 114 CLR 394 at 406 per Barwick CJ, 416 per Windeyer J and 422 per Owen J; *Re Sterling; Ex parte Esanda Ltd* (1980) 44 FLR 125 at 131; *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524 at 528; *Australian Securities Commission v Bell* (1991) 32 FCR 517 at 528 per Sheppard J; *Johns v Connor* (1992) 35 FCR 1 at 10; and *Alice Springs Town Council v Mpweteyrre Aboriginal Corp* (1997) 94 LGERA 330 per Mildren J, with whom Martin CJ agreed.

38 The ancient maxim and its more modern formulations, although they vary, convey the notion that what is done in the exercise of a statutory power is confined to that which is of the essence of its exercise. The judges formulating the principle have not tended to use words like "ancillary", "convenient" or "reasonable". Particularly in relation to the conflict between statutory powers and private rights, the formulations of the principle tend to be restrictive as to the extent of statutory powers. See, for instance, *Fenton v Hampton* (1858) 14 ER 727; 11 Moo PC 347, in which the first instance judgment of the Supreme Court of Van Diemen's Land is quoted. At Moo PC 360, Fleming CJ said:

> Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*.

O'Connor J quoted this passage with approval in the *Trolly, Draymen and Carters Union* case, in the passage cited in [37] above. Both the mandatory nature of the powers conferred by s 496(1) of the WR Act, and the penal consequences that may follow a failure to comply with the order, pursuant to s 496(10) and (11), are apt to reinforce the proposition that the Commission is not empowered to choose whatever means it thinks likely to enhance the attainment of the object of its orders, when it formulates those orders. Whatever method is adopted to attain the object, the order must be essentially an order that the relevant industrial action stop, not occur or not be organised, as the case may be. In the absence of a statutory indication that the Commission is entitled to invoke any other powers (if it still has any relevant other powers), or that it is able to give directions that will facilitate a particular outcome (as was the case under the former s 127), the Commission must focus its attention on the essence of the powers conferred on it, when it formulates its orders.

39 It is also necessary to bear in mind that the duty of the Commission to make orders is confined by s 496(1) of the WR Act to orders that "the industrial action stop, not occur and not be organised." The reference to "the" industrial action is a reference to industrial action that appears to the Commission to be happening, to be threatened, impending or probable, or to be in the process of being organised. It is necessary for the Commission to identify the industrial action that appears to it to be happening, threatened, impending or probable, or being organised, and to make orders that that industrial action stop, not occur or not be organised, as the case may be. Section 496(1) contains neither a duty nor a power to make orders that any act or omission that might possibly fall within the definition of "industrial action" in s 420 of the WR Act stop, not occur or not be organised. The Commission's duty, and power, is limited to the industrial action that is the subject of the application before it.

40 In the present case, in [6] of his reasons for decision, Senior Deputy President Hamberger found that it was common ground that unprotected industrial action was occurring. Beyond that, there is no finding as to what form or forms that industrial action took. Indeed, the solicitor who appeared for TNT

and Riteway in the hearing before Senior Deputy President Hamberger referred only to "strike action" and to "the stoppage". The officer who appeared on behalf of the TWU NSW conceded the futility of suggesting that employees of TNT and Riteway were available for work "at the moment". Nor did the Full Bench make any finding as to the nature of the industrial action, contenting itself at [10] of its reasons for decision with a finding that it was clear that industrial action was occurring, and a statement at [26] that "no specific finding concerning the nature of the industrial action is necessary." There is no material by way of evidence to this Court providing any further detail as to the nature of the industrial action that was taking place. This makes it difficult to determine whether the Commission's order, so far as it was an order that the industrial action stop, exceeded its power. The likelihood is that it did. The definition of industrial action in cl 3 of the order adopts the whole of the definition of "industrial action" in s 420 of the WR Act and also sets out in full provisions extracted or derived from that statutory definition. The statutory definition, both in the provisions set out in the order and in other provisions, contains elements inconsistent with a total cessation of work. If the industrial action concerned amounted to a total cessation of work, and the order extended to requiring that other forms of industrial action stop, the order to that extent was beyond power.

41 Paragraph 4(a) of the order not only requires that each employee immediately stop industrial action, but that each employee not engage in industrial action, and not threaten to engage in industrial action. Paragraph 2(d)(i) expresses the order to be binding upon not only employees of TNT and Riteway who were members of the TWU NSW at the time, but also employees who were eligible to be its members. It does not appear that any notice of the proceeding was given to any of the employees individually. So far as the material before the Court shows, the only notification of the application for the order was made to the TWU NSW. This raises issues of the validity of the order, so far as it purports to bind employees of TNT and Riteway, because they may have been denied what is now called procedural fairness, which used to be known as natural justice.

42 Counsel for TNT and Riteway referred to the decision of a Full Bench of the Commission in *Pryor v Coal & Allied Operations Pty Ltd* (1997) 78 IR 300 at 305-306, in which the Full Bench took the view that service of an application on individual employees was unnecessary, because their interests were represented by the organisation of which they were members. The application concerned was for orders pursuant to the former s 127 of the WR Act. Although the organisation concerned had announced at first instance that it appeared in the proceeding in its own right, the Full Bench on appeal took the view that the organisation represented sufficiently the interests of the employees, so that natural justice or procedural fairness had been afforded to them. In making this decision, the Full Bench relied on *Re Harrison; Ex parte Reid* (1995) 62 IR 280 at 286, in which a Full Court of the Industrial Relations Court of Australia said:

> ordinarily the Commission will be acting reasonably and in accordance with the dictates of natural justice if it relies on registered organisations to represent the interests of their members.

That proceeding was brought by a number of individual employees, who contended that they had been denied natural justice when the Commission had made a demarcation order, as between two organisations, without providing to individual employees whose work was the subject of the order an opportunity to

participate in a hearing. It is by no means clear that it is safe for the Commission to rely on its practice under s 127, or on what was said by the Industrial Relations Court of Australia in relation to an order of a very different kind, when dealing with an application for an order under s 496(1) of the WR Act. The presence of subss (10) and (11) of s 496, coupled with the significantly reduced role of unions under the WR Act since the Work Choices Act, results in the Commission being faced with a task that is significantly different from its task in proceedings traditionally conducted under the C&A Act, the IR Act, and even the WR Act in its original form. An order made under s 496(1) now carries with it the possibility of civil penal consequences. The interests of an employee against whom such an order is made are now affected to a far greater degree than they could have been under the former s 127, or under an order demarking their work as between two organisations.

43 In particular, the interests of each individual employee against whom it is proposed to make an order assume greater importance in the light of the availability of civil penal consequences for failure to comply with the order. This appears to bring into play the general principle that the exercise of a statutory power is impliedly conditioned on affording procedural fairness to a person whose interests are likely to be affected by the exercise of the power. The principle is stated in *Kioa v West* (1985) 159 CLR 550 at 609 per Brennan J:

> When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention

Again, at 628, Brennan J said:

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise

Similarly, at 632, Deane J said:

> In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural justice or procedural fairness.

44 There can be little doubt that it is contrary to this fundamental principle for employees to find out only after an order has been made that they are potentially liable for financial penalties if they fail to comply with that order. The exercise of a power of this nature requires advance notice of the fact that an order is sought, and an opportunity to provide evidence and to make submissions about the issues attending its making. It is not as if TNT and Riteway had no means of contacting the employees; employers are normally in possession of contact details for each employee. The problem of lack of advance notice is compounded by the provisions of cl 5 of the order, under which TNT and Riteway appear to be absolved from notifying each employee that the order has been made, if they serve a copy of it on the TWU NSW and post a copy of it on a notice board in the workplace, at which the employees were not in attendance. There is not even provision for notice that the order has been made, so that employees could decide to comply with it.

45 Even if there remain cases in which the Commission can legitimately say that the interests of particular employees are represented adequately by an organisation, for the purposes of the requirements of procedural fairness, the present case differs from that situation in two respects. One is that the TWU NSW was not an organisation, or a transitionally registered association, which could be treated as an organisation. Part of the reasoning in *Re Harrison*, justifying the court in treating the interests of members of the organisation as sufficiently represented by the organisation, was the proposition appearing at 286, that the organisation was subject to statutory provisions, now found in Sch 1 to the WR Act, designed to ensure the democratic control of an organisation by its members. In the present case, the Commission could not necessarily assume that the same would apply to the TWU NSW. The second distinguishing feature is that, because the order also purported to bind employees of TNT and Riteway who were not members of the TWU NSW, but would have been eligible to join if they had chosen to do so, it could not be said that the TWU NSW had any responsibility to represent the interests, collectively or individually, of those employees. There is no material before the Court as to whether there were any such persons, so it is not clear whether the Commission's order exceeded the Commission's powers, or was simply a dead letter, to the extent to which it purported to bind employees who were not members of the TWU NSW. All that can be said is that, if there were employees of TNT and Riteway at the relevant places of employment who were not members of the TWU NSW, but were merely eligible to join, the TWU NSW could not represent their interests.

46 In summary, there may be cases of various types before the Commission in which the Commission is entitled to assume that an organisation represents the interests of its members, for the purposes of the application of the principles of procedural fairness. It is clear, however, that the form of s 496 of the WR Act makes it difficult for the Commission to rely on any practice that may have prevailed under the former s 127, of assuming that it is affording procedural fairness to all relevant employees by treating their individual interests as represented adequately, for the purposes of the application of those principles, by the participation of a union in a hearing, particularly where that union is not an organisation.

47 Paragraph 4(a) of the Commission's order appears to have exceeded the power to make it, in the absence of any finding that any industrial action was threatened, impending or probable, because it went beyond the reach of an order that industrial action stop. The absence of any finding by the Commission that it appeared that industrial action was threatened, impending or probable means that it had no power to order that the employees not threaten to engage in industrial action. Whether an order not to engage in industrial action goes beyond an order to stop it is unclear.

48 The second clause of para 4(b) of the order may well be beyond the power of the Commission. Depending on the nature of the industrial action, and the terms of a particular industrial agreement, it might be within the ambit of an order that industrial action stop or not occur to order that employees perform work in accordance with particular provisions of that agreement. A case in which the industrial action consists of a ban on the performance of particular tasks, the performance of which is required by the agreement, comes to mind as an example. Such cases would be relatively rare, since industrial agreements

usually consist predominantly of terms prescribing the remuneration for work, and the conditions on which it is to be performed, the assumption being that, if work is not performed, there will be no entitlement to the remuneration prescribed and the conditions prescribed will be inapplicable. A possible case is a ban on the performance of overtime, when the agreement requires that employees work reasonable overtime, although the difficulty of determining in the context of a penalty proceeding whether a particular employee has refused to respond affirmatively to a particular request to work overtime in breach of the order, or because the request is not reasonable, is obvious. It is difficult to see how an order requiring each employee to perform work as required by his or her employer, in accordance with every term of a collective agreement, could ever be regarded as necessary for, incidental to or consequential upon the making of an order that industrial action stop, not occur or not be organised. An order of this nature has the potential to expose an employee to a financial penalty for failing to comply with some requirement of an employer, irrespective of whether the requirement is reasonable or whether it is a requirement to do something that would normally be expected of the particular employee in the position in which he or she has been engaged. The making of an order requiring work in accordance with the terms of an industrial agreement or award would appear to require an examination of the terms of that agreement, the selection of those applicable, and a consideration of the duties of each employee in relation to those terms.

49 The second clause of para 4(b) also suffers from the fundamental flaw that it lacks the precision necessary to enable an employee to know what he or she must do, or refrain from doing, in order to comply. A requirement that carries with it the need to consult the terms of a collective agreement, to see whether what the employee is being required to do is in accordance with those terms, on pain of liability for a civil penalty if it should turn out that the employer's view is correct, such penalty being applicable even while the employee is considering his or her position with respect to the agreement, is highly undesirable, at the very least. While the first clause of para 4(b) might be said to amount to an order that industrial action (consisting of a failure or refusal to perform work) stop, it goes beyond that requirement to the extent that each employee is ordered to be available immediately for work, irrespective of whether he or she has been rostered for work, is on leave, or is unavailable for other reasons. Again, such an order would appear to require that the circumstances of each particular employee be considered.

50 Paragraph 4(c) purports to impose on the TWU NSW, and on all of its officers, employees, agents and delegates, a series of obligations that become increasingly vague as the provisions of the paragraph progress. In the absence of any finding that industrial action was threatened, impending or probable, or was being organised, cl (i) of para 4(c) could not extend beyond a requirement that the TWU NSW stop any form of industrial action that appeared to the Commission to be happening. It could so extend if the Commission reached the conclusion that making such an order against the TWU NSW was necessary for, incidental to or consequential upon the making of an order that the relevant industrial action stop. In the absence of any finding that the TWU NSW was itself engaging in anything that fell within the definition of industrial action, and that appeared to the Commission to be happening, or any finding that the TWU NSW was, directly or indirectly, a party to or concerned in conduct by another

person or other persons that amounted to industrial action that appeared to the Commission to be happening, an order against the TWU NSW could not have been justified.

51 Clause 4(c)(ii) of the order appears to travel well beyond any finding that the Commission made, and even beyond any evidence that was before it as to the role of the TWU NSW.

52 Clause (iii) of para 4(c) of the order imposes an obligation to take positive action, as distinct from refraining to do something. This does not necessarily cause it to travel beyond the power of the Commission. It may be that an order to take some positive step can be seen as necessary for, incidental to, or consequential upon an order that industrial action stop, not occur or not be organised. In the absence of any finding that there was any direction, advice or authorisation to delegates or members of the TWU NSW in the present case, it is hard to see how an order requiring immediate advice that such direction, advice or authorisation was withdrawn and that any action must cease was justified.

53 Clause (iv) of para 4(c) again requires positive action, but the action is expressed with such vagueness as to be well beyond any power that the Commission could possibly have. The requirement is that the TWU NSW take all steps "necessary, reasonable and available" to ensure that employees comply with the order. There is a specific requirement of advising each employee of the terms of the order, but no specification of how this is to be done. There is also an obligation to advise TNT and Riteway by a particular time on the morning after the making of the order what steps have been taken to comply with cl (iv) of para 4(c). It is possible that there may be cases in which it is within the power of the Commission to order that a union give advice in certain terms to its members. Such an order may amount to an order that industrial action stop, not occur or not be organised. In such cases, it is at least advisable that the order specify the means by which, and the time by which such communication is to be effected, so that it can be determined with precision whether the union has or has not complied, if that question should ever arise. Otherwise, it is difficult to see how any penal consequences could flow. It is more difficult to see how an order obliging a union to report to an employer the particular steps it has taken to comply with the order can fall within the ambit of the Commission's powers under s 496(1). It is quite impossible to see how a requirement to make choices as to what steps are necessary, reasonable and available to ensure compliance with an order by other persons could ever fall within that ambit. Apart from anything else the principle that a mandatory order must set out distinctly what is required to be done is not merely infringed, but set aside entirely.

54 Paragraph 4(c) as a whole of the order imposes requirements not merely on the TWU NSW, but on its officers, employees, agents and delegates, without the expression of any limitations. In its terms, the order purports to bind all those falling within the four categories of persons, whether or not they have any knowledge of, or concern with, the industrial action to which the order relates, or any authority or capacity to take any steps at all in relation to it. On its face, the order requires that employees of the TWU NSW engaged in purely administrative duties, agents of whatever kind, and delegates employed in workplaces having nothing whatever to do with TNT or Riteway, make choices about what steps they might take, and whether those steps could properly be described as necessary, reasonable and available to ensure that employees of

TNT or Riteway (whether members of the TWU NSW, or only eligible to be such members) comply with the order. Further, each of those persons is required to give written notice to TNT and Riteway by 9.00 am on the morning after the making of the order of what steps he or she has taken in compliance with the clause. An order of such generality and vagueness goes manifestly beyond the notion of an order that industrial action, of whatever kind, stop. It would also go beyond the sphere of any order that industrial action not occur and not be organised.

Remedies

55 The jurisdiction of the Court exercised in this case is conferred either by s 39B(1) or s 44(3)(a) of the *Judiciary Act 1903* (Cth) (the *Judiciary Act*). Each of those provisions confers on the Court original jurisdiction derived from that conferred on the High Court by s 75(v) of the *Constitution*. There are two remedies sought in this case, writs of certiorari and mandamus. Mandamus is one of the remedies referred to in both s 75(v) of the *Constitution* and s 39B(1) of the *Judiciary Act*. Certiorari is not mentioned. Certiorari may be regarded as a remedy in aid of the exercise of the power to grant mandamus. Before compelling a decision-maker to perform his or her function according to law, it is considered necessary to quash the decision that results from the purported performance of the function that has been impugned successfully. Alternatively, certiorari might be considered to be a remedy which the Court may grant as an appropriate order in a proceeding in which it has jurisdiction, in the exercise of the power granted by s 23 of the *Federal Court of Australia Act 1976* (Cth). Whichever view be taken, the primary focus in a proceeding of this nature is on the question whether mandamus should be granted, to compel the decision-maker to perform its function according to law. See *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [14] per Gaudron and Gummow JJ and *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25-26 per Gibbs J, with whom Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreed, and 32-33 per Aickin J. Both mandamus and certiorari are remedies to which there is no absolute entitlement. They may be refused, in the discretion of the Court, particularly when it would be futile to grant them, because their grant would achieve nothing, or nothing of sufficient significance to warrant the grant of a remedy. They may also be refused on the ground that some other course exists which would achieve the result sought to be achieved by the remedies.

56 In the present case, the order made by Senior Deputy President Hamberger is expressed to remain in force for a period of one month. This means that its immediate effect expired on 7 May 2006, before the appeal to the Full Bench was heard and well before this proceeding was commenced in the High Court. Counsel for TNT and Riteway informed the Court that the order was effective, in the sense that the TWU NSW advised the employees in accordance with it, and the employees returned to work from the commencement of the first shift after the making of the order. TNT and Riteway, by their counsel, undertook to the Court that, so far as lies within their power, no proceeding would be instituted by way of enforcement of the order.

57 Counsel for the TWU NSW submitted that the effect of the order is not wholly spent. The possibility remains that someone to whom the order purported to apply might be the subject of a proceeding for a civil penalty, pursuant to s 496(10) and (11). For this reason, counsel for the TWU NSW

submitted that the Court ought to quash the Commission's order, even if it did not order the issue of a writ of mandamus, directed to the Commission, commanding it to perform its function according to law.

58 The foundation for granting remedies of the kinds sought in this case is that there is a decision that constitutes an invalid exercise of the decision-making power, because of jurisdictional error. See *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [76] and [83] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. The present case is one in which the Commission appears to have exceeded its jurisdiction in some respects, and has perhaps made errors within its jurisdiction in others, while there remains some of its order that may amount to a valid exercise of its power, and is therefore not subject to jurisdictional error. It is undesirable that this Court should be called upon to dissect the order in its detail, in an abstract way, to identify and isolate the elements that involve excess of jurisdiction. The task is made more difficult than it should be, because there is a lack of evidence, admissible in this Court, as to some factual matters that would need to be established before it could be shown that the Commission exceeded its jurisdiction in some respects.

59 As to questions of the form and breadth of the order, there is some difficulty in determining whether those constitute errors within the jurisdiction of the Commission, or jurisdictional error. The dissection of the order, without concrete facts in mind, is a difficult task. In the circumstances, the Court ought not to undertake it.

60 It is highly unlikely that, after the lapse of time that has occurred since the effect of the order expired, any proceeding would be taken to subject anyone to a civil financial penalty for failing to comply with it. If that did occur, it would be open to the person against whom the proceeding was taken to raise with the Court the question of the validity of the relevant provision of the order. If that provision were invalid because of jurisdictional error, the application for a penalty could not succeed.

61 It must be remembered that the case the TWU NSW sought to make in this Court is a negative one. Counsel for the TWU NSW relied solely on the proposition that the Commission failed to make the requisite jurisdictional findings. The case is not that such findings could not have been made. To make a case of that kind would have required that there be evidence, admissible in this Court, inconsistent with the making of the findings. For instance, it is not said that an order binding on the TWU NSW could not have been made, because the TWU NSW had no involvement at all in the industrial action. The true nature and extent of the TWU NSW's role was not revealed to the Commission. Indeed, in a hearing before Giudice J, the President of the Commission, on 1 May 2006, concerning the question whether the order had also been properly made against the Transport Workers' Union of Australia, and the question of an application to stay the order in that respect, counsel for the TWU NSW made the submission that:

> there was no evidence, nor was there any submission to the effect that my client had itself organised the industrial action or was in some way responsible for that industrial action or was in any way engaged in any activity which might be regarded as illegitimate.

Giudice J asked:

> The implication being that the action was spontaneous and unrelated to the union?

Counsel for the TWU NSW replied:

> Well, we don't ask any implications being made. We simply rely upon the material before his Honour and the findings made by his Honour.

The learned President's question provided an opportunity for the TWU NSW, if it wished to do so, to make clear to the Commission the extent of its involvement, or the absence of any involvement.

62 Further, there is no evidence before this Court to the effect that the TWU NSW was uninvolved, or as to the nature and extent of its involvement. These are matters that lie within the knowledge of the TWU NSW and its officers, and the TWU NSW is the party bearing the onus of establishing in this Court jurisdictional error on the part of the Commission. If the TWU NSW had sought to establish that it was beyond the jurisdiction of the Commission to make an order directed to the TWU NSW that the industrial action stop, it would have failed if it did not make that affirmative case in this Court.

63 Nor is there any evidence before this Court that industrial action was not threatened, impending or probable, or was not being organised. The TWU NSW rests its case on the proposition that the Commission did not make findings in relation to these matters, so that the requisite foundation for the Commission's jurisdiction was not established by it. In those circumstances, the TWU NSW has succeeded in establishing the proposition that the Commission did not exercise its jurisdiction correctly, because the WR Act did not permit it to make orders that industrial action not occur, or not be organised, unless the requisite jurisdictional facts appeared to the Commission. The TWU NSW has not established in this Court that those orders could not have been made against it, because industrial action in any form was not threatened, impending or probable, or was not being organised.

64 The fact that the essential effect of the order is long since spent, and there is no occasion for the Commission to continue to be concerned with its subject matter, leads to the conclusion that a writ of mandamus should not be granted. There is simply no occasion now for the Commission to exercise its jurisdiction under s 496(1) of the WR Act in respect of any industrial action that was occurring on the part of employees of TNT and Riteway on 7 April 2006, or that may have been threatened, impending or probable, or being organised, at that time. To order the Commission to revisit the making of the order would be utterly without point. If certiorari be regarded as an order ancillary to mandamus, its purpose being to quash the original decision of the Commission, and the decision of the Full Bench affirming it, to clear the way for the Commission to be required by mandamus to exercise its jurisdiction according to law, then the grant of certiorari would be futile. If certiorari is to be regarded as an order that the Court could properly make if it stood alone, because the jurisdiction of the Court had been invoked properly in respect of the unsuccessful application for mandamus, then nothing of significance would be achieved by granting certiorari to quash the decisions of the Commission. Any quashing of the decisions could only be partial, because some elements of the order have, or may have, validity. If partial quashing be possible, the Court should not be required to do it in a case such as the present, because it involves the difficult task of dissecting the order to ascertain which elements of it are valid and which are not.

65 For these reasons, orders made having the effect of dismissing the substantive application should be made. As the application remitted to this Court was an application for an order nisi, the order nisi should be granted but discharged. There is no dispute that the case is one falling within s 824(1) of the WR Act, and no contention by TNT and Riteway that the TWU NSW instituted the proceeding vexatiously or without reasonable cause. Accordingly, no order for costs can be made.

Gyles J.

66 The manner in which the issues arise has been explained in the judgment of Gray and North JJ, which I have had the advantage of reading in draft and I agree with the orders proposed by Gray and North JJ.

67 There is a real question as to whether this Court should consider the merits of the claim for relief. The order of the Full Bench of the Australian Industrial Relations Commission under challenge was delivered on 15 June 2006, related to an order which came into effect on 7 April 2006 and was only in force for a period of one month. It is common ground that the substance of the order was complied with as the employees returned to work in accordance with it. There is no suggestion of any other proceeding having been commenced or threatened for breach of the order. The second and third respondents have undertaken that no such proceeding will be commenced by either of them. In my opinion, the possibility of any other such proceeding borders on the fanciful. In the unlikely event that such a proceeding were commenced, there could be a collateral challenge to the validity of the order if there were any jurisdictional error in the making of it (*BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2000] FCA 1614; (2000) 102 IR 275).

68 The existence of the discretion to refuse prerogative (or constitutional) relief is well established. Lack of a useful result is a recognised basis for refusal. (See *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 81 ALJR 1190 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ at [28].) Where it is appropriate that such a discretion should be exercised, it may be exercised without entering upon the merits (eg *McGowan v Migration Agents Registration Authority* [2003] FCA 482; (2003) 129 FCR 118; and *Saitta Pty Ltd v Commonwealth* [2000] FCA 1546; (2000) 106 FCR 554).

69 In my opinion, the only grounds appropriate to be decided on this application are those contained in grounds 9(iii) and (viii) of the application, which are as follows:

> (iii) finding that there was power under section 496(1) to make an order binding upon the Plaintiff that industrial action not be organised in circumstances where there had been no finding that the relevant jurisdictional pre-requisite in section 496(1)(c) had been satisfied;
>
> …
>
> (viii) finding that there was power under section 496(1) to make an order binding upon a state-registered organisation which was not registered under the Act, such as the Plaintiff;

70 Each concerns the proper construction of the *Workplace Relations Act 1996* (Cth) (the Act) and does not depend upon any disputed facts. Neither would be capable of being cured, no matter how the matter was dealt with in the Commission. Each, if decided favourably to the applicant, would clearly establish jurisdictional error. Each is of sufficient importance to warrant a

decision to clarify the law (Aronson M and Dyer B, *Judicial Review of Administrative Action*, 2nd edn, LBC Information Services, 2000, p 581 — footnote 208).

71 The other grounds are in a different category. They involve debateable questions of construction of s 496 of the Act and would require close analysis of the facts of the individual case, together with the manner in which the case was conducted both before the Senior Deputy President of the Commission and the Full Bench of the Commission. Even if error be demonstrated, it may be error within jurisdiction rather than jurisdictional error. Argument as to those grounds has been similar to that which would arise on an appeal from the decision of the Full Bench of the Commission.

72 Declining to consider these grounds involves no approval of the Full Bench decision as to them. In particular, it gives no imprimatur to the catch all nature of the order made. It appears to be some kind of a template, that impression being reinforced by seeing similar orders made in other cases. The Full Bench referred to the need to carefully tailor orders made pursuant to s 496 in a practical way so that no one set of orders will be appropriate in all cases. Suffice to say that there was substance to some of the criticisms of the form of, and basis for, aspects of the order advanced by counsel for the applicant.

Ground 9(iii)

73 The gist of the submission for the applicant is that the last part of s 496(1), namely "stop, not occur and not be organised", should be read disjunctively and, more importantly, then matched with the three earlier triggers so that an order that industrial action stop is limited to the case where there is a finding that industrial action is happening, that an order that industrial action not occur can only be made where there is a finding that industrial action is threatened, impending or probable and, most relevantly for this case, that an order that industrial action not be organised can only be made if a finding is made that industrial action is being organised. It is said that this is necessary to avoid the absurdity that would be involved in ordering that industrial action stop when it is only threatened, impending or probable or was being organised but had not taken place.

74 I do not agree. There are circumstances where "and" can be read as "or" where there is an obvious mistake. The structure of the section makes that a difficult step. Even if it were taken, I cannot see any warrant for taking the further step and reorganising the section so as to have a notional "a" before "stop", "b" before "not occur" and "c" before "not be organised" and then relate the orders to the earlier triggers in a self-contained fashion. Apart from doing violence to the structure of the section, it would lead to unlikely results. It would, for example, not permit of an order that industrial action not occur where it is established that it is being organised. Furthermore, and closer to the facts of this case, where the only finding that is made is that industrial action is happening, orders could not be made that it not occur and not be organised. In my opinion, once the relevant industrial action was found to be happening, then the Commission was obliged to make an appropriate order. That could have included orders that the action stop, not occur and not be organised or one or more of such orders as was appropriate in the circumstances.

75 For the reasons indicated earlier, I will not enter into questions as to the form of order that was appropriate in this case.

Ground 9(viii)

76 I agree with the reasons of Gray and North JJ for rejecting the contention that the applicant was immune from orders under s 496(1) of the Act by virtue of being a State-registered union, which has not applied to become a transitionally registered association under Sch 10.

Order nisi granted and discharged

Solicitors for the applicant: *Maurice Blackburn*.

Solicitors for the first respondent: *Blake Dawson Waldron*.

DAVID R A CARUSO