FEDERAL COURT OF AUSTRALIA

Smith v Zinifex Australia Limited [2008] FCA 532

INDUSTRIAL LAW – power of workplace inspectors appointed under post-*Work Choices* legislation to bring proceedings under pre-*Work Choices* regime – whether regulation granting power to bring proceedings must be read down – whether regulation granting power to bring proceedings prospective only

Federal Court Rules O 29 r 2
Legislative Instruments Act 2003 (Cth) ss 12, 13
Workplace Relations Act 1996 (Cth) (as at 20 September 2005) ss 4(1), 83BB(1), 84(4), 170 VV, 170WG
Workplace Relations Regulations 1996 (Cth) reg 9
Workplace Relations Act 1996 (Cth) (as at 28 March 2008) s 846, Sch 7 cl 17
Workplace Relations Regulations 2006 (Cth) reg 2.14
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

British Amusement Catering Trades Association v Westminster City Council [1989] AC 147 cited
Elazac Pty Ltd v Commissioner of Patents (1994) 53 FCR 86 cited
Government of Canada v Aronson [1990] 1 AC 579 cited
Hanlon v The Law Society [1981] AC 124 cited
Morton v The Union Steamship Company of New Zealand Limited (1951) 83 CLR 402 distinguished
Rodway v The Queen (1990) 169 CLR 515 distinguished
Thorn EMI Pty Ltd v Commissioner of Taxation (1987) 13 FCR 491 cited

RAYMOND MURRAY SMITH (OFFICE OF WORKPLACE OMBUDSMAN) v ZINIFEX AUSTRALIA LIMITED AND MARK BRENDAN EMMETT
TAD 46 OF 2007

HEEREY J
24 APRIL 2008
HOBART

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY **TAD 46 OF 2007**

BETWEEN:	**RAYMOND MURRAY SMITH (OFFICE OF WORKPLACE OMBUDSMAN)** **Applicant**
AND:	**ZINIFEX AUSTRALIA LIMITED** **First Respondent** **MARK BRENDAN EMMETT** **Second Respondent**

JUDGE:	**HEEREY J**
DATE OF ORDER:	**24 APRIL 2008**
WHERE MADE:	**HOBART**

THE COURT ORDERS THAT:

1. Answer the question:

   Was the Applicant empowered to make this Application (being the Application dated 6 December 2007, supported by Statement of Claim dated 6 December 2007)?

   Yes.

2. The proceeding is adjourned for further directions on a date to be fixed.

3. Costs are reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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BETWEEN:	**RAYMOND MURRAY SMITH (OFFICE OF WORKPLACE OMBUDSMAN)** **Applicant**
AND:	**ZINIFEX AUSTRALIA LIMITED** **First Respondent** **MARK BRENDAN EMMETT** **Second Respondent**
JUDGE:	**HEEREY J**
DATE:	**24 APRIL 2008**
PLACE:	**HOBART**

REASONS FOR JUDGMENT

1 In this proceeding it is alleged that in and between September and December 2005 the respondents contravened s 170WG of the *Workplace Relations Act 1996* (Cth) by applying duress to some of Zinifex's employees in connection with an Australian Workplace Agreement (AWA).

2 Effective from 27 March 2006, the Workplace Relations Act was substantially amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). I shall refer to the Workplace Relations Act in its pre- and post-amendment forms as, respectively, the Old Act and the New Act. Regulations made under the Old Act and the New Act will be similarly designated.

3 The applicant is a workplace inspector appointed under s 167(2) of the New Act. The respondents say the applicant does not have power to bring this proceeding in respect of contraventions of the Old Act. The following question has been ordered to be heard and determined under O 29 r 2 of the *Federal Court Rules* before trial and before any other questions:

> Was the Applicant empowered to make this Application (being the Application dated 6 December 2007, supported by the Statement of Claim dated 6 December 2007)?

4 The applicant relies on the power conferred by reg 2.14 in Ch 7 Pt 2 Div 12 of the New Regulations which provides:

> Despite the amendments of the pre-reform Act by the Work Choices Act, and the repeal of the pre-reform Regulations, a workplace inspector may, subject to any directions given by the Minister under subsection 167(7) of the Act:
> (a) institute, or give evidence in, any proceedings; or
> (b) conduct, or assist in the conduct of, any prosecution;
> in respect of an alleged breach of a matter under the pre-reform Act or the pre-reform Regulations.

5 The respondents accept that on its face reg 2.14 would confer power on the applicant to institute the present proceeding. However, the respondents say that:

1. The AWA regime under the Old Act constituted a "private code";
2. The Old Act AWA regime has been preserved by cl 17(1)(g) of Sch 7 of the New Act;
3. Reg 2.14 conflicts with this preserved private code and must be read down under s 13(1)(c) of the *Legislative Instruments Act 2003* (Cth);
4. Alternatively, reg 2.14 must be read as having prospective effect only.

6 The basis of the "private code" argument is s 170VVof the Old Act which provided:

> (1) An eligible court may make an order imposing a penalty on a person who contravenes a penalty provision.
> …
> (3) An application for an order under subsection (1) that relates to an AWA or ancillary document may be made by a party to the AWA or ancillary document.
> (4) In this section: *penalty provision* means… subsection 170WG(1) …

Section 170WG(1) of the Old Act provided that a person must not apply duress to an employer or employee in connection with an AWA or ancillary document.

7 Regulation 9(3) of the Old Regulations provided that, subject to subregs (4) and (5), an "inspector" (ie an inspector appointed under Pt V of the Old Act) may, subject to any direction of the Minister, inter alia, "institute … any proceedings… in respect of… a

contravention of the Act". However, subreg (5) provided that inspectors "do not have any powers with respect to breaches of Parts… VID… of the Act". Sections 170VV and 170WG were in Pt VID.

8 The "private code" is said to be preserved by cl 17 of Sch 7 of the New Act which provides:

> (1) Subject to this Schedule, the following provisions of the pre-reform Act continue to apply in relation to a pre-reform AWA, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*:
>
> …
>
> (g) sections… 170VV…
>
> …
>
> (2) Regulations made under the pre-reform Act, to the extent that they relate to the provisions mentioned in subclause (1), continue to apply in relation to a pre-reform AWA.

9 Under the Old Act the compliance regime in respect of AWAs was not entirely private. The Employment Advocate was empowered to investigate alleged breaches of AWAs and provide free legal representation to a party in proceedings: s 83BB(1)(e) and (g). However, to the extent that there was a "private code" under the Old Act, it was a code to be found both in that Act and the regulations made under it. Whatever construction is to be put on "may" in s 170VV(3), it is the Old Regulations which clearly prevented an inspector from bringing proceedings for a penalty in respect of AWA duress. Note also s 84(4) of the Old Act which provided that an inspector had such powers and functions "in relation to the observance of this Act… as are conferred by this Act". The expression "this Act" was defined to include the (Old) Regulations: s 4(1).

10 In that setting, it is understandable that the New Act should provide that the powers of workplace inspectors could be conferred at regulation level. (Workplace inspectors under the New Act are in a sense the successors of inspectors under the Old Act but the two offices are quite distinct.) Thus s 846 of the New Act confers power on the Governor-General to make regulations in relation to, inter alia, "the manner in which… applications… under this Act may be made and dealt with": s 846(2)(a).

11 When the New Act and the New Regulations are compared with the Old Act and Old Regulations it will be seen that the supposed conflict between New Act and New Regulations is resolved.

12 The principles that govern the use of regulations in construing the statute under which they are made were stated by Lord Lowry in *Hanlon v The Law Society* [1981] AC 124 at 193-194 as follows:

> (1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous.
>
> (2) Regulations made under the Act provide a Parliamentary or administrative contemporanea expositio of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.
>
> (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
>
> (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former.
>
> (5) The regulations are a clear guide, and may be decisive, when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modify.
>
> (6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act.

Number (4) is applicable to the present case.

13 In *Thorn EMI Pty Ltd v Commissioner of Taxation* (1987) 13 FCR 491 at 498 Beaumont J, in the context of the sales tax legislative scheme, said:

> It may be accepted, as a general proposition, that "the intention of Parliament in enacting an Act is not to be ascertained by reference to the terms in which a delegated power to legislate has been exercised" (per Brennan J in *Webster v McIntosh* (1980) 49 FLR 317 at 321.) On the other hand, as Mason J observed in the course of argument in *Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651 at 652:
>
> > One looks at regulations, not to construe an overall scheme or to throw

> light on ambiguity in a statutory provision, but to ascertain what the scheme is.
>
> In the present context, it has been settled since the decision in *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd* (1934) 52 CLR 85, that the Sales Tax Regulations are an essential part of the legislative scheme (see, especially, per Dixon J at 89). This approach was affirmed recently in *Brayson Motors* (supra, at 657) and it is unnecessary to pursue the questions which could arise in other contexts (cf *Neill v Glacier Metal Co Ltd* [1965] 1 QB 16 at 27; *Jackson v Hall* [1980] AC 854 at 884, 889; *Bennion*, opcit, at p 146).
>
> In my opinion, reference to the Sales Tax Regulations, including reg 14A(2), is not merely permissible; it is essential to an understanding of the legislative plan.

14 Contemporaneous regulations have been called in aid in construing an Act in two comparatively recent decisions of the House of Lords: see *Government of Canada v Aronson* [1990] 1 AC 579 at 610 (per Lord Lowry) and *British Amusement Catering Trades Association v Westminster City Council* [1989] AC 147 at 158; see also *Elazac Pty Ltd v Commissioner of Patents* (1994) 53 FCR 86 at 90.

15 In the Second Reading speech of 2 November 2005 (Australia, House of Representatives, Debates (2005) Vol HR 18, p 22), the Minister, speaking of the Office of Workplace Services, an executive agency in which inspectors were deployed, said that the Office

> …will have increased powers. These include the power to enforce compliance with the Workplace Relations Act, awards and agreements, the freedom of association provisions and the rules for agreement making.

16 Thus when cl 17(1) of Sch 7 of the New Act speaks of provisions of the Old Act, including s 170VV "continu(ing) to apply" in relation to an Old Act AWA, that is to be read as meaning so much of s 170VV as is consistent with the new scheme under the New Act and New Regulations. The power of an eligible court to impose a penalty (subs (1)) and the maximum limit of that penalty (subs (2)) would still apply to contraventions of the Old Act, but not the prohibition on inspectors instituting proceedings by virtue of subs (3) (if that be its effect) and Old reg 9(5). That makes sense, because after the New Act came into operation there were no "inspectors" but only "workplace inspectors". There would be no point in

prohibiting officials who no longer exist from instituting proceedings. Similar considerations apply to the Old Regulations.

17 The respondents relied on *Morton v The Union Steamship Company of New Zealand Limited* (1951) 83 CLR 402. In that case the High Court held (at 410) that reg 188 of the *Excise Regulations* 1925 (Cth) were ultra vires the *Excise Act 1901* (Cth) and void because regulations cannot

> vary or depart from the positive provisions made by the Act or… go outside the field of operation which the Act marks out for itself.

The regulation in question was invalid because it imposed "a distinct and independent addition of liability to the liabilities which the legislature has provided" (at 412).

18 In the present case the respondents eschewed any argument that reg 2.14 was ultra vires and therefore void.

19 The present case is not like *Morton* where the statute covered the field and left no room for regulations. On the contrary, the scheme of both Old Act and New Act is to leave to the regulations questions of who may enforce.

20 The respondents' alternative argument is that reg 2.14 only operates prospectively. They say that at the time the alleged contraventions took place they had a "right" not to be vexed by litigation by anyone other than a party to an AWA. Citing *Rodway v The Queen* (1990) 169 CLR 515 at 519, they contended that they had a "right to be free of a claim". They rely also on s 12(2) of the Legislative Instruments Act.

21 The expression quoted from *Rodway* appears in a context where their Honours are discussing limitation statutes and whether they should be given a retrospective operation to revive a cause of action which has become barred, or deprive a person of the opportunity of instituting an action which is within time. In such cases, giving the legislation a retrospective operation

> would operate so as to impair existing, *substantive* rights – either the right to be free of a claim or the right to bring a claim – and such an operation could not be said to be merely procedural. (Emphasis added.)

22 The actual decision in *Rodway* does not assist the respondents – indeed to the contrary. Until its repeal on 26 November 1987, s 136(1) of the *Criminal Code* (Tas) required corroboration for conviction of certain offences. Before the date of repeal the appellant was charged with such an offence. He was committed for trial in 1988 and his trial commenced in 1989. The High Court (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) unanimously held that the Code in its post-amendment form applied. Their Honours said at 521:

> … ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial.

In the present case the respondents in September–December 2005 either did or did not apply duress in relation to AWAs. If they did, they incurred a substantive obligation, the liability to such penalty as might be fixed by a court. They did not acquire any substantive right to have that obligation ascertained in some particular way, or only at the suit of some particular person or class of persons, any more than they acquired the right to be tried only by the law of evidence as it stood in December 2005.

23 For the same reason, the respondents acquired no "rights" in terms of the Legislative Instruments Act.

24 In any event, the presumption against retrospectivity is no more than that, a presumption which must yield to a clear expression of intent to the contrary. An issue of retrospectivity raises the question whether a law which on its face applies equally to past and future events must be read down as to apply only to the latter. In its terms reg 2.14 is solely concerned with involvement in proceedings for alleged contraventions under the Old Act. Such contraventions can only have happened *before* reg 2.14 came into operation. The whole purpose of reg 2.14 is to deal with past events.

25 The question will be answered: Yes. The proceeding will be adjourned for further directions on a date to be fixed. Costs are reserved.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey.

Associate:

Dated: 24 April 2008

Counsel for the Applicant:	J Bourke
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondents:	S Wood
Solicitors for the Respondents:	Minter Ellison
Date of Hearing:	3 April 2008
Date of Judgment:	24 April 2008