FEDERAL COURT OF AUSTRALIA

Martinuzzi v Fair Work Ombudsman [2012] FCA 636

Citation:	Martinuzzi v Fair Work Ombudsman [2012] FCA 636
Appeal from:	Workplace Ombudsman v QMGIM Pty Ltd & Ors [2010] FMCA 64 Workplace Ombudsman v QMGIM Pty Ltd & Ors [2010] FMCA 441 Workplace Ombudsman v QMGIM Pty Ltd & Ors [2011] FMCA 261
Parties:	**PETER RALPH MARTINUZZI, QUEENSLAND MARINE AND GENERAL INSURANCE MANAGEMENT PTY LTD ACN 010 887 644 and QUEENSLAND MARINE AND GENERAL INSURANCE BROKERS PTY LTD v FAIR WORK OMBUDSMAN**
File number:	QUD 83 of 2011
Judge:	**LOGAN J**
Date of judgment:	19 June 2012
Catchwords:	**PRACTICE AND PROCEDURE** – constitution of the court following resignation of federal magistrate – declarations of contraventions of industrial award made prior to retirement – whether it was possible for the Federal Magistrates Court as differently constituted to impose penalties and make ancillary orders – separate, distinct stages in proceeding – requirement for rehearing not mandated by the *Federal Magistrates Court Act 1999* (Cth) or other implications flowing from need to exercise judicial power in a procedurally fair way **INDUSTRIAL LAW** – industrial award binding on appellant's company – whether ambit of award sufficiently broad to include particular employees as "clerical and administrative" employees – whether having regard to the language employed in the award it had application to particular insurance broking jobs – language of the industrial award, read a whole and in context, not apt to apply to jobs in insurance broking business
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 14

	Federal Magistrates Act 1999 (Cth) ss 8, 11 *Workplace Relations Act 1996* (Cth)
Cases cited:	*Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 followed *Australian Competition & Consumer Commission v Australian Communications Network Pty Ltd* [2005] FCA 988 considered *Australian Securities and Investments Commission v Forge* [2007] NSWSC 1489 considered *Bagshaw v Scott* [2005] FCA 104 considered *Brennan v Brennan* (1953) 89 CLR 129 followed *Carra v Hamilton* (2001) 3 VR 114 cited *City of Wanneroo v Holmes* (1989) 30 IR 362 referred to *Coleshill v Manchester Corporation* [1928] 1 KB 776 considered *Educang Limited v Brisbane City Council* [2002] QSC 374 referred to *Huddart, Parker & Co Proprietary Limited v Moorehead* (1909) 8 CLR 330 followed *Kucks v CSR Limited* (1996) 66 IR 182 referred to *O'Brien v Macskimin* (1994) 101 NTR 1 applied *Orr v Holmes* (1948) 76 CLR 632 applied *Queensland Marine and General Insurance Management Pty Ltd v Fair Work Ombudsman* [2011] FCA 852 referred to *R v Pepper* [1921] 3 KB 167 considered *Ross Walker v Perpetual Trustees Australia Limited* [2004] AIRC 906 not followed *Workplace Ombudsman v Queensland Marine and General Insurance Management Pty Ltd and Ors* (2010) 245 FLR 369 considered *Workplace Ombudsman v QMGIM Pty Ltd* [2010] FMCA 64 reversed *Workplace Ombudsman v QMGIM Pty Ltd* [2011] FMCA 261 considered *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 applied Megarry, Sir Robert, *A Second Miscellany-at-Law; a further diversion for lawyers and others* (Stevens, 1973) Logan JA, "Letter to the Editor of the Australian Law Journal" (2005) 79 ALJ 141
Date of hearing:	20 February 2012
Place:	Brisbane (via telephone-link to Cairns) (Heard in Cairns)
Division:	FAIR WORK DIVISION

Category:	Catchwords
Number of paragraphs:	44
Solicitor for the Appellants:	Mr Myles Thompson
Counsel for the Respondent:	Mr C Murdoch
Solicitor for the Respondent:	McCullough Robertson

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
FAIR WORK DIVISION QUD 83 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	PETER RALPH MARTINUZZI First Appellant
	QUEENSLAND MARINE AND GENERAL INSURANCE MANAGEMENT PTY LTD ACN 010 887 644 Second Appellant
	QUEENSLAND MARINE AND GENERAL INSURANCE BROKERS PTY LTD Third Appellant
AND:	FAIR WORK OMBUDSMAN Respondent

JUDGE:	LOGAN J
DATE OF ORDER:	19 JUNE 2012
WHERE MADE:	BRISBANE (VIA TELEPHONE-LINK TO CAIRNS) (HEARD IN CAIRNS)

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The declarations and orders made in paragraphs (1) and (1A) of the orders made by the Federal Magistrates Court on 4 February 2010 are set aside.
3. Save for the order made in paragraph (24) that there be no order as to costs; the orders made by the Federal Magistrates Court on 15 March 2011 are set aside.
4. In lieu of the orders which have been set aside, it is ordered that the proceedings in the Federal Magistrates Court be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
FAIR WORK DIVISION QUD 83 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	PETER RALPH MARTINUZZI First Appellant
	QUEENSLAND MARINE AND GENERAL INSURANCE MANAGEMENT PTY LTD ACN 010 887 644 Second Appellant
	QUEENSLAND MARINE AND GENERAL INSURANCE BROKERS PTY LTD Third Appellant
AND:	FAIR WORK OMBUDSMAN Respondent
JUDGE:	LOGAN J
DATE:	19 JUNE 2012
PLACE:	BRISBANE (VIA TELEPHONE-LINK TO CAIRNS) (HEARD IN CAIRNS)

REASONS FOR JUDGMENT

1 On 25 July last year, I granted Mr Peter Martinuzzi, Queensland Marine and General Insurance Management Pty Ltd (Queensland Marine Insurance Management), and Queensland Marine and General Insurance Brokers Pty Ltd (Queensland Marine Insurance Brokers), respectively the First, Second and Third Appellants, an extension of time within which to appeal against declarations of contraventions of the now former *Workplace Relations Act 1996* (Cth) (Workplace Relations Act) and related penalty and repayment orders made by the Federal Magistrates Court: *Queensland Marine and General Insurance Management Pty Ltd v Fair Work Ombudsman* [2011] FCA 852.

2 Unfortunately, in the interval between the grant of that extension and when the appeal came to be heard in Cairns, Mr Sumner-Potts of Counsel, who had hitherto represented the Appellants both in this Court and in tbe court below, died. That necessitated some revision of pre-hearing orders and a change in the time and place of hearing, in relation to which the

respondent Commonwealth officer, an official formerly known as the Workplace Ombudsman and now known as the Fair Work Ombudsman (to whom I shall refer by his current title) fully co-operated, so as to ensure that the Appellants were not prejudiced by this development. In the result, the Appellants' case was ably presented by their longstanding solicitor, Mr Myles Thompson, with the benefit of written submissions which Mr Sumner-Potts had commenced to prepare prior to his death. I record at the outset my appreciation in respect of the assistance which those submissions, as well as those of Mr C Murdoch of Counsel who appeared for the Fair Work Ombudsman, provided.

3 The proceedings in the Federal Magistrates Court were grounded upon alleged contraventions of the Workplace Relations Act by Queensland Marine Insurance Management constituted by alleged breaches of provisions in the Insurance Industry Award 1998 (the Award) in its application, so it was alleged, to two employees, Mr David Stone and Mr Michael Lee. Mr Martinuzzi and Queensland Marine Insurance Brokers were alleged to be persons involved in those contraventions. Queensland Marine Insurance Brokers conducted an insurance broking business, Queensland Marine Insurance Management was the service company employer entity and Mr Martinuzzi was the managing director of each.

4 As I related when granting the extension of time, the proceedings in the Federal Magistrates Court occurred in a number of stages. In the first stage, that court, constituted then by Wilson FM, concluded on 4 February 2010 that Queensland Marine and General Insurance Management had breached the Award and made declarations accordingly as to contraventions of the Workplace Relations Act: see *Workplace Ombudsman v QMGIM Pty Ltd & Ors* [2010] FMCA 64. As so constituted, the Federal Magistrates Court further declared that Mr Martinuzzi and Queensland Marine and General Insurance Brokers were involved in each contravention. The court then made procedural orders directed to the later determination of penalty. The orders envisaged that determination was to occur before the Federal Magistrates Court as constituted by Burnett FM. The reason for that was the then impending effective date of Wilson FM's resignation from that court.

5 The point having been raised before him by the Appellants, it fell to Burnett FM to determine whether or not, in light of the resignation of Wilson FM prior to the imposition of penalties, the proceedings had to be heard afresh or whether they might lawfully be concluded by the Federal Magistrates Court as differently constituted. On 21 July 2010, his

Honour concluded that he could constitute the court for the purpose of determining penalty: see *Workplace Ombudsman v Queensland Marine and General Insurance Management Pty Ltd and Ors* (2010) 245 FLR 369. The only order which his Honour made that day was to order that the matter be listed at 9.30 am on 4 August 2010 for further directions.

6 In the result, penalty was not determined in the Federal Magistrates Court until 15 March 2011. For reasons which were given that day, orders were made imposing penalty and also ordering the payment of particular amounts of money to Messrs Stone and Lee: *Workplace Ombudsman v Queensland Marine and General Insurance Management Pty Ltd* [2011] FMCA 261.

7 The Appellants advanced a number of grounds of appeal the merits of each of which I shall deal with in turn. As will be seen, the result of the conclusion reached in respect of whether the Award had any application to the jobs performed by Messrs Stone and Lee is that it was never necessary for the Federal Magistrates Court to embark upon a consideration of penalty and related orders. However, the jurisdictional point was fully argued and has an importance beyond the circumstances of this particular case. I have therefore dealt with it on the merits.

WAS IT LAWFULLY POSSIBLE FOR THE FEDERAL MAGISTRATES COURT AS DIFFERENTLY CONSTITUTED TO IMPOSE PENALTIES AND MAKE ANCILLARY ORDERS?

8 In *Huddart, Parker & Co Proprietary Limited v Moorehead* (1909) 8 CLR 330 at 356, Griffith CJ observed of Commonwealth judicial power that its exercise did not begin "until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action". In this instance, that tribunal was the Federal Magistrates Court and it was called upon to take action by the institution of proceedings by the Fair Work Ombudsman against the appellants.

9 The *Federal Magistrates Act 1999* (Cth) (FMC Act) is silent as to whether that court must be constituted by the same magistrate throughout all stages of the exercise of its jurisdiction in respect of a matter. The FMC Act provides that the Federal Magistrates Court is constituted by a Chief Federal Magistrate and by such other Federal Magistrates as are from time to time commissioned: s 8 of the FMC Act. That Act further provides that the

court's jurisdiction is exercised by the court constituted by a single Federal Magistrate: s 11 of the FMC Act. If there is any requirement that the court be constituted by the same Federal Magistrate throughout all stages of a proceeding in respect of a matter, that must be found in some necessary implication relating to the exercise of judicial power.

10 There is no authority which holds that the same judicial officer must, without exception, constitute a court from in respect of a proceeding from its inception, through all interlocutory stages and for the trial. There are to be found examples of cases where, after evidence in a trial has been heard, the judicial officer constituting the court has died and, by consent of the parties, another judicial officer has determined the case by reading the transcript of evidence already taken, considering any exhibits already admitted and, sometimes even, hearing such witnesses as remain to be heard. In *Brennan v Brennan* (1953) 89 CLR 129 at 136-137 (*Brennan v Brennan*) a Full Court of the High Court (Williams ACJ, Webb and Kitto JJ), following earlier English authorities and though they thought that in most cases there were grave objections to the course, particularly where there was a serious conflict of evidence, treated the course followed as an irregularity capable of waiver by an informed decision made by legally represented parties.

11 The authorities here and in the United Kingdom bearing on when a court must throughout a proceeding or part thereof be constituted by the same judicial officer were comprehensively summarised by Kirby P (as his Honour then was) in *Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642 at 649 *(Wentworth v Rogers (No 3))*:

> 1. If specific provision is made by statute for the reconstitution of the court following the death, illness, resignation, prolonged absence or other incapacity of a judge who has part heard a case, the legislation will govern the substitution: *Chua Chee Chor v Chua Kim Yong*.
>
> 2. Statute apart, the primary rule is that once a court embarks upon the hearing of the case, prima facie the court as so constituted should conclude the hearing and any reconstitution of the court in the middle of proceedings will be an irregularity warranting intervention on appeal or review to require a new trial de novo.
>
> 3. The primary rule is subject to the exception that if an ancillary, severable and distinct matter is severed and not dealt with in an earlier proceeding, it may be determined by another judge, or an appeal court including another judge: *Orr v Holmes*.
>
> 4. The primary rule applies with special force where the part heard case is before the court constituted by a judge and jury (*Coleshill*) or where, though

> constituted by a judge alone, there is a serious conflict of evidence: *Chua Chee Chor v Chua Kim Yong*; *Brennan v Brennan*. In such cases proper practice requires recommencement of the trial de novo.
>
> 5. The above requirements, if not followed, may result in an order for a new trial. But in certain circumstances such an order will not be made. The guiding principle is the demands of justice in the particular case. Relevant to the application of that principle is a consideration of the extent of any possible prejudice done by the procedure that was followed and the risk of injustice arising from it as well as the expense and delay that would be occasioned by an order for a trial de novo in the circumstances that have occurred: *Brennan v Brennan*; *Cotogno v Lamb*.
>
> 6. It is also relevant in this last connection to consider the conduct of the parties, and those who represented them (if any) at the trial for if they have induced, acquiesced in or waived the irregularity they will not normally thereafter be heard to complain of it: *British Reinforced Concrete case*; *Brennan v Brennan*.

In that same case, Priestly JA (with whom Glass JA agreed) stated (6 NSWLR at 653):

> If a judge is unable through absence to make an order which needs to be made for some proceeding before the court to be completed there must be jurisdiction in the court enabling another judge to make the order. The question which can present difficulties in such circumstances is the extent to which the new judge can use materials already before his predecessor in arriving at his conclusion.

In the result, Priestly JA did not find it necessary to investigate what the position might be were there to be an absence of consent by the parties as to the use by a successor judge of materials already before his predecessor because he concluded that the parties had acquiesced to such use in the court below. His Honour noted in passing that the White Practice directed attention to a survey of authority on the subject by Megarry, Sir Robert, *A Second Miscellany-at-Law; a further diversion for lawyers and others* (Stevens, 1973), pp 53-58.

12 Amongst the many authorities discussed by Sir Robert Megarry in that work is (at p 54), *Coleshill v Manchester Corporation* [1928] 1 KB 776 (*Coleshill v Manchester Corporation*) in which, at 785-786, Scrutton LJ remarked, in respect of the continuation, by express request of the parties, of the trial by another judge following the death of the initial trial judge:

> I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner.

Sir Robert Megarry observed (at p 54) of those remarks that, "it is perhaps not unfair to say that they have been distinguished with more zest than they have been followed." The accuracy of that observation is amply borne out by the summary of authority by Kirby P in *Wentworth v Rogers (No 3)* and later authorities to which I shall now refer.

13 In 2005, in cases arising from what was truly an *annus horibilis* in terms of the death shortly after illness occasioned retirement or in office of judges of this Court, the summary offered by Kirby P in *Wentworth v Rogers (No 3)* was cited with apparent approval by Bennett J in *Bagshaw v Scott* [2005] FCA 104 and by Mansfield J in *Australian Competition & Consumer Commission v Australian Communications Network Pty Ltd* [2005] FCA 988. Like the FMC Act, the *Federal Court of Australia Act 1976* (Cth) is, in respect of the exercise of original jurisdiction by a single judge, silent as to how that jurisdiction may be exercised in the event of the death, retirement or incapacity of a judge who has commenced to hear a proceeding (compare s 14(3) & s 14(4) in respect of a Full Court proceeding).

14 In neither of the Federal Court cases mentioned was it necessary further to explore the position as to whether, in the absence of consent, a different judge might continue a part heard proceeding because the requisite consent was present. Here, there was neither consent nor acquiescence by the appellants. They expressly objected to the determination of penalty by a Federal Magistrate different from the Federal Magistrate who had determined liability. They submitted that a re-trial was necessary in the circumstances.

15 In a Queensland case, *Educang Limited v Brisbane City Council* [2002] QSC 374 at [2], the detailed background circumstances to which are recorded in a *Letter to the Editor* of *the Australian Law Journal* (2005) 79 ALJ 141, which I wrote when at the Bar, drawing on experience as counsel in the case concerned, there was active acquiescence to the course of another judge determining on the papers a judicial review application in which judgment had been reserved but in respect of which the trial judge was unable, because of ultimately mortal illness, to give judgment. On the basis of the consent of the parties and applying *Wentworth v Rogers (No 3)*, White J; who had not originally constituted the court, determined the case on the papers.

16 In Victoria, in *Carra v Hamilton* (2001) 3 VR 114 at 130, [61], Balmford J, after surveying authorities including *Coleshill v Manchester Corporation*; *Brennan v Brennan*; and *Wentworth v Rogers (No 3)*, concluded:

> All of the authorities which I have cited indicate that there are, as the High Court said in *Brennan*, "grave objections" to a judicial officer completing a matter heard in part by another judicial officer without rehearing the evidence heard by the first judicial officer; or to a judicial officer making a further order when the substance of the matter has been dealt with by another judicial officer. However, it is clear from those authorities that in the end, where the interests of justice and the necessity of the case dictate, that is the procedure which must be adopted, even in the absence of a relevant statutory provision. A court will, understandably, form that view more readily if the parties are in agreement with that course or have waived their right to object.

17 In the present case, there was a factual controversy to resolve as to the duties performed by Messrs Stone and Lee. That controversy was resolved by Wilson FM, who also then construed and applied the Award to the facts which he found. That the appellants subsequently objected to the conclusion of the proceeding by another Federal Magistrate, Burnett FM, did not, contrary to their submission, mandate that the whole proceeding had to be heard afresh. No "grave objection" of the kind mentioned in *Brennan v Brennan* was present because such evidentiary controversies as there were had already been resolved and declarations as to contraventions made by Wilson FM in his judgment. Subject only to the contingency of being set aside on appeal, those contravention declarations finally determined, as between the parties, whether or not the Award had been breached in the manner alleged by the Fair Work Ombudsman. They did not depend for their efficacy in law upon the subsequent determination by the Federal Magistrates Court, by whosoever constituted, of the penalties to be imposed or upon the making of any ancillary orders. No such result was expressly dictated by the FMC Act. Nor was it implicit in the exercise of judicial power, as a matter of procedural fairness, that the same judicial officer determine penalty. Declarations as to contraventions already having been pronounced in open court, it would be subversive of the quality of finality which attends an exercise of judicial power for there to be anything provisional about those declarations, derived from a need for the subsequent continuance in office by the Federal Magistrate who had constituted the court for the purpose of deciding whether the contraventions had occurred.

18 Two authorities cited by the Fair Work Ombudsman in his submissions support such a conclusion in the case of a civil penalty proceeding.

19 In respect of a criminal proceeding, *R v Pepper* [1921] 3 KB 167 at 168 (*R v Pepper*), it was held that it was competent for another judge to impose sentence in circumstances where the trial judge had died after the jury's verdict and while the prisoner was awaiting sentence. The present is not a criminal case but the analogy is nonetheless a close one in terms of the staged progress of a case such as the present where the first and perhaps only stage was necessarily a determination as to whether the alleged contraventions had occurred.

20 Closer still is *Australian Securities and Investments Commission v Forge* [2007] NSWSC 1489, which was a civil penalty proceeding. In that case, an Acting Justice had both made contravention declarations and imposed penalties. An appeal against the contravention declarations failed but succeeded in respect of the penalties on the basis that the defendants had not been afforded an opportunity to have a separate hearing and lead evidence in respect of penalty. The case was remitted to the Equity Division of the New South Wales Supreme Court for that penalty hearing. By then the Acting Justice was no longer a member of the court. The defendants took, but ultimately did not press, an objection to the continuance of the proceeding by another judge. Acquiescence alone did not form the basis upon which White J considered that it was jurisdictionally competent for him to continue the proceeding. Instead, at [31], referring to *R v Pepper*, his Honour observed:

> In the same way, where a judge dies after an accused is convicted but before sentence is passed, sentence may be passed by a new judge on the basis of the materials at the trial with such further materials as might be adduced at the hearing on sentence, and with the accused being entitled to be heard before sentence is pronounced.

21 In *O'Brien v Macskimin* (1994) 101 NTR 1 (*O'Brien v Macskimin*), another case in which a question arose as to whether the court had to be constituted by the same judicial officer at all stages, Martin CJ stated:

> It has been held that a magistrate before whom a case has begun should complete the hearing and determination of it and, if the hearing is adjourned, no magistrate other than the one before whom the hearing commenced can adjudicate, the adjournment being an extension of the hearing of the case: *R v Smith; Ex parte Stellino* [1952] QWN 37. On the other hand, in *R v Hermes; Ex parte V* [1963] SASR 81 it was held that where an order had been made by a magistrate forbidding the publication of the name of a party or witness "until further order", another magistrate before whom the proceedings may come has power, in his discretion, to make an order terminating the prohibition of the publication of the name of the party or witness. This case is also distinguishable from the circumstances that arose in *R v Marrington* (1850) 1 SCR (NSW) App 11; Legge 643 and in *Ex parte Ryan* (1864) 3 SCR(NSW) 221 where the statute required that there be a hearing before two justices and the same two justices were not present during the whole of the trial: see s 45 of the Justices Act. **The**

> **distinction that is made is between matters where the proceedings before the court are part-heard and not determined, and there is a change in the constitution of the court, and where a hearing has been completed and a determination made and a separate issue arises, which, although it could be said arise from the earlier proceedings, are based upon a separate set of facts, or in respect of which different considerations are brought to bear.**
>
> [Emphasis added]

22 Even though the case did not come before him by way of remitter following an appeal, Burnett FM was correct to conclude that the same position prevailed in the present case. So far as a civil penalty proceeding is concerned, there are always in prospect, on the institution of the proceeding, two distinct stages, determination of whether an alleged contravention is proved and, if so, what, if any, penalty and other relief, if sought, ought to be granted. Sometimes, of course, the first stage is rendered unnecessary by an admission of liability; sometimes the second is rendered unnecessary by a conclusion that the alleged contravention is not proved.

23 However desirable it may be that the same judicial officer constitutes the court for the purpose of determining both liability and penalty, this course is not mandated either by the terms of the FMC Act or by implications flowing from a need that judicial power be exercised in a procedurally fair way. There are separate, distinct stages in the proceeding. The present is but a manifestation of the exception, described in the third of the propositions stated by Kirby P in *Wentworth v Rogers (No 3)* in the passage quoted above and to like effect by Martin CJ in *O'Brien v Macskimin* in the passage to which I have given emphasis. That there could be no objection, after the death of one judicial officer, to another judicial officer dealing with a distinct stage in a proceeding was recognised by Dixon J in *Orr v Holmes* (1948) 76 CLR 632 at 637-638. The position with respect to supervening retirement or resignation is no different. This ground of appeal fails.

MEANING AND APPLICATION OF THE AWARD

24 It was admitted in the Federal Magistrates Court by Queensland Marine Insurance Management and Queensland Marine Insurance Brokers that each was bound by the Award. What is challenged on appeal is the conclusion of that court that that award applied to the employment of Messrs Stone and Lee. As in *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] per Gleeson CJ and McHugh J, "*The resolution of*

the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose".

25 Clause 6 of the Award provides:

> This Award binds the employers named in the schedule of respondents to this Award with reference to all their employees, as defined in Clause 4 of this award ...

That directs attention to cl 4, which provides, materially:

> 4.1 "Employees" means
> 4.1.1 The clerical and administrative staff of respondent employers including
> 4.1.1(a) Employees working in the information technology area
> 4.1.1(b) Representatives employed in the Insurance Industry
> 4.1.1(c) Messengers
> 4.1.1(d) Operators of office machinery

26 The evidence as to the duties performed by Messrs Stone and Lee was such that Wilson FM was able readily to conclude that cl 4.1.1(a), (c) and (d) could not, on any view, apply to them. "Representative" was a term defined in the Award by cl 4.2 of the Award to be "an employee who works away from the office undertaking assessing, surveying and risk control duties as directed or product sales functions". The evidence before the Court was that though, exceptionally, Messrs Stone and Lee worked away from the office, they did not ever engage in sales duties. In light of these facts, the learned Federal Magistrate concluded that cl 4.1.1(b) likewise did not apply to Messrs Stone and Lee.

27 Unsurprisingly, the results of this process of elimination were not challenged by the appellants. Their approach was that Messrs Stone and Lee were employed in an insurance brokerage business, not in a business which provided insurance. Their submission was that, read as a whole, the Award could be seen to apply only to the providers of insurance, not to brokers. The nature of the business within which Messrs Stone and Lee were employed, so the submission went, was identifying insurance cover provided by others and advising clients as to insurance cover available and the related premium so as to meet a need and budget identified by a client. The essence of the contrary submission made by the Fair Work Ombudsman was that the conclusion reached by Wilson FM was correct, for the reasons given by his Honour.

28 Having engaged by this process of eliminating from application the expressly included examples, Wilson FM derived what his Honour considered to be the principal award construction and application issues. These were what was the meaning to be given to the composite term "clerical and administrative staff" in cl 4.1.1 and then, properly construed, whether the duties performed by Messrs Stone and Lee meant that they were such staff?

29 The learned Federal Magistrate commenced his consideration of how to construe the term "clerical and administrative staff" first by setting out what he understood to be the general approach to the construction of an industrial award. In this regard, his Honour referred with approval to the following passage from the judgment of French J (as his Honour then was) in *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378 (*City of Wanneroo v Holmes*):

> The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words ... The words are to be read as a whole and in context ... Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: *Picard v John Heine & Son Ltd* (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all ... That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:
>
> > "... it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award." ...
>
> It is of course no part of the court's task to assign a meaning in order that the award may provide what the Court thinks is appropriate ... Indeed it has been said that a tribunal interpreting an award must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the award making authority ...

30 To like effect and frequently cited with approval in this Court (and, later in his judgment, by the learned Federal Magistrate) is the following statement of principle in relation to award construction by Madgwick J in *Kucks v CSR Limited* (1996) 66 IR 182 at 184 (*Kucks v CSR Limited*):

> It is trite that narrow or pedantic approaches to the interpretation of an award are

> misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

31 The task which fell to the court below was award interpretation, not arbitration. The Award was a given, not a negotiating gambit which might freely be adapted to suit notions of industrial equity in the circumstances of the particular case. There was no error therefore in the learned Federal Magistrate giving primary attention to the language employed in cl 4.1.1, as read in the context of the Award as a whole. Further, his Honour appreciated that, in so doing, his task was not to construe the words "clerical" and "administrative" piecemeal but rather as parts of a composite phrase. He opined (at para 29) that the phrase had "a chameleon like quality adapting to a variety of situations".

32 In the result, his Honour came particularly to be influenced by the approach of Commissioner Lewin in *Ross Walker v Perpetual Trustees Australia Limited* [2004] AIRC 906 (*Walker v Perpetual Trustees*) to the construction of the Award. Commissioner Lewin conducted an historical analysis of the position prior to the making of the Award. He also noted the absence of a "scope clause" in it. The Commissioner considered that the scope of the Award was, "highly ambiguous and uncertain": *Walker v Perpetual Trustees* at [27]. Wilson FM was clearly also of this view and it is one which I share fully. Commissioner Lewin came to have regard to the definitions clause (cl 4), the parties bound and to the original log of claims and to the eligibility rule of the union which had served that log, the Australian Insurance Employees' Union (the successor to which is the Finance Sector Union), particularly noting that the eligibility rule of that union included, "industries, trades, businesses, undertakings, callings and occupations of loss adjusting, loss assessing, insurance broking": *Walker v Perpetual Trustees* at [33]. From this the Commissioner reached the conclusion that the Award was made in settlement of an industrial dispute confined to the performance of work referred to in the industry and eligibility rules of the Australian Insurance Employees' Union: *Walker v Perpetual Trustees* at [43].

33 Adopting this approach, Wilson FM concluded that the Award did apply to clerical and administrative work performed within insurance broking or insurance broking staff related businesses such as those conducted by Queensland Marine Insurance Brokers with staff employed by Queensland Marine Insurance Management. By reference to pertinent authority (para 29 to para 33), his Honour approached the question of who constituted "clerical and administrative staff" on the basis that, in modern times, "clerical" and "administrative" were each broad terms, extending on the one hand to include tasks beyond the mere recording of information to the making of discretionary judgments and on the other to cover a myriad of tasks in or pertaining to administration.

34 As to Mr Stone, Wilson FM concluded (para 50):

> Essentially Mr Stone was employed to obtain for clients of the third respondent whatever life insurance product they needed. That included term life insurance, trauma insurance, disability insurance and other associated products. Mr Stone was required to assess a client's needs and then source an appropriate policy for them.

As to Mr Lee, it came to be common ground that he worked in the general insurance area of the business and gave advice to the clients of the third respondent particularly in marine insurance matters. It is important though to remember that the conclusion below was that the business was that of insurance broking, not the provision of insurance.

35 So it was that his Honour concluded that the Award applied to the work undertaken by each of Messrs Stone and Lee.

36 Having so done, Wilson FM immediately encountered difficulty in assigning an award pay grade to each of Messrs Stone and Lee. His Honour confessed (at para 57), in respect of Mr Stone that it was "difficult to 'pigeon hole' [him] into any Grade". His Honour came to grade him as a "Grade 6 (Specialist). As to Mr Lee, his Honour opined (at para 65) that he fell between a Grade 4 (Technical) and Grade 5 (Technical) employee but considered that he fell more within the latter than the former because of the complexity of the insurance policy knowledge that he had to possess to perform his work.

37 The difficulty encountered by Wilson FM in assigning a grade to each of these employees gives at least raises an interrogative note about whether the Award has any application to them at all. Consideration of the history of an award or for that matter the claim

made in the underlying dispute is not a substitute for first construing the language actually employed in the award in the context that language appears and reading the award as a whole. This was a point made by French J in *City of Wanneroo v Holmes* in the passage quoted above. It bears repeating that the Court's task is the interpretation, not the arbitration, of an award. If, truly, the language employed is inadequate to cover a case which one might have thought, having regard to the history of an award and underlying dispute was intended to be covered, effect must be given to the language that has been employed, not to what might have been employed but was not. To strain for language which avoids inconvenience or injustice is one thing (*Kucks v CSR Limited*), to do injustice by straining language is another.

38 So far as cl 6 is concerned, the parties bound by the Award are the employers named in the respondency schedule, but only "with reference to all their employees, as defined in cl 4 of this award". Reading the Award as a whole includes taking full account of Pt 5, which is directed to the subject of grades of employees and related salaries. Within that part, cl 14.2 provides that, "each employer respondent must grade the jobs falling within the grades as defined in Appendix B." Clause 14.5 sets out particular grades and the salaries payable to employees in such grades. The grades set out in Appendix B include typical tasks. The guide in that appendix to using the grade descriptions makes it plain that not every job will include all of these tasks and that "from the alternative it should be reasonably clear which grade is the closer fit on balance".

39 Part 5 of the Award and with it Appendix B give some insight into the types of jobs the Award covers and the ends to which those jobs are directed. This is important because, as is amply borne out by the authorities cited by the learned Federal Magistrate, the term "clerical and administrative staff" in the cl 4 definition of "Employees" is broad and does indeed have chameleon like qualities.

40 What is striking about the tasks listed in respect of the various jobs set out in Appendix B is that none is expressly directed to the provision of advice about the types of insurance offered by *different* insurers and which bests suits the needs and budget of a particular client. "Underwriting" is mentioned frequently, particularly in relation to more senior grades. "On site inspection of risks/damage" is mentioned (Task 9, Grade 6 (Specialist) typical tasks). A broad knowledge of "relevant business and insurance issues" is mentioned (Typical background requirement, Grade 6 (Managerial)). Insurance broking

knowledge or experience is mentioned not at all. The grades are hierarchical. In itself that is hardly surprising but reading them as a whole the impression strongly gained is that the grades in Appendix B are concerned with jobs within a provider, not a broker, of insurance, particularly an insurer with a branch network and perhaps a network of subsidiaries. The subordinate jobs grades in Appendix B can be seen to support the more senior technical, specialist and managerial grades where tasks peculiar to an insurer, not an insurance broker, are mentioned in the typical tasks.

41 A broking business advises clients about the products offered by a range of insurers. It is no part of such a business to underwrite risks or to decide whether claims fall within contracted for risks. The evidence as to what was undertaken by the appellant companies was typical of what one might expect from an ordinary understanding of what is entailed in insurance broking.

42 The very title of the Award gives pause for thought about whether it extends employees undertaking insurance broking jobs. As used as a noun, insurance means:

> 1. the act, system, or business of insuring property, life, the person, etc., against loss or harm arising in specified contingencies, as fire, accident, death, disablement, or the like, in consideration of a payment proportionate to the risk involved.
> 2. the contract thus made, set forth in a written or printed agreement (policy).
> 3. the amount for which anything is insured.
> 4. the premium paid for insuring a thing.
>
> (The Macquarie Dictionary Online, accessed 16 June 2012)

As used adjectively, the word means, "relating to a company, agent, etc., dealing with insurance" (The Macquarie Dictionary Online, accessed 16 June 2012). At the margin of application, it is not impossible to regard the adjective "insurance" as embracing insurance broking but that is hardly an ordinary meaning, instead being one which carries with it the notion of "and related". "Broking" is not mentioned at all in the definition in the standard dictionary which takes account of Australian idiom. Neither is it mentioned at all in respect of any of the jobs in Appendix B. All of the usual content of the word "insurance", as the word is commonly understood, is to be found on an analysis of the typical tasks in the grades in Appendix B, read as a whole - underwriting and claims assessment and supporting tasks. There is no tension between the title of the Award as an "insurance industry" award and the jobs described in Appendix B. Further, on the modern understanding of the term "clerical

and administrative", all of the jobs described in Appendix B still fall aptly within it if one regards Appendix B as describing jobs within an insurer. In an award which does not have a "scope clause" and which uses such a bland and broad term as "clerical and administrative" the insight into which clerical and administrative employees are covered which is offered by an overall impression of the job descriptions in Appendix B and the symmetry between that impression, the Award's title and the ordinary meaning of the word "insurance" are decisive considerations.

43 It may well be that the Award was, as Commissioner Lewin apprehended in *Walker v Perpetual Trustees*, intended to apply to broking jobs. After all, the appellant companies apart, there are other respondents to the Award whose name includes the word, "broker". Yet, incongruently, the Award itself does not mention broking in any typical task. My conclusion is that what has been fashioned is an award the language of which is not, read as a whole and in context, apt to apply to jobs in an insurance broking business. For the reasons given, I find myself in respectful disagreement with Wilson FM as to whether, having regard to the language which is employed in the Award, it has any application at all to insurance broking jobs such as those undertaken by Messrs Stone and Lee. My conclusion is that it does not. It necessarily follows from this conclusion that Queensland Marine and General Insurance Management did not contravene the Award and that neither Queensland Marine and General Insurance Brokers nor Mr Martinuzzi was not involved in any contravention.

44 For these reasons, the declarations made by Wilson FM must be set aside, as must all of the penalty and related orders made by Burnett FM. Though I agree with the conclusion of Burnett FM that his Honour was not prevented by the resignation of Wilson FM from continuing the proceeding, the need to consider that question ought not to have arisen. The proceedings should have been dismissed. The related order though, was limited to listing and need not, in my opinion, be set aside.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate: 

Dated: 19 June 2012