ACCRUED RIGHTS AND STATUTORY INTERPRETATION:

THE CHICKEN-CATCHER'S CASE

Attorney-General (Qld) v AIRC (2002) 76 ALJR 1502

24 June 2003

This story begins in its most recent form on 1 January 1997 when s. 111AAA was introduced into the *Workplace Relations Act* 1996 (Cth). I had, by then, spent about six years on and off appearing for the Queensland Government trying to contain the spread of Federal awards into the Queensland public sector. Both sides of politics here were keen to maintain the State industrial system and to maintain local control over the expense associated with employing public servants and other employees in the public sector. It had been a war of attrition requiring numerous, sometimes lengthy, appearances before the Australian Industrial Relations Commission ("AIRC") and several appeals to the High Court dealing with the constitutional power of the Commonwealth Parliament to permit the creation of awards affecting significant parts of the State public sector.

Section 111AAA was designed to do me out of those jobs.

According to the law of unintended consequences, however, that section created another five years' worth of briefs taking me around the country to almost all the State capitals with a conclusion in the High Court in February last year.

Section 111AAA was introduced by the Howard Government shortly after it came into power and took effect from the beginning of 1997. It provided that if the AIRC was satisfied that a State award or State employment agreement governed the wages and conditions of employment of particular employees whose wages and conditions of employment were the subject of an industrial dispute, then the Commission must cease dealing with the industrial dispute in relation to those employees, unless it was satisfied that ceasing would not be in the public interest. In the section "cease dealing" meant, amongst other things, to refrain from further hearing or from determining the industrial dispute or part of it.

That statutory injunction, I thought, provided rather clearly that when a State award or employment agreement existed then the ball lay in the court of those wanting a Federal award to show that there was a public interest in the creation of such an award. Until then s.111(1)(g) of the Act had put the onus on those resisting a Federal award to show that it was proper to be dealt with by a State industrial authority or that further proceedings were not necessary or desirable in the public interest. In other words s.111AAA created a change in the onus of proof where the issue was whether a State award should be supplanted by a Federal award.

The Federal unions at a reasonably early stage decided to argue that s.111AAA did not affect proceedings that were already on foot at least to the extent that a dispute had been found and hearings were taking place dealing with the issue whether a Federal award should be created. The two matters that eventually went to the High

Court, described by it as the Darwalla dispute and the Furnishing Industry dispute were both matters where the Federal unions sought to "rope-in" Queensland employers to existing Federal awards. Two different full benches of the AIRC decided that s.111AAA did not apply because the unions had an "accrued right" to have the industrial disputes arbitrated by the Commission under the 1988 Act which had been preserved by s.8 of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"). Those decisions were made on 30 June 1998 and 27 November 1998.

The initial stance of the AIRC on that issue had been different. A full bench chaired by Justice Munro in *Re Teachers' (Victorian Government Schools) Conditions of Employment Award* 1995 (1997) 73 IR 118 had decided that s. 111AAA did apply in a decision which seemed to me to be clear, well reasoned and to reflect accurately the intent of the Commonwealth Parliament. A later, five member full bench of the AIRC, however, in *Australian Rail, Tram and Bus Industry Union v Western Australia Government Railways Commission (Westrail)* (1997) 74 IR 119 reached a different conclusion, adopting the argument of the unions that there was an accrued right to have existing applications determined under the 1988 Act.

The first attempt to challenge the argument in the High Court arose from that *Westrail* decision. Justice Kirby formed the view, as it turned out, accurately, that the application was premature and did not merit the High Court's attention at that time. He was clearly interested in the argument, however, and needed very little

persuasion that the High Court should look at the issue when these two matters later became the subject of leave applications.

The unions beat a strategic retreat in the *Westrail* matter, which left the Darwalla dispute, otherwise known by afficionados as the "Chicken Catchers'" dispute, and the Furnishing Industry dispute as the vehicles through which the argument was pursued. Those disputes were remitted initially by the High Court to the Full Court of the Federal Court in its original jurisdiction. That Court adopted a similar approach to that adopted by the full benches of the AIRC, not surprising, perhaps, because Justice O'Connor not only presided over the full bench in the *Westrail* matter in the AIRC but sat as a member of the Full Court in these two matters.

By the time the case came to be argued in the High Court in February 2002 five years had passed since the commencement of the legislation. During that period the unions' war of attrition based on the argument that they had accrued rights meant that the section had very little effect in the day to day operations of the AIRC. Nonetheless, we had always been of the view that the meaning of the section was plain and that it should have had effect on disputes that existed when it was introduced. That was why the Queensland Government pursued the matter to the High Court, eventually successfully.

This potted history of the industrial issues surrounding this litigation will be of passing interest only to most of this audience of administrative lawyers. The main

issue for you is the approach taken by the High Court to the sometimes vexed debate about the circumstances in which an accrued right exists and may be enforceable after a statutory amendment. There has been a significant number of cases dealing with such arguments at the State and Federal level over the last few years, particularly since the decision of the High Court in *Esber v The Commonwealth* (1992) 174 CLR 430, a decision which was distinguished and explained in this case, *Attorney-General (Qld) v AIRC* (2002) 76 ALJR 1502.

The first lesson one draws from the decision is that one must, initially, ascertain the true meaning of the amending statute. The joint judgment of Gaudron, McHugh, Gummow and Hayne JJ undertook that exercise, first by examining the relevant provisions of the Act as they existed immediately before 1 January 1997 and then by proceeding to consider whether the right to have disputes arbitrated in accordance with the previous Act was an "accrued right" for the purposes of the Interpretation Act. In deciding that it was not, their Honours drew a distinction between rights involving the exercise of judicial power that will often require the determination of *pre-existing* rights or liabilities and arbitral functions where the arbitrator was empowered to make a determination, not of *existing* legal rights and liabilities but as to the conditions to prevail in the future between the parties to the dispute; see at [44]-[45]. It was on that basis that their Honours distinguished *Esber*. The "accrued right" at stake there, in *Esber*, related to the continuation of an application for review by the AAT and the determination of Mr Esber's entitlement to redeem his rights to further payments of compensation under the earlier compensation legislation. The

transitional provisions of the repealing statute at issue were held by the majority in *Esber* expressly to preserve the entitlement which had accrued under the previous law; see at [48]-[50].

Their Honours, in analysing the amending legislation that introduced s.111AAA, were also confident that it showed a contrary intention to permitting the continuance of the accrued rights claimed by the unions. As they said:

> "[53] Although it received little attention in the Federal Court, the text of s 111AAA itself indicates a contrary intention. The expression 'must cease dealing with' assumes the existence of pending proceedings. It postulates the prior continuation of those proceedings, to which the provision then attaches, requiring, in terms, that those proceedings cease. <u>One can only 'cease dealing with' a matter if one is already dealing with it</u>. This construction, consistent with the natural meaning of the words used in s 111AAA(1), is reinforced by s 111AAA(4). That subsection relevantly provides that the definition of 'cease dealing', in relation to an industrial dispute, includes '*to refrain from further hearing* or from determining the industrial dispute or part of the industrial dispute' (italics added)." (My underlining.)

In further analysing the language of the section their Honours concluded that it was clearly broad enough to encompass all proceedings before the Commission whenever commenced; at [56]. They also examined the broader legislative context of the section to reach the conclusion that it was improbable that Parliament contemplated that protracted disputes would continue to be dealt with in accordance with provisions long since repealed; at [66].

The importance of examining the text of the amending Act closely and comparing its provisions with those that existed before the amendment is also emphasised by Gleeson CJ in a passage that is worth repeating:

> "[6] When a statute changes the law, the effect of the change upon existing rights, liabilities, claims, or proceedings is determined by the meaning of the statute. The common law developed rules of statutory construction as an aid to discovering that meaning. Such rules involved presumptions; but, being rules of construction, they were subject to any contrary intention evinced with sufficient clarity in the statute. *Maxwell v Murphy* (1957) 96 CLR 261 at 267, 270 per Dixon CJ. When expressed in summary form, those rules distinguished between retrospective and prospective effect, and between procedural provisions, and provisions affecting rights or liabilities. However, such distinctions are not always clear-cut. The terms retrospective and prospective may often be a convenient shorthand, but in a given case it may be necessary to identify more precisely the particular application of the alteration to the law in question. And, as the present case shows, there may be rights which, in their nature, are closely bound up with procedures and remedies."

In applying that approach his Honour went on to say at [12]-[13]:

> "[12] The amending provision, s 111AAA, was expressed in terms that attached directly to, and qualified, the claimed right. It obliges the Commission to cease dealing with certain industrial disputes. The legislative injunction, to 'cease dealing' with certain kinds of dispute, assumes that the Commission is otherwise empowered and obliged to deal with them, and requires the Commission to desist. The characteristic of the disputes the subject of that injunction to the Commission is that there is a State award or agreement which, to the Commission 's satisfaction, has a certain operation in relation to employees affected by the dispute. That is the discrimen by reference to which s 111AAA applies in the case of some disputes and not others. The argument for the respondents seeks to introduce an additional discrimen relating to the stage of the pending proceedings in the Commission. There is nothing in the language of the amending provision to warrant that. Section 111AAA identifies the disputes with which the commission 'must cease dealing'. It does not provide that the Commission must cease dealing with some of those disputes, but not with others. It simply provides that the Commission must cease dealing with such disputes.
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> [13] If the parties to the disputes in question in these appeals, by virtue of Pt VI of the Act and, in particular, by virtue of s 104, had a right, then there was manifested plainly a legislative intention to affect that right. The right was to have the Commission deal with the disputes by arbitration, in accordance with the Act. The legislature amended the Act, by directing the Commission to cease dealing with the disputes."

Similarly Kirby J said that the correct starting point for the analysis of the question was to discover the meaning of s. 111AAA derived from its language, understood from its context and given effect to achieve the apparent legislative purpose; [112]. His Honour distinguished *Esber* on a similar basis to that adopted by the joint judgment at [127] and [136]-[140], relying upon a passage from an advice of the Judicial Committee of the Privy Council in *Director of Public Works v Ho Po Sang* [1961] AC 901, that, I believe, describes the issues precisely in referring to the "manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given" (at 922). Kirby J accepted that dichotomy, one which has been relied upon in many decisions before and since *Esber*.

Callinan J also commenced by examining the effect of s 111AAA and said:

> "[152] A reader, reading those words naturally, would have no reason to read them other than as applying to any and all disputes. There is no obvious reason why, for example, the expression should be read as if it were in this form: 'must *sometimes* cease dealing', or 'must cease dealing with *future* industrial disputes', or, 'must cease dealing with industrial disputes *except pending* industrial disputes'. Furthermore, the words 'cease dealing' are important. For them to have work to do, there must be a proceeding in being to which they can apply."

His Honour distinguished *Esber* on a similar basis to the other members of the court by saying:

> "[157] In *Esber*, the applicant had a right to have his claim determined in his favour, if the delegate of the Minister had wrongly refused his claim, on the basis of events, it should be emphasised, which had all occurred before the application for the review of the applicant's decision. The applicant there had fulfilled all of the requirements of the amended legislation for the acquisition of the right,

> even though the right to enforce it had not yet been established in the pending proceedings. That is a right of the kind which the CFMEU here would only have, had the Commission made a final determination of which the CFMEU could take advantage."

One aspect of this case that I found unusual was that, although our arguments had been unsuccessful consistently before the AIRC and the Full Court of the Federal Court, I remained quite confident that they would be successful in the High Court. I have only had one other experience like that in my professional career. I was encouraged in my view when the Solicitor-General, Pat Keane QC, came in to lead us in the High Court and shared my confidence that the decisions below were wrong. We knew that we were likely to win fairly early on in the argument on 7 February 2002 when the following exchange occurred between the Chief Justice and the Solicitor-General:

> "**GLEESON CJ:** Does the decision of the Full Court produce the consequence that section 111AAA, read in the light of the *Acts Interpretation Act*, means when it was enacted, the Commission must cease dealing with the industrial dispute unless it is already dealing with it?
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> **MR KEANE:** Yes, and, your Honour, that that is so is clear from the reference to "further" dealing in subsection (4)(b)."

That pithy encapsulation of the precise issue at stake was adopted by the joint judgment at [53] and was yet another illustration to me of why the Chief Justice had such a high reputation as an advocate.

In conclusion, the main general lesson to take from this decision is that, in deciding whether a right survives an amending statute, it is most important first to look at the

text of the amending legislation in the context of the pre-existing Act and the other amendments introduced by the amending legislation.

The second issue of interest is the decision's clarification of the earlier decision of the Court in *Esber*, limiting its effect to cases of decisions dealing with an entitlement that had accrued and was preserved under the previous law. It does not preserve a right to a *proceeding* dealing, not with existing legal rights and liabilities, but the conditions to prevail in the future between the parties to a dispute; see at [45] and [49]-[50]. This seems to me to bring us back to the approach of the Judicial Committee in *Ho Po Sang* that there is a "manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given"; [1961] AC 901 at 922. The former will give rise to an accrued right that may be preserved. The latter will not.

J. S. DOUGLAS QC