The law of unfair contracts

Jeffrey Phillips SC and Michael Tooma

Law Book Co., 2003

The publication of this work by Jeffrey Phillips SC and Michael Tooma comes at a significant point in the history of sec 106 of the *Industrial Relations Act 1996* (NSW), the statutory successor of sec 88F of the *Industrial Arbitration Act 1940* (NSW). As the authors observe in their preface, the book appears hot on the heels of the New South Wales Court of Appeal's controversial judgment in *Mitchforce v Industrial Relations Commission* [2002] NSWCA 151, in which, to quote the authors, the commission's 'march into the heartland of commercial contracts has come under attack'. They observe that the Court of Appeal (which comprised Spigelman CJ Mason P and Handley JA) was 'troubled by the evolution of this jurisdiction from its humble origin in the 1950s as a device designed for worker protection and preservation of the award system'.

Apart from describing the actual majority decision in *Mitchforce* as wrong and inconsistent with *Stevenson v Barham* (1977) 136 CLR 190 and *Caltex Oil (Aust) Pty Ltd v Feenan* [1981] 1 NSWLR 169 (PC), the authors are critical of the *Mitchforce* court's express and implied criticism of the imperial 'march' of sec 106, as interpreted by the commission. They argue that the viewpoint espoused by the Court of Appeal in that case 'neglects the changing nature of modern working arrangements and their dramatic divergence from the traditional master and servant relationship', stating that 'these changes have been characterised by changes in the Australian economy, the client and the trade union movement, a rise of franchise agreements, increasing use of contractors and out workers, the communications revolution, globalisation, increasing labour force mobility and the frequency of organisational restructure'. All of these factors, in the authors' opinion, have altered the emphasis on the place of the individual within the workplace with a consequent shift in the focus of attention towards individual rather than collective answer to workplace problems.

The decision in *Mitchforce* can be viewed as a direct institutional clash between the Supreme Court of New South Wales and the Industrial Relations Commission of New South Wales. In terms of their constitutive statutes, both have the same status as superior courts of record, albeit that the Supreme Court (probably) retains at least limited scope for review of decisions of the commission notwithstanding the terms of sec 179 of the *Industrial Relations Act 1996*. Resonances of this institutional competition could be detected in the Court of Appeal's earlier decisions in *Resarta Pty Ltd v Finemore* (2002) 55 NSWLR 320 and *Tszyu v Fightvision Pty Ltd* [2001] NWCA 103; (2001) 104 IR 225. In the former case the Court of Appeal did not accept as sufficiently forceful arguments based on the specialist nature of the commission's sec 106 jurisdiction as a reason for declining to transfer sec 106 proceedings to the Supreme Court of Victoria. Spigelman CJ referred to members of the commission having a 'cast of mind' rendering more likely the exercise of jurisdiction to reformulate rights and obligations of a contract.

The authors predict that the impact of *Mitchforce* and the sentiment expressed in *Resarta* will only serve to encourage litigants, and respondents, in particular, to create skirmishes with a view to bringing proceedings before the Supreme Court. Certainly the device of commencing proceedings in the Supreme Court of another State or in the Federal Court has been used by some respondents as a means of cross-vesting sec 106 cases out of the commission's reach. *Resarta* sanctioned such an approach, at least in cases broadly capable of being characterized as 'commercial'.

In the context of the *Mitchforce* 'debate', avid commission watchers will be fascinated by the observation of commission President Wright in the book's Foreword:

> The events of next year or two may well determine whether section 106 remains an important part of the legal landscape in New South Wales or falls into desuetude as appears to have largely happened with the *Contracts Review Act*. Nevertheless, irrespective of what happens in the time frame mentioned, it is most timely that this book is being published now. It will be an essential guide for the practitioner. It will be of assistance to judges hearing cases under section 106. It will undoubtedly be of benefit to those students who might wish to chart the way in which society shapes its laws.

These sentiments may be readily endorsed. The book is organised in 9 chapters together with a useful set of appendices containing forms relevant to a sec 106 application.

Chapter 1 contains an introduction to the history of the unfair contracts jurisdiction, locating the original use of the words 'harsh and unconscionable' in the English *Moneylenders Act 1900*. This chapter deals with key definitional elements that underpin the jurisdiction such as the definition of contract and the concept of a contract 'whereby a person performs work' in an industry. This chapter contains a short but important discussion of the application of sec 106 to work performed (or aspects of work performed) outside Australia but with some nexus to New South Wales.

Chapter 2 is headed 'Unfairness' and considers what Sheldon J famously described as the 'tautological trinity', namely the concepts 'unfair, harsh and unconscionable'. This chapter should especially be consulted by those coming fresh to the jurisdiction. It gives a brief (perhaps overly brief?) account of the central concept of 'unfairness', making it plain that fraud, deceit or misrepresentation are unnecessary, that a contract may become unfair by reason of a change in circumstances or in its operation, notwithstanding that its terms may be unexceptional. In the chapters which follow Chapter 2, the broad concept of unfairness is sought to be illustrated by the authors by exploring instances of unfairness as revealed in

the decided cases. This is broadly done by reference to employment contracts, on the one hand, and commercial contracts on the other.

Chapter 3 deals with unfairness in the context of incentive schemes and share option schemes in employment contracts and Chapter 4 considers unfairness in the context of termination of employment and the relationship between unfair dismissal, jurisprudence and unfair contracts law. It draws attention to those kinds of employment contracts in respect of which applications cannot be made.

Chapter 5 interestingly considers the *Trade Practices Act 1974* as an alternate remedy to relief under sec 106. That may be of particular significance given the $200,000 'salary cap' recently introduced by 2002 amendments to the Act. The authors note that the scope for relief under the Trade Practices Act is narrower than under the Industrial Relations Act. Whilst that may be correct, in this reviewer's opinion at least, the scope for creative fashioning of relief afforded by section 87 of the former Act is not dimensionally different to that which is currently vested in the commission exercising its sec 106 jurisdiction.

Chapters 6 and 7 focus on commercial contracts. Chapter 6 deals with sec 106 in the context of franchise contracts and agreements, an area which has arguably escaped the recent jurisdictional limitations on the reach of the sec 106 jurisdiction. Chapter 7 is concerned with unfairness in partnerships and partnership disputes.

Chapter 8 is devoted to considerations of relief, including a detailed discussion as to the commission's ability to grant injunctive relief. Chapter 9 deals with questions of practice and procedure and contributes to making this book of invaluable assistance to practitioners.

This last observation applies not just to practitioners who practice regularly in the jurisdiction but also to those who may not be familiar with the commission's jurisdiction and jurisprudence on the basis that it represents an arcane specialised area. As this book demonstrates, however, what some may see as the imperial march of the commission into significant areas of commercial law - the very matter which excited the concern of the Court of Appeal in *Mitchforce* - means that a familiarity with this area of law and the reach of sec 106, in particular, cannot be responsibly avoided. That is only emphasised by the statistic provided by the authors that in 2001-2002, there were some 653 cases dealt with by the commission under sec 106, a 450 per cent increase since 1997-1998.

Reviewed by Andrew Bell