Section 106 of the Industrial Relations Act 1996

A source of jurisdictional conflict

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Introduction

Recent issues of the *New South Wales Law Reports* have contained a number of important decisions in relation to the operation of sec 106 of the *Industrial Relations Act 1996*[1] ('the 1996 Act') (formerly sec 275 of the *Industrial Relations Act 1991*, 'the 1991 Act', and 'the modern equivalent of the old 88F of the *Industrial Arbitration Act 1940*'[2], 'the 1940 Act').

It has been said of the section that it 'acts with drastic and pervasive effect. It certainly plays havoc with the classical principles relating to contracts.'

Section 106 and its predecessors have been recognised as powerful tools available to be deployed by a claimant in the Industrial Relations Commission sitting in court session ('the Commission').[3] Sitting in court session, the Commission enjoys 'equivalent status' to that of the Supreme Court of New South Wales[4]. The High Court and the Court of Appeal 'have repeatedly stressed the very wide discretion conferred... [by sec 106 upon the Commission, and that once the section] attaches, the remedies which are then at the disposal of the Commission ... are also extremely wide'[5].

It has been said of the section that it 'acts with drastic and pervasive effect. It certainly plays havoc with the classical principles relating to contracts.'[6] The relief which can be granted once there has been a finding of unfair, harsh or unconscionable contract, arrangement or agreement is not necessarily confined to parties to that agreement. Compensatory or monetary orders may be made against third parties not being parties to the contract or arrangement.[7] A contract, not originally harsh, unfair or unconscionable may become so over time or by reference to parties' conduct, and as such come within the Commission's reach.[8] The interpretation of the word 'industry' is notoriously broad.[9]

Because of the expansive interpretation afforded by the Commission to the meaning of 'industry', and to the scope of its powers generally, recourse to the Commission in what might be styled 'common garden-variety' commercial disputes has increased. A recent example illustrates the point. In *Metrocall*, proceedings under sec 106 were commenced by a company, Electronic Tracking Systems Pty Limited, with regard to a licensing agreement between it and Metrocall in connection with the installation, marketing, leasing, operation and maintenance of a particular tracking system. The license agreement was contained in a contract with provided for arbitration in Texas with Texan law nominated as the governing law. Notwithstanding these provisions and the entirely commercial nature of the arrangement, the Commission not only treated the dispute in relation to this contract as involving work 'in an industry' within the meaning of sec 106 but held that the dispute was one which was 'incapable of settlement by arbitration' within the meaning of sec 7 of the *International Arbitration Act 1974* (Cth).

The potential impact of the jurisdiction is seen in the recent acknowledgement by the Commission that 'outcomes in proceedings under sec 106 in favour of applicants are now in some cases being measured in millions rather than thousands of dollars.'[10]

Jurisdictional conflict

The existence of the 'unfair contract' jurisdiction and its wide-ranging potential attendant remedies has long been a source of jurisdictional conflict. The main reason for the jurisdictional conflict is that the jurisdiction of the Commission under sec 106 is *exclusively* vested in it. It is a statutory jurisdiction which is not invested in the Supreme Court. Conversely, being a creature of statute, the Commission has no general jurisdiction to entertain disputes to enforce contracts or to award damages for breach of contract or specific performance in addition to or in lieu of damages. The legislature has ignored suggestions by the Commission that when dealing with any contract, condition or arrangement under sec 106 it should be 'empowered to consider *any other claim* arising out of the same contract, condition or arrangement and be empowered to grant relief accordingly'.[11]

Initially the conflict was seen to arise where parties to proceedings in the Commission were engaged in litigation elsewhere. Sometimes, in answer to, or in anticipation of, proceedings in the Supreme or Federal Courts, proceedings are commenced in the Commission seeking to have the very contract the subject of the Supreme or Federal Court proceedings (or anticipated proceedings) quashed or varied. Sometimes, the order of commencement is reversed and anticipatory Supreme or Federal Court proceedings are commenced by putative defendants in the Commission. This strategy has frequently generated and will continue to generate an undesirable situation for litigants in the sense that competing jurisdictions may be seised of essentially the same subject matter. Where this occurs, and there are concurrent proceedings in the Supreme or District courts of New South Wales or the Federal Court of Australia, on the one hand, and the Commission, on the other, a significant procedural impasse arises.

Staying or restraining Supreme Court proceedings

The Supreme Court has an inherent power to make orders to ensure that the pursuit of its ordinary procedure by litigants does not lead to injustice and for this purpose to grant a stay of proceedings whether permanent or temporary upon such terms and conditions as may seem appropriate[12]. This power extends to staying proceedings within the Court for the purposes of the prosecution of proceedings in another court, if injustice would be occasioned in the absence of such an order. However, the power is

exercised sparingly and a stay not lightly granted. The general considerations to be taken into account where a court is faced with concurrent proceedings were described by Lockhart J in *Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Limited*[13] as including:

i Which proceedings was commenced first.

ii Whether the termination of one proceeding is likely to have a material effect on the other.

iii The public interest.

iv The undesirability of two courts competing to see which of them determines common facts first.

v The circumstances relating to witnesses.

vi Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.

vii The undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.

viii How far advanced the proceedings are in each court.

ix That the law should strive against permitting multiplicity of proceedings in relation to similar issues.

x A general balancing of the advantages and disadvantages of each party.

Accordingly, the Supreme Court has stayed its proceedings where the 'demands of justice dictate'[14] that the party should have an opportunity of having its claim brought before and determined by the Commission. The Federal Court has also acted to stay its proceedings to allow the Commission to first determine its proceedings.[15]

The existence and availability of relief in the Commission not otherwise available in the Supreme Court is sometimes relied a significant factor in granting a stay of Supreme Court proceedings.[16] The existence of proceedings in the Commission is not sufficient to obtain a stay of a judgment regularly obtained in the Supreme Court.[17] It is ultimately a delicate matter of considering the interests and conduct of the parties in deciding whether or not to grant a stay and whether or not there is a concurrent consideration of the same facts in a different legal guise.[18] The fact that the Supreme Court (or District Court for that matter) accedes to a stay application[19] pending the hearing of the Commission proceedings does not entitle a party, if otherwise not lawfully entitled, to an injunction to maintain the status quo pending the conclusion of the Commission proceedings.[20]

In a case in 1979 the Supreme Court acted to support the Commission's jurisdiction when it granted an interlocutory injunction restraining a party from exercising its legal rights 'on the footing of protecting the [applicant's] rights to have his application determined by the Industrial Commission in the circumstances as they presently exist rather than in completely altered circumstances which may well operate in a practical sense to deprive [the applicant] of the proper measure of relief which might otherwise be...[available in the Commission]'[21]. This supportive attitude did not last and six months later the Supreme Court held that 'the principles of equity provide no justification to restrain acts which neither infringe some legal, equitable or statutory rights...nor are otherwise unlawful'.[22] Nor, as observed above, could the plaintiff call in aid an interlocutory injunction to protect a right to final relief in the Commission. This view correctly recognises that the applicant for relief under s.106, no matter how meritorious, is not possessed of a right to an order. Section 106 'does not of itself confer any rights or obligations on anyone...[an applicant] has the right to apply for an order, nothing more.'[23]

Restraining Commission proceedings

Another procedural tool that has been deployed in cases where proceedings have been on foot in both the Supreme Court at the Commission is the anti-suit injunction. In *Tszyu v Fightvision*[24], the Court of Appeal upheld a decision of Hunter J[25] restraining Tszyu from proceeding in the Commission in circumstances where the relief sought in the Commission in terms sought to unwind an earlier decision of the New South Wales Court of Appeal[26] in relation to a contract dispute between the same parties and when Tszyu had eschewed the opportunity (for perceived tactical reasons) to pursue his Commission action prior to the three week trial in the Supreme Court. The facts of this case were somewhat unusual and it is suggested that the use of anti-suit injunctions to break the jurisdictional impasse that may be presented by concurrent Supreme Court and Commission proceedings will be rare.

It should be noted that the principles that apply to the grant of a stay of proceedings in circumstances of concurrent or overlapping issues (which may entail matters of case management) are not the same as for the grant of anti-suit injunctions[127] and, in order to obtain the latter form of relief, it is necessary to establish that the 'foreign proceedings are vexatious or oppressive', as that phrase has been explained in the cases.[28]

Cross-vesting

Before turning to consider legislative solutions to the dilemma of factually overlapping, but not legally concurrent, jurisdiction, a further scenario touched on above needs to be considered in more detail, namely a circumstance where there are proceedings pending in the Federal Court or the Supreme Court of another State, whether additionally or alternatively to proceedings in the Supreme Court of New South Wales, and which overlap factually with proceedings in the Commission.

A body of case law has emerged[29] whereby the mechanism of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* has been deployed to have Commission proceedings transferred to the Supreme Court of New South Wales either for them to be determined by the Supreme Court or for them to be then cross-vested to the Supreme Court of another State or the Federal Court (although this last possibility, namely transfer to the Federal Court, is not available after *Re Wakim ex parte McNally*[30]). This body of case law entails the ultimate consequence that the Supreme Court of another State may be invested with jurisdiction, via sec 8 of the Jurisdiction of Courts (Cross-Vesting) Act to hear proceedings under the Industrial Relations Act 1996 in circumstances where the Supreme Court of New South Wales has been given no such jurisdiction directly.

There are certainly cases, pre-*Wakim*, where Commission proceedings have been cross-vested to the Federal Court. In *Adamson v NSW Rugby League Ltd*[31], orders under sec 8 of the cross-vesting legislation were obtained by consent from

the Supreme Court removing the proceedings to the Supreme Court and then orders were made under sec 5 removing those 'Supreme Court' proceedings to the Federal Court. Interestingly notice was given to the State and Commonwealth attorneys-general pursuant to sec 78B of the *Judiciary Act 1903* of an anticipated argument that, were the Federal Court to exercise the powers of the Commission, this would be an exercise of a non-judicial power (by virtue of the nature of the then sec 88F jurisdiction) and the cross vesting legislation did not operate validly to vest non-judicial power in the Federal Court. Ultimately no such argument was advanced and the Federal Court proceeded to determine the case under sec 88F of the 1940 Act[32].

In an early (unsuccessful) application to achieve this result, *Wood v Boral Resources (NSW) Pty Ltd*[33], which has since not been followed in other (necessarily) first instance decisions (necessarily because there is no right of appeal from a cross-vesting decision save, perhaps, a constitutionally entrenched right to seek special leave to appeal to the High Court), McLelland J observed:

> the jurisdiction under sec 275 is, by the Industrial Relations Act, conferred solely on a specialist Court, namely the Industrial Court, established primarily to deal with matters relating to industrial relations. The importance of the specialised nature of the Court is emphasised by the use of such a wide criterion as 'against the public interest' in para(c) of subs (1), reinforced by the inclusion in the content of that expression of the matters described in subs (2), and also by the additional powers in proceedings under sec 275 conferred on the Industrial Court by sec 276. It is apparent that the legislature considered it appropriate that the wide discretional powers arising under sec 275 should, at least primarily, be exercised by a Court whose members had specialised knowledge and experience in the area of industrial relations. It is significant that the powers of the Industrial Court under sec 275 cannot be exercised by any other New South Wales court including the Supreme Court. It would therefore be somewhat anomalous if the mechanism of the Cross-Vesting Act were to be used to transfer proceedings properly pending in the Industrial Court to which its specialised nature is highly relevant, to another court of relevantly un-specialised jurisdiction or composition, whose eligibility to receive such a transfer depends upon the fact that it is not a New South Wales court.

One legislative solution would be the concurrent investment of jurisdiction under sec 106 in the Supreme Court of New South Wales.

This question whether and, if so, by what criteria Commission proceedings may be removed into the Supreme Court of New South Wales for the purposes of transfer to the Supreme Court of another State has recently been referred to the Court of Appeal by Einstein J.[34] The process of referral to the Court of Appeal had been earlier followed in *James Hardie v Brear*[35] where the Court had to consider whether or not proceedings in the Dust Diseases Tribunal could and should be transferred to the Supreme Court of Queensland. The Court, whilst holding that they could be so transferred, held that the procedural advantages afforded by the *Dust Diseases Tribunal Act 1989*, not available in Queensland, made it inappropriate to transfer proceedings.

If it be correct, as Austin J held in *Heath v Hanning*[36], that Commission proceedings may be transferred to the Supreme Court in anticipation of related Federal Court proceedings also being transferred to that Court, then it is a curious feature of this jurisdiction that the Court of Appeal (as well as appellate courts in States where matters have been cross-vested) will have, on that scenario, appellate jurisdiction to consider the result of any determination of the Supreme Court of an application under sec 106 which has been removed to it and yet may no longer have even supervisory jurisdiction over any such decision by the Commission.

There is no scope, either in the *Supreme Court Act 1970* or in the 1996 Act, for a direct transfer of proceedings from one court to the other. Similarly there is no scope for a Supreme Court matter and a Commission matter converging through a common appellate tribunal. Even the Court of Appeal's supervisory jurisdiction, which was regularly invoked under the 1940 Act and the 1991 Act, now seems questionable. The privative provisions of the 1940 Act and the 1991 Act were held, as a matter of their construction,[37] not to be a bar to the Court of Appeal's supervisory jurisdiction or to its power to issue orders of prohibition or certiorari in appropriate cases. The Court emphasised that the then privative provision, sec 301, only applied to a 'lawful decision'[38] and did not apply if there was no jurisdiction for the Commission's decision or where the Commission's decision exceeded its jurisdiction.

On one construction, the current privative provision would oust the supervisory jurisdiction of the Court of Appeal completely. The new privative provision, sec 179, applies additionally to 'purported' decisions and the prohibition now extends to calling in question the purported decision whether 'on an issue of fact, law, jurisdiction or otherwise'. Further, in the second reading speech which led to the 1996 Act, it was said that sec 179 of the 1996 Act which deals 'with the finality of decisions is a *bolstered version* of the privative clause [previously] contained in the 1991 Act. The Government [being] of the view that where a specialist court or tribunal is established to deal with a particular area of the law then that is the forum where the particular body of law ordinarily should be determined' [39].

The Court of Appeal whilst recognising that such an argument exists, has not yet found it necessary to decide this vexed question of jurisdiction and has dismissed all challenges to decisions under the 1996 Act on other grounds.[40] It may safely be said that the circumstances (if any) in which application may be made to the Court of Appeal in respect of a decision under sec 106 of the 1996 Act are extremely limited.

The decision in *Resarta*, if adopting the 'cross-vesting' technique, will only go some limited distance (and then by a somewhat artificial and indirect route) to answering the problems presented by the exclusivity of the sec 106 jurisdiction. If the Court of Appeal holds that the cross-vesting technique is not available, the only technique practically available to parties is grant of a stay (either of Supreme Court or Commission) of proceedings.

Solutions

A number of possibilities arise. First, one legislative solution would be the concurrent investment of jurisdiction

under sec 106 in the Supreme Court of New South Wales. That would at least mean that there would be one Court which could hear all aspects of a dispute involving sec 106 unfair contract issues as well as related attempts to enforce the unamended contract. Alternatively, a pendent jurisdiction, similar to the Federal Court's accrued or associated jurisdiction, could be conferred on the Commission.[41]

Secondly, express transfer provisions (of the kind that currently exist between the District Court and the Supreme Court and of the kind that existed prior to the Supreme Court Act in relation to common law matters and equity suits[42]) could be inserted into the legislation. No doubt, the test to be applied on such a transfer would draw upon the same considerations as have emerged in cross-vesting jurisprudence.

Thirdly, the current jurisdiction of the Commission under sec 106 could be removed from it entirely and invested in the Supreme Court. A variation on this solution would be to create an Industrial Division of the Supreme Court which could exercise the Commission's present jurisdiction under sec 106.

A fourth, and perhaps the most radical, potential solution would be either to eliminate or constrain the Commission's jurisdiction under sec 106. There can be no doubt that that section, as it has been interpreted over time by the Commission and its predecessors, is extraordinarily broad in its reach. In *Stevenson v Barham*[43], Barwick CJ expressed doubt that it was 'within the contemplating of the legislature that agreements for business ventures … freely entered into by parties in equal bargaining positions should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void'. His Honour held, however, that the language of (then) sec 88F of the 1940 Act was intractable and was to be given effect according to its width and generality. It may be observed that Barwick CJ's surprise 25 years ago would be even greater in light of recent decisions by the Commission as to the breadth of its jurisdiction, as referred to earlier in this article.

Elimination of the 'unfair contracts' jurisdiction is most unlikely. It has long been a feature of New South Wales law and its aspiration is a commendable one. Constraining or limiting the Commission's jurisdiction, on the other hand, would reduce, if not eliminate, some of the jurisdictional problems that have been discussed in this paper. In this context, at the time of going to press, a Bill, styled the Industrial Relations Amendment (Unfair Contracts) Bill 2002 was due to be presented to Parliament. It is designed to prevent orders under sec 106 being made in respect of 'contracts of employment' if the annual remuneration package paid or receivable under the contract exceeds $200,000. This amendment, if passed, would affect high profile 'employee' cases such as the heavily publicised Macquarie Bank v Bell and Berg litigation. On the other hand, depending upon the manner in which the key term 'contract of employment' is interpreted by the Commission, the amendments will not eliminate resort to the Commission in commercial cases such as Metrocall in which a 'contract of employment' is not involved. In this context at least, the scope for the jurisdictional difficulties canvassed above will remain.

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1 *Stone Microsystems (Australia) Pty Limited v Kwong* (1997) 42 NSWLR 160 ('*Stone Microsystems*'); *Kinsella v Trustees of the Camperdown Cemetery Trust* (1998) 43 NSWLR 376; *Woolworths Ltd v Hawke* (1998) 45 NSWLR 13; *Behan v Bush Boake Allen Australia Limited* (1999) 47 NSWLR 648; *Reich v Client Server Professionals of Australia Pty Limited* (2000) 49 NSWLR 551 ('Reich') and *Metrocall Inc v Electronic Tracking Systems Pty Limited* (2000) 52 NSWLR 1 ('Metrocall')

2 Per Meagher at [3] in *Fisher v Madden* [2002] NSWCA 28

3 See generally Holmes 'An historical analysis of the jurisdiction conferred on the Industrial Court' (1995) 69 ALJ 49

4 see sec152(2) of the 1996 Act

5 *Walker v Industrial Court* (1994) 53 IR 121 per Kirby P at 135

6 *Davies v General Transport Development Pty Ltd* [1967] AR (NSW) 371 at 373 per Sheldon J

7 *Stone Microsystems, and Hoffman v Industrial Commission* (1990) 30 IR 139 per Handley JA at 141-143

8 *Reich*; and see sec 106(2) which embodied in the statute the approach taken by the Court of Appeal in *Walker v Industrial Court* (1994) 53 IR 121 at 133-134 per Kirby P.

9 See Holmes, op.cit. at 56-61.

10 Emphasis added, per Wright P at [55] in *Westfield Holdings v Adams* [2001] NSWIR Comm 293 and see e.g. *Avis v Australian Mutual Provident Society* [1997] NSW IRComm 182

11 per Marks J, in *Pullen v. R & C Products Pty Ltd* (1994) 60 IR 183 at 208, emphasis added

12 see *Tringali v Stewardson Stubbs v Collett Limited* (1966) 66 SR (NSW) 335 at 344, *Williams v Williams* (1979) 1 NSWLR 376 at 386 and *BP Australia Limited v Bennett*, No.4263 of 1983 McLelland J, 17 August 1983 unreported at p5

13 (1992) 34 FCR 287

14 per Rogers J in *Alpine Finance Limited v Clarke* No.14275 of 1987, 12333 of 1983, 14 December 1983 unreported at p7 and O'Keefe J in *National Mutual Life Association of Australia v Jones*, No 50371/93, 16 August 1994, unreported and Rogers J in *AMP v Noy*, No 11416 of 1992, 6 October 1992, Butterworths, unreported judgments BC 9201569

15 *Bell v Macquarie Bank*, NG 1042 o 1997, (Unreported, Lehane J, 15 May 1997)

16 *AMP v Noy*, Rogers J, No.11416 of 1992, 6 October 1992, Butterworths Unreported Judgments.

17 *Majik Markets Pty Ltd v S & M Motor Repairs Pty Ltd*, No. 3793 of 1987, Young J, 13 October 1987, Butterworths Unreported Judgments BC8701067, see also *Richardson & Wrench Ltd v Harfield Pty Ltd*, No. 3588 of 1991, Young J, 15 July 1991, Butterworths Unreported Judgments, BC9101796.

18 Cases where a stay of proceedings in the Supreme Court has been refused include *Star League v Pay*, No 2430 of 1995, Santow J 9 June 1995 *Woodruff v De Marchi & Ors*, No. 10541 of 1995, Hidden J, 26 June 1996, *Cole v Coca Cola Amatil*, No 2305 of 1998, Master Macready 16 September 1998 and *ECC Lighting v McGurk*, No 3851 of 1993, 15 June 1995 Santow J which proceedings ultimately led to an 'estoppel' which led to the Commission proceedings being dismissed, see (1996) 82 IR 102

19 As occurred in *Beard v Caltex Oil (Australia) Pty Ltd*; (Unreported, Kearney J, 29 June 1979)

20 *Bringmann v LendLease Investments Pty Ltd* (Unreported, McLelland J, 4 December 1979)

21 Kearney J, 29 June 1979 *Beard v Caltex Oil (Aust) Pty Ltd* Unreported at p.3, subsequent proceedings reported in *Beard v Caltex* [1979] AR 601

22 McLelland J in *Bringmann v Lend Lease Investments Pty Limited* 4 December 1979 unreported at p.4, which was followed by *Henderson v The Taree City Bowling Club Co-Operative Ltd* 10/6/1983 unreported, No.4182 of 1983, Needham J, and *Wood v Boral Resources* (NSW) Pty Ltd 2 October 1992, No.41980 of 1992, Butterworths Unreported Judgments BC9201576, Hodgson J.

23 Meagher JA in *Fisher v Madden* [2002] NSWCA 28 at [12], and Sheller JA at [44], see also *Majik Markets Pty Ltd v Brake & Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 461 per Mahony JA and at 467 Handley JA

24 [2001] NSWCA 103

25 [2000] NSWSC 899

26 (1999) 47 NSWLR 473

27 See *CSR Ltd v Cigna Insurance Australia Ltd* (1977) 189 CLR 345 at 397-398.

28 cf. *Pegasus Leasing v Cadorrol Pty Ltd* (1996) 59 FCR 192; see also Bell and Gleeson 'The Anti-Suit Injunction' (1997) 71 ALJ 955.

29 *Winron Pty Ltd v Shell Co of Australia Ltd* (1996) 66 IR 64; B*runing v Kingmill* (Australia) Pty Ltd (1998) 44 NSWLR 180; *Heath Group Australasia Pty Ltd v Hanning* [1999] NSWSC 719; *Macquarie Bank Ltd v Bell* [1999] NSWSC 957; *Premier Sports Australia Pty Ltd v Dodds* [2001] NSWSC 707.

30 (1999) 198 CLR 511.

31 (1991) 27 FCR 535 at 541, a similar procedure was followed in *Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 113 ALR 159 at 194-196 and 213

32 see p.551-553 and p.568; see also *Gallagher*, supra at 194-196 and 213.

33 No 4980/92, 28 October 1993, unreported, McLelland J and followed by Santow J in *ECC Lighting v McGurk* 15/6/95, BC 9504958

34 see *Resarta Pty Ltd v Finemore* [2002] NSWSC 75 (One of the co-authors is briefed in that matter)

35 (2000) 50 NSWLR 388

36 [1999] NSWSC 719

37 *Walker v Industrial Commission* (1994) 53 IR 121 per Kirby P at 136-138 when construing sec 84 of the 1940 Act and sec 301 of the 1991 Act.

38 *Walker*, supra., per Kirby P at 137, and not to a 'decision made without authority or beyond authority' per Sheller JA at 149

39 emphasis added, second reading speech, Hansard, 23 November 1995 at p 3852 The second reading speech of the 1995 Bill was adopted into the second reading speech of the 1996 Bill which resulted in the 1996 Act except where there had been amendments; Hansard, 17 April 1996 Legislative Council p81 at p82, see also Cahill V-P in R*ennard v. Fortran Auto Treatments Pty Ltd* NSWIR Comm 68.

40 See *Woolworths Limited v Hawke & Ors*. (1998) 45 NSWLR 13 and *Carey v Industrial Relations Commission in Court Session*, [1999] NSWCA 189, Registrar Jupp, and (2000) 109 IR 376 per Spigelman CJ at 377.

41 See also observations of Marks J cited at fn.11 above.

42 see section 98 of the *Supreme Court Procedures Act 1957* and section 8A of the *Equity Act 1901*

43 (1977) 136 CLR 190 at 192