NSW Legislative Assembly Hansard

Industrial Relations Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Thursday 17 November 2005.

Second Reading

Mr MILTON ORKOPOULOS (Swansea—Minister for Aboriginal Affairs, and Minister Assisting the Premier on Citizenship) [7.50 p.m.], on behalf of Mr John Watkins: I move:

That this bill be now read a second time.

This bill amends the Industrial Relations Act. The major purposes of this bill are to clarify the Industrial Relations Commission's jurisdiction to declare void or vary unfair contracts, and to allow for appeals on questions of the jurisdiction of the Industrial Relations Commission [IRC] in Court Session, but only after the processes of the commission are complete. These amendments are necessary to clarify the situation following a number of recent judgments in the Court of Appeal, notably *Mitchforce v Industrial Relations Commission & Ors* [2003] NSWCA 151 and *Solution 6 Holdings Ltd & Ors v Industrial Relations Commission & Ors* [2004] NSWCA 200. These decisions threw the scope of the IRC's unfair contracts jurisdiction into doubt and allowed parties to remove disputes from the IRC to the Court of Appeal before the IRC had had a chance to consider whether or not they fell within its jurisdiction.

The bill also makes two other amendments. It enables the commission, in exceptional circumstances, to accept an application in relation to an alleged unfair contract that is made out of time, and changes the name of the Industrial Commission in Court Session to the Industrial Court of New South Wales. I would like to give the House some background to these amendments before going into detail about their effect. Section 106 of the Industrial Relations Act allows the Industrial Relations Commission in Court Session to review contracts whereby work is performed in an industry and, where it finds such contracts unfair, to vary them or declare them void in whole or in part.

Section 179 of the Act is a privative clause. In effect, it states that there can be no appeal from decisions of the Industrial Relations Commission in Court Session, even on the grounds that the commission did not have the jurisdiction to hear the matter. A number of recent judgments of the Court of Appeal, beginning with Mitchforce, have indicated difficulties with the jurisdiction of the IRC to hear unfair contract cases that have a significant commercial element, and with the operation of section 179 as a privative clause. These cases have expanded the opportunities for matters to be brought before the Court of Appeal for consideration of jurisdictional issues, prior to any hearing being held by the commission.

In the Mitchforce and Solution 6 cases, the Court of Appeal criticised the IRC for "intruding into the heartland of commercial contracts". The Court of Appeal in these decisions considerably narrowed the interpretation of section 106 that had been adopted previously by appellate courts by holding that the power to declare void or vary a contract, as defined in section 105, extended only to such aspects of it as closely relate to the performance of work in an industry. Further, in the Solution 6 case, the Court of Appeal held that since the privative clause says that there is no appeal from a decision of the commission, it was not prevented from hearing cases that were brought before it prior to the commission having made a decision in the matter. This meant that if a party brought a matter before the Court of Appeal in the very early stages of proceedings—for example, at the time that the statement of claim is filed in the IRC—section 179 would not come into effect.

This practice has the potential to subject workers to substantial expense and delay by forcing them to litigate in the Court of Appeal, which is expensive and is not as expeditious as the IRC. Following these cases, in 2004 the Attorney General formed an expert working party to consider all the issues involved. The terms of reference for the working party were to consider the scope of section 106 and section 179 of the Industrial Relations Act. Acting Justice Stein of the Court of Appeal chaired the working party. Other members were Mr Joe Catanzariti of Clayton Utz, representing the Law Society, Mr Dick Grozier of Australian Business Ltd, Mr Max Kimber, SC, representing the Bar Association and Mr Mark Lennon of the former Labor Council, now Unions NSW. The working party's report contained 12 recommendations, most of which either did not require legislative action, or were matters for the IRC to consider. The bill seeks to implement a number of the recommended legislative amendments. It is important to note that the amendments made by this bill will affect the commission only in court session, which exercises judicial functions: there is no change proposed to the industrial arbitration functions of the commission.

I would like to speak now in some more detail about the bill's amendments to section 106 of the Industrial Relations Act. Section 106 gives the commission the power to amend or vary any contract "whereby a person performs work in any industry", if it finds that the contract is unfair. An unfair contract is defined to be one that is unfair, harsh, or unconscionable, or against the public interest, or that provides a total remuneration that is less

than a person performing the work would receive as an employee performing the work, or that is designed to, or does, avoid the provisions of an industrial instrument. This provision was originally designed to protect the industrial arbitration system and awards by giving the IRC the power to strike down arrangements that would undermine that system.

The provision gave the IRC effective powers to deal with contractual substance, and not mere form, because it was considered unlikely that either the common law or equity would provide an effective remedy for unfairness in work-related contracts. The terms of section 106 and its predecessors have remained essentially unchanged for 45 years. However, over that time, work practices have changed radically and the protection provided by section 106 has been validly extended to a wide range of transactions including franchise, licence and lease agreements in circumstances where work is performed in an industry.

Section 106 must be read together with section 105, which defines the term "contract". Read together, these sections provide that contracts or arrangements, or collateral arrangements, or related conditions, are reviewable under the unfair contracts jurisdiction. Up until the decision in Solution 6, the commission and appellate courts had interpreted the words of the equivalent sections in previous versions of the Industrial Relations Act to mean that as long as there was a contract or arrangement between the parties whereby work was performed, then any collateral arrangements or related conditions—for example, a superannuation scheme or share bonus scheme—could also be varied or declared void. These other arrangements did not, in themselves, have to satisfy the test of being contracts "whereby a person performs work in an industry".

In Solution 6, the Court of Appeal held that the commission may only declare void or vary a collateral arrangement or related condition that itself leads directly to the performance of work. This interpretation of the section significantly narrows the scope of the commission's unfair contracts jurisdiction. It is problematic because an arrangement that leads to the performance of work may consist of a formal work contract as well as other related agreements, which, of themselves, may not lead to the performance of work. If this interpretation were continued, and a person's total package were not reviewable, then the commission's unfair contract jurisdiction would be narrowed to a significant extent for employees and independent contractors. It would then be open to unscrupulous employers to ensure that the contract for work was minimalist and carefully quarantined from other aspects of the relationship that are set out in different documents, or entered into at different times.

The bill amends section 106 to clarify that if the commission finds that there is a contract or arrangement whereby a person performs work in an industry, then it can vary or declare void any related condition or collateral arrangement found to be unfair, even though that related condition or collateral arrangement does not in itself relate to a person's performance of work. For example, the commission will be able to vary a superannuation arrangement, share option agreement or franchise agreement that is related or collateral to a contract whereby a person performs work in an industry. The amendment requires however that the performance of work is a significant purpose of the overall contractual arrangements between the parties. By adopting the requirement that there be a significant connection between the arrangements and the performance of work, the bill ensures that the Court of Appeal will be able to continue to set the parameters of what are industrial matters, as opposed to those which are essentially commercial in nature.

The Government regards it as crucial that the Court of Appeal should be able to scrutinise judicial decisions of the IRC to ensure that they involve the proper exercise of its jurisdiction. At the same time, the Government acknowledges the crucial role of the IRC in safeguarding principles of industrial equity. The amendments aim to reverse the decision in Solution 6, insofar as it held that the power to declare void or vary a contract, or arrangement, under section 106 extended only to such aspects of it as closely relate to the performance of work in an industry. The amendments will clarify the commission's power to vary or declare void any provision or aspect of the overall arrangement found to be unfair.

I should also bring the transitional provisions in the bill concerning the amendment to section 106 to the attention of honourable members. The proposed change to section 106 is to apply to cases pending in the commission, but not to any case pending in a higher court. This provision is particularly important in view of the fact that an appeal against the Solution 6 has been heard in the High Court, and judgment is currently reserved. The Government has no intention of interfering with the High Court's determination in this matter and the bill, accordingly, makes it clear that it does not apply to proceedings pending in any court or tribunal apart from the IRC at the time of the bill's commencement.

The second necessary amendment that is made by the bill is to the privative clause, section 179, which states that a decision or purported decision of the commission is final and may not be appealed against, reviewed, quashed, or called into question by any other court, whether on an issue of fact, law, jurisdiction, or otherwise. This section is designed to prevent other courts from dealing with any appeal or review of decisions of the commission. The purpose is to preserve the commission's status as a superior court of record that exercises a specialist jurisdiction. The main purpose of the commission's specialist jurisdiction is to settle disputes between employers and employees and to ensure that work-related disputes are resolved quickly and cheaply. Section 179 has been around in more or less its current form for over a century.

The most significant amendment was made to it in 1996, when the words "or purported decision" were added, following the High Court's decision in *Public Service Association of South Australia v Federal Clerks Union*. In that case, the court drew a distinction between a decision and a purported decision. Essentially, the court found that where a court makes a decision that is outside its jurisdiction, it can only be a purported decision because it was not one that was within the court's power to make. In order to afford decisions of the IRC the greatest possible protection from appeal and review, section 179 was amended to state that even purported decisions of the IRC—that is, decisions that were outside its jurisdiction—could not be reviewed or appealed against. That amendment made section 179 one of the most complete privative clauses on record.

The Court of Appeal considered that it was in fact too effective in preventing appeals and reviews. This is why, in Solution 6, the Court of Appeal adopted a new approach to section 179, and decided to allow parties to bypass the commission by applying directly to the Court of Appeal before the commission has made any decision at all, that is, as soon as the plaintiff lodges the originating process in the commission. Following this decision, in 2004 the Law Society of New South Wales issued a practice note to all solicitors informing them of the Court of Appeal's preparedness to deal with unfair contract cases in advance of the commission. Since then at least 29 applications concerning unfair contract matters, which would ordinarily be dealt with in the commission, have been lodged in the Court of Appeal.

The Court of Appeal has in a number of its decisions granted orders prohibiting the commission from exercising, or purporting to exercise, its power under section 106 with respect to particular proceedings, or from hearing and determining certain proceedings, on the basis that the commission does not have jurisdiction. These orders have been made where no decision has yet been made in relation to the matter by the commission, for example, in *BEA Systems Pty Ltd v Industrial Relations Commission of New South Wales in Court Session & Anor* [2005] NSW CA 227. Further, these applications are no longer confined to applications under section 106: an additional 13 matters relating to prosecutions for occupational health and safety matters have been filed in the Court of Appeal. This is a bad result for workers, the courts and the community.

The IRC is a quicker, cheaper, and less adversarial jurisdiction than the Supreme Court or Court of Appeal. In 2003 the IRC resolved over 90 per cent of all matters by conciliation without the need for a full hearing and the expense and delay which that entails. The Court of Appeal's decisions in Mitchforce and Solution 6 have created the potential for additional, more drawn-out and more expensive litigation. The bill seeks to remedy this situation in two ways. Firstly, it removes the protection of purported decisions of the Commission in Court Session from the privative clause. This allows for review of decisions that are claimed to be outside the Commission in Court Session's jurisdiction, and so should cause the Court of Appeal to reinstate the doctrine of restraint, and to refrain from accepting very early applications before the commission has had an opportunity to consider jurisdiction. Secondly, the bill makes clear that there will be no access to the Court of Appeal under any circumstance until the processes of the commission, including appeal, are complete. This will ensure that parties cannot use the judgment in Solution 6 to bypass the commission.

The effect of these amendments is that the Court of Appeal will be able to review the decisions of the Commission in Court Session, but only insofar as there is a challenge to the commission's jurisdiction, and only after the processes of the commission, including appeal to the Full Bench of the commission, are complete. These amendments provide for a reasonable amount of appellate supervision, including review by the High Court. At the same time, they will prevent the jurisdiction of the IRC from being undermined, and employees and contractors from being forced into expensive and delay-ridden appeals. These changes will only apply to the Commission in Court Session: the intention is to preserve the full operation of the privative clause in so far as the arbitral function of the IRC is concerned. Under the transitional provisions of the bill, the amendments to section 179 will not apply to current proceedings in the High Court. Again, this provision has been drafted to ensure that the bill does not interfere in any way with the High Court's determination in the Solution 6 case.

The other amendments made by the bill, whilst also important, are somewhat more straightforward. One of these amendments is an extension, with the leave of the court, of the time in which an application for review of an unfair contract may be brought. The time frame is currently limited to 12 months and there is no discretion to allow any extension of time. This does not allow for exceptional circumstances, and so the bill amends the section to give the court discretion to allow any application made within three months of the expiry of the original 12-month period.

The bill also amends the Industrial Relations Act to change the title of the Industrial Relations Commission in Court Session to the Industrial Relations Court of New South Wales. The Industrial Relations Commission of New South Wales consists of both judicial and non-judicial members. Both types of members can exercise the arbitration powers of the commission, but only the Commission in Court Session, which is constituted by one or more judicial members, can exercise the judicial functions of the commission. These judicial functions include the hearing of unfair contract applications, prosecution of offences against the Act, proceedings for breach of industrial instruments, appeals against decisions of inferior courts in industrial matters, and prosecution of occupational health and safety offences under the Occupational Health and Safety Act 2000.

Section 152 of the Act provides that the Commission in Court Session is a court of superior record and is of equivalent status to the Supreme Court and the Land and Environment Court. The title "Commission in Court Session" may cause some confusion in the public mind about the status and powers of this body. This is particularly significant in the area of occupational health and safety. The Commission in Court Session deals with prosecutions for occupational health and safety offences, some of which have a serious impact on the health and safety of workers and which may result in severe penalties being imposed.

The criminal nature of these proceedings is sometimes lost on those who do not understand that the proceedings are being dealt with by a court, because the judicial body is generally referred to as the commission. The bill, therefore, amends the Act to provide that the Commission in Court Session should be referred to and known as the Industrial Court of New South Wales. The only change will be to the name or title of the body; there will be no variation to the way in which the court and commission interrelate, or to how the functions of each are allocated under the Act. I commend the bill to the House.