# Keeping the Industrial Court of NSW focused on industrial relations

By Arthur Moses

*Fish v Solution 6 Holdings Limited [2006] HCA 22*
*Batterham v QSR Limited [2006] HCA 23*
*Old UGC, Inc v IRC in Court Session [2006] HCA 24*

On 18 May 2006 the High Court handed down three decisions that considered the unfair contracts jurisdiction of the Industrial Court of NSW[1] under Ch 2 Pt 9 of the *Industrial Relations Act 1996* (NSW), and also the impact of the privative clause in s179 of that Act. These cases are summarised below. The significance of these cases is also briefly considered in light of recent changes to industrial legislation at the Commonwealth and state levels.

### *Fish v Solution 6 Holdings Limited [2006] HCA 22 ('Fish')*

The first case, *Fish*, was an appeal by Nicholas Fish and Nisha Nominees Pty Ltd (a company controlled by Fish) against a decision of the New South Wales Court of Appeal. In 2000, Nisha Nominees agreed to sell its shares to Solution 6 Holdings Ltd for $19 million. When the share purchase agreement was complete, Solution 6 was to pay Nisha $18.5 million, and Nisha was to subscribe for 1,897,436 shares in the capital of Solution 6. The balance of the purchase price was to be paid three months after the completion of the contract. Fish was a party to the agreement, in which he guaranteed the performance of Nisha's obligations.

Under the share purchase agreement, completion was not to proceed unless Fish entered into an employment agreement with Solution 6. Fish then made an agreement with Solution 6 Pty Ltd, a subsidiary of Solution 6 Holdings, under which he was employed as Executive Manager of Enterprise Integration Services. The term of employment was fixed at three years, although it could be terminated earlier by Fish giving 12 weeks notice.

No provision had been made in the share purchase agreement for the possibility that the market value of the shares in Solution 6 Ltd, which were issued to Nisha at $9.75 each, would drop between the exchange and completion of the contract. By the time the agreement was completed the shares were worth $3.00 each.

In 2001, Fish was made redundant and had his employment with Solution 6 Pty Ltd terminated. Fish and Nisha Nominees later sought orders from the Industrial Relations Commission in court session including a declaration that the share purchase agreement was an unfair contract within the meaning of s106.

A conciliation conference before the commission was unsuccessful and the respondents applied to the NSW Court of Appeal for an order prohibiting the commission exercising it powers under s106 in respect of the share purchase agreement. The Court of Appeal allowed the application.[2] The court (Spigelman CJ, Mason P and Handley JA) agreed that the critical jurisdictional fact in relation to s106 was the identification of a contract, as defined in s105, whereby a person performs work in an industry. A contract would satisfy this test if it led directly to a person working in any industry. As far as s179 was concerned, Mason P and Handley JA added that the Court of Appeal should be slow to intervene before the commission has had an opportunity to determine its own jurisdiction, but that intervention would be appropriate where restraint would render the court's supervisory jurisdiction irrelevant.[3]

The court held that even though the share agreement contemplated the creation of the employment agreement that the share agreement itself was not a contract whereby a person performed work in any industry within s106. The relationship between the agreement and the performance of such work was indirect or consequential.[4]

Fish was granted special leave to appeal to the High Court and it was dismissed with costs (Gleeson CJ, Gummow, Hayne, Callinan & Crennan JJ; Kirby and Heydon JJ dissenting).[5] The majority wrote a joint judgment. They concluded that the share purchase agreement was not a s106 contract. Under the employment agreement, Fish performed work in an industry. Fish did not perform work in an industry under the share purchase agreement. Thus, the share purchase agreement did not constitute a s106 contract. The employment agreement, not the share agreement, could be declared void or varied by the commission. It was not sufficient for the two contracts to merely relate to each other.

The majority reinforced this conclusion with the approach they took to s179. The majority said that unless the Industrial Relations Commission in court session was restricted to employment agreements, commercial arrangements which would otherwise fall within the jurisdiction of the state courts would be intra vires the commission and immunized from review by s179. In the absence of express provision to that effect, the parliament could not be assumed to have intended to limit the jurisdiction of the Supreme Court to determine matters ordinarily dealt with by that court. To adopt too broad an approach to s 106 in this context would increase the number of cases in which there would be no appeal to the Supreme Court, with the result that the role of these courts 'would be confined to granting relief ensuring the commission's compliance with jurisdictional limits when by hypothesis, the jurisdiction of the commission would extend to a very wide range of agreements the fairness or unfairness of which may have no industrial consequence'.[6] The majority contended that such an approach would also truncate the High Court's role contemplated by s73 of the Constitution.

Kirby J and Heydon J delivered separate dissenting judgments.

Kirby J held that the agreements were inter-related. They were created at the same time and were expressed to be dependent on one another: the 'notion that the two agreements were legally separate for the purposes of relief of the kind contained in s106(1) requires an artificial severance which the documents, their purposes and the history of their making (as proved to this stage) deny'[7]. Kirby J also noted that s105 extends to 'any related condition or collateral arrangement'. It would therefore be contrary to ss105-106 to characterize a 'contract' as separate to another on the mere basis that it appears in a separate document.

This would enable employers to bypass s106. Kirby J rejected as irrelevant the majority's concern that cases which might otherwise be brought before the Supreme Court and High Court might not be. That argument had been rendered redundant by the *Industrial Relations Amendment Act 2005* (NSW) (the relevant provisions are outlined below). In addition, Kirby J held that the list of 'appeals' which might be brought before the High Court (as identified in s73 of the Constitution) is not exhaustive. For these reasons the Court of Appeal should not have issued prohibition.

Heydon J held that s179 'reduces, almost to nil, the scope of judicial review for jurisdictional errors after an error occurs', but that there was no reason to conclude that s179 'increases the scope for review before an error occurs'.[8] In prohibiting the commission to determine its own jurisdiction as expressly permitted by the Act, the Court of Appeal had created a 'lack of harmony in the legal regime'.[9] Heydon J concluded that the fact that 'a particular s106 controversy was more 'commercial' and less 'industrial' was not a reason to depart from earlier Court of Appeal authority'[10].

### *Batterham v QSR Limited [2006] HCA 23*

In the second case, Peter Batterham was promoter of a business arrangement whereby QSR Limited acquired a restaurant business, and was then floated as a public company. As a founding director of QSR, part of Batterham's remuneration package included one million options that could be exercise three years after they were issued subject to the achievement of a performance benchmark. The benchmark required a particular level of performance in each of the three years. The company performed better than the benchmark in the first two years, but slipped below the benchmark in the third. If the performance was assessed on the basis of aggregate performance over the three years the benchmark would have been satisfied.

Batterham commenced proceedings in the Industrial Relations Commission unders s106 and sought orders to, amongst other things, have the option deed declared unfair, harsh, unconscionable and contrary to the public interest. QSR opposed the action on the ground that the Commission had no jurisdiction over the option deed because it was not a s106 contract.

The Court of Appeal held that the IRC had no jurisdiction over the option deed[11] and Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ dismissed the appeal.[12] Their Honours noted that Mr Batterham had performed work promoting the company, negotiating the purchase contract, arranging finance and then serving as a director. They also concluded that the option deed was of benefit to Mr Batterham and that he obtained that benefit because he was a promoter of the venture and of QSR. However:

> As explained in Fish v Solution 6 Holdings[6], to decide whether the commission had jurisdiction to make the orders which the appellants seek, it is necessary first to identify whether Mr Batterham performs (or in this case, did perform) work in an industry. (It was not argued that anything turns on the fact that Mr Batterham was no longer performing the relevant work when he applied to the commission.) Having identified the work that Mr Batterham performed, the next inquiry is what was the contract or arrangement (and any related condition or collateral arrangement) according to which (or in fulfillment of which, or in consequence of which) that work was performed? It is only that contract or arrangement which the commission may declare void or vary.[13]

The majority noted that the option deed made no explicit reference to the performance of the work. Their Honours held that because it was a pre-incorporation contract, and therefore concerned work that had already been done, the agreement could not be described as a contract, or an arrangement, *whereby* a person performs work in an industry: the work that was done 'was not done according to, or in fulfilment of, or in consequence of, that agreement.' The grant of the options was complete upon the execution of the deed. By describing the option deed as 'remuneration' for work done the appellants sought to connect the option deed with the performance of that work but this could not be achieved.

Kirby J's dissent in this case focused on s179, and its apparently wide ambit. His Honour emphasised that the Industrial Court of NSW is a constitutional institution under Part 9 of the *Constitution Act 1902* (NSW) and that in order to maintain confidence in the administration of justice, judicial institutions of equivalent status should exercise comity. By interfering with the decision of the trial judge, Peterson J, the Court of Appeal deprived a litigant of the right to present their case and to do so before an independent court or tribunal, as required by the rule of law.

### Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session [2006] HCA 24

The third and final case concerned an agreement under which a Mr McRann was employed as managing director of the Australian affiliates of a group headed by Old UGC. McRann was entitled to a base salary, annual bonus and incentive compensation. His employment ended on 31 July 1997. A second compensation and release agreement (CRA) would come into effect if the employment agreement was terminated. The CRA was designed to resolve all disputes between McRann and UGC and provide McRann with compensation and benefits in exchange for giving up all legal rights and claims against Old UGC. The CRA was governed by the laws of the State of Colorado.

An application was made to the Industrial Relations Commission that the CRA was unfair, harsh or unconscionable. The Court of Appeal refused to grant a writ of prohibition, holding that the CRA formed part of 'a single contract of employment constituted by reading together the Employment Agreement and the [CR] Agreement'.[14] The Court of Appeal rejected a submission that because the CRA was governed by the laws of the State of Colorado, the contract was placed outside the jurisdiction of the commission under s106.

The High Court allowed the appeal by a majority of 4 to 3. In this case, unlike the others, Gleeson CJ also dissented, agreeing with the Court of Appeal that the CRA constituted a variation of the employment agreement, and an alteration of the remuneration to which McRann was entitled under the employment agreement.[15]

The 'jurisdictional focus' of the case was therefore the employment agreement, a contract whereby McRann performed work in an Australian industry, and therefore subject to s 106.

The majority was comprised of Gummow, Hayne, Callinan & Crennan JJ. Their Honours held that the Court of Appeal's conclusion that the CRA and employment agreement were a single contract of employment was erroneous. It was necessary to identify 'what contractual stipulations or other arrangements were to be regarded as related to one another'.[16] While the CRA varied the employment relationship between McRann and Old UGC, this did not lead to the conclusion that 'all the resulting stipulations and arrangements fell within the expression a 'contract whereby a person performs work in any industry''. The employment agreement was a contract whereby McRann performed work in any industry but the CRA was not of this character. Rather, the CRA merely stipulated the terms upon which McRann's employment was terminated. The fact that the CRA varied McRann's entitlements under the employment agreement did not alter that conclusion.[17] However, the majority did reject the 'proper law of the contract' argument.

### Concluding analysis

The High Court's decisions in *Fish, Batterham* and *Old UGC* purport to shrink the Industrial Court of NSW's s106 jurisdiction. However the practical impact of the decisions is limited due to legislative changes at the state and federal level.

The *Industrial Relations Amendment Act 2005* (NSW) inserted s106(2A), which reads:

(2A) A contract that is a related condition or collatera arrangement may be declared void or varied even though it does not relate to the performance by a person of work in an industry, so long as:

(a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and

(b) the performance of work is a significant purpose of the contractual arrangements made by the person

This provision applies to a contract made before 9 December 2005 and to proceedings pending in the Industrial Court at that date that have not been finally determined by the Industrial Court. However, section 106 (2A) does not apply to any proceedings pending in any other court or tribunal on that commencement (viz., the three decisions discussed here).

The purpose of the s106 (2A) amendment was to clarify the true scope of the Industrial Court's jurisdiction under s106 of the *Industrial Relation Act 1996* (NSW). It reverses so much of the judgment of the NSW Court of Appeal in *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW & Anor*[18] (affirmed by the High Court of Australia[19]) which established the principle as to the need for a collateral arrangement (such as share option agreements, superannuation arrangements and deeds of releases) to lead directly to a person working in an industry.

The test for a related condition or collateral arrangement to be within jurisdiction appears to be that it need not itself directly lead to the performance of work in an industry in NSW subject to:

(a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and

(b) the performance of work is a **significant** purpose of the contractual arrangements made by the person.

The *Industrial Relations Amendment Act 2005* (NSW) also replaced the old s179 with a new s179:

#### *179 Finality of decisions*

(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

(2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

(a) the Full Bench of the Commission in Court Session, or

(b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section: "decision" includes any award or order.

This amendment applies to decisions and proceedings of the commission made or instituted before 9 December 2005, and to proceedings pending in any state court or tribunal (other than the commission) on that commencement. However, those amendments do not affect any order or decision made by any such court or tribunal before that commencement.

The explanatory note which accompanied the Industrial Relations Amendment Bill 2005 stated that the purpose of the amendment to s179 was twofold:

- To reverse so much of the decision of the Court of Appeal in *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW*[20] which held that s179 did not prevent the exercise of the Supreme Court's supervisory jurisdiction in relation to proceedings or proposed proceedings before the Industrial Court of NSW if an application is made to the Supreme Court before the Industrial Court of NSW makes a decision in the proceedings; and

- To restrict the operation of s179 so that the Supreme Court's supervisory jurisdiction is available if a purported decision of the Industrial Court of NSW is alleged to be outside the jurisdiction of the Industrial Court, but only after the exercise of any right of appeal to the full court of the Industrial Court of NSW.

The upshot of these changes is that the High Court's decisions resolved the appeals but do not provide authoritative guidance on the scope of s106 in light of the changes effected by s106(2A) and s179.[21] And the Commonwealth's Work Choices legislation (the *Workplace Amendment (Work Choices) Act 2005* restricts the significance of that question even further. Section 16 of the Commonwealth Act excludes state and territory industrial laws, including 'laws providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair' (s16(1)(d). The definition of 'state or territory law' specifically includes the *Industrial Relations Act 1996* of NSW'.

The Commonwealth law applies to all employees of foreign corporations, or trading or financial corporations formed within the limits of the Commonwealth within the meaning of s51(xx) of the Constitution. Since the great bulk of employment in NSW is done by 'constitutional corporations', this will have a massive impact on the Industrial Court's jurisdiction.

The validity of this provision has been challenged in proceedings before the High Court of Australia in *State of NSW & Ors v Commonwealth of Australia* (aka 'Workplace Relations Challenge') which reserved its decision on 9 May 2006.[22] A fair reading of the submissions before the High Court and the exchanges between the justices and counsel for the various parties, suggests that this provision may not survive the challenge. As Gleeson CJ noted during the course of argument, there is no provision contained in the *Workplace Relations Act 1996* (Cth) which purports to cover the field in respect of the variation or avoidance of unfair contracts of employment.

However, in the event that s16 (1)(d) of WorkChoices survives the current High Court challenge then the decisions in *Fish, Batterham* and *Old UGC* may soon become mere footnotes in the development of a modern system of Australian industrial law.

1 The *Industrial Relations Amendment Act 2005* (NSW) has inserted s151A into the *Industrial Relations Act 1996* (NSW). The effect of the amendment is that the name of the Industrial Relations Commission in court session is to be the Industrial Court of NSW commencing from 9 December 2005.

2 (2004) 60 NSWLR 558

3 ibid., at [138], [144], [145], [182], [183]

4 ibid., at [53], [59]-[64], [178]

5 [2006] HCA 22

6 ibid., at [34]

7 ibid., at [76]

8 ibid., at [176]

9 ibid., at [177]

10 ibid., at [179]

11 [2004] NSWCA 199

12 [2006] HCA 23

13 ibid., at [13]

14 (2004) 60 NSWLR 620

15 [2006] HCA 24 at [10]

16 ibid., at [25]

17 ibid., at [26]

18 (2004) 60 NSWLR 558 at [58], [59], [64], [67], [160], [161], [166] and [171]

19 [2006] HCA 22

20 supra

21 On 30 June 2006 the NSW Court of Appeal delivered its judgment in *Kirk Group Holdings Pty Ltd & Anor v Workcover Authority of NSW & Anor* [2006] NSWCA 172 at [34] which makes it clear that the Court of Appeal will adhere to the intention of the NSW Parliament as to the application of the new s179 and will not exercise its supervisory jurisdiction until the Full Court of the Industrial Court has either decided the issue of jurisdiction or refused leave to appeal from such a decision.

22 [2006] HCA Trans 218