INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*In the Matter of a Proposed Queensland Local Government Industry Award – State 2015* [2016] ICQ 006
PARTIES:	**THE HONOURABLE CURTIS PITT, TREASURER AND MINISTER FOR EMPLOYMENT AND INDUSTRIAL RELATIONS** (appellant) **v** **LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND LIMITED** (first respondent) **QUEENSLAND SERVICES, INDUSTRIAL UNION OF EMPLOYEES** (second respondent) **AUTOMOTIVE, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND** (third respondent) **CONSTRUCTION, FORESTRY, MINING & ENERGY, INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND** (fourth respondent) **PLUMBERS & GAS FITTERS EMPLOYEES' UNION QUEENSLAND, UNION OF EMPLOYEES** (fifth respondent) **ELECTRICAL TRADES UNION OF EMPLOYEES, QUEENSLAND** (sixth respondent)
FILE NO/S:	C/2015/51
PARTIES:	**BENJAMIN CHARLES SWAN, SECRETARY OF THE AUSTRALIAN WORKERS' UNION OF EMPLOYEES, QUEENSLAND** (appellant) **v** **LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND LIMITED** (first respondent) **THE HONOURABLE CURTIS PITT, TREASURER AND MINISTER FOR EMPLOYMENT AND INDUSTRIAL RELATIONS** (second respondent) **QUEENSLAND SERVICES, INDUSTRIAL UNION OF EMPLOYEES** (third respondent)

AUTOMOTIVE, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND
(fourth respondent)
CONSTRUCTION, FORESTRY, MINING & ENERGY, INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND
(fifth respondent)
PLUMBERS & GAS FITTERS EMPLOYEES' UNION OF QUEENSLAND, UNION OF EMPLOYEES
(sixth respondent)
ELECTRICAL TRADES UNION OF EMPLOYEES, QUEENSLAND
(seventh respondent)

FILE NO/S: C/2015/56

PROCEEDING: Appeal

DELIVERED ON: 14 March 2016

HEARING DATE: 23 November 2015

MEMBER: Martin J, President

ORDER/S:

1. **The appeals are allowed.**
2. **The decision of the Full Bench is set aside.**
3. **The matter is remitted to the Commission to be heard and determined according to law.**

CATCHWORDS: INDUSTRIAL LAW – QUEENSLAND – AWARDS – AMENDMENT, VARIATION OR RECISSION – where s 140C(1) of the *Industrial Relations Act* 1999 permits the Minister to request the Queensland Industrial Relations Commission carry out a process of modernising awards – where s 140CA(1) permits the Minister to vary the request before the award modernisation process is completed by giving a variation notice to the Commission – where an award modernisation process had begun – where the Minister issued a variation notice and a Consolidated Request requesting the recommencement of the award modernisation process in accordance with that Consolidated Request – where, as part of that award modernisation process, a Full Bench of the Commission made orders varying the *Queensland Local Government Industry Award – State 2014* – where the appellants appeal those orders – whether the Commission erred in finding that the Consolidated Request was only binding on the Commission in relation to matters of process rather than the subject matter of the award – whether the Commission misinterpreted the terms of the Consolidated Request in making an award where there was a loss or reduction of entitlements compared to relevant pre-modernisation awards –

whether the Commission erred in basing its conclusion that no grounds had been made out for reinsertion of locality allowances in a modernised award in part on the finding that this would result in a "discriminatory" award contrary to s 273(1)(a) of the *Industrial Relations Act* 1999 – whether the powers of the Minister with respect to issuing a Consolidated Request to the Commission are inconsistent with the separation of powers doctrine

Acts Interpretation Act 1954 s 32CA(2)
Industrial Relations Act 1999 ss 3, 140BA, 140C, 140CA, 140 CC, 140D, 273(1)(a), s 320(3)

CASES: *Jennifer Cameron AND Q-COMP (C/2011/24) - Decision <http://www.qirc.qld.gov.au>*
Hardy v St Vincent's Hospital Toowoomba Ltd [2000] 2 Qd R 19
Re an Application for Amendment of the Queensland Local Governments Industry Award – State 2014 [2015] QIRC 52
Re: Variation and renaming of a modern award - Queensland Local Government Industry Award - State 2015 [2015] QIRC 186

APPEARANCES: C/2015/51

J Murdoch QC instructed by G Cooper (Crown Solicitor) for the appellant
A Herbert instructed by King & Company for the first respondent
R Reitano instructed by Hall Payne for the second, third, fourth, fifth and sixth respondents

C/2015/56

T McKernan of the Australian Workers' Union of Employees, Queensland, appellant
A Herbert instructed by King & Company for the first respondent
J Murdoch QC instructed by G Cooper (Crown Solicitor) for the second respondent
R Reitano instructed by Hall Payne for the third, fourth, fifth, sixth and seventh respondents

[1] On 31 October 2015 a Full Bench of the Commission made orders, relying upon the award modernisation process contained in Part 8 of Chapter 5 of the *Industrial Relations Act* 1999 ("the Act"), varying the *Queensland Local Government Industry Award – State 2014* ("the Award"). This appeal concerns questions with respect to, among other things, the effect of the *Industrial Relations (Restoring Fairness) and Other Legislation Act* 2015 and the Minister's request made under the award modernisation provisions.

[2] The history of the proceedings is well set out in the Full Bench's decision[1] and I repeat it here:

> "[1] Part 8 of Chapter 5 "Modernisation of awards" as well as Chapter 5A, "Modern awards", were inserted into the *Industrial Relations Act* 1999 (the Act) by Act No. 61 of 2013. The amending Act thereby introduces a regime which permits the Minister to request the Queensland Industrial Relations Commission (Commission) to undertake a process of modernising awards. Section 140C empowers the Minister to give the Commission an award modernisation request (Request) to carry out an award modernisation process.
>
> [2] On 26 September 2014 following a Request from the then Attorney-General and Minister for Justice given in January 2014, a differently constituted Full Bench of this Commission made the *Queensland Local Government Industry Award - State 2014* (the 2014 Award). …
>
> [3] The Act was amended in 2015 by the *Industrial Relations (Restoring Fairness) and Other Legislation Act 2015* which amongst other things, amended s 140D of the Act "Modern award objectives", by deleting the requirement that the Commission have regard to "financial considerations" as defined in that section. It also amended the principal object of the Act by deleting s 3(p) which required that when wages and employment conditions are determined by arbitration and the matter involved the public sector, the financial position of the State and the relevant public sector entity and the State's fiscal strategy were to be taken into account.
>
> [4] The *Industrial Relations (Restoring Fairness) and Other Legislation Act* 2015 also inserted Part 20, *Transitional Provisions for Industrial Relations (Restoring Fairness) and other Legislation Amendment Act* 2015 in to the Act. Section 841 of the Act requires the Commission to review a relevant modern award and vary it if the Minister gives the Commission a variation notice under s 140CA. Section 140CA(1) [sic s 842(1)] requires the Commission to remove certain provisions which had been required to be inserted prior to their repeal by the *Industrial Relations (Restoring Fairness) and Other Legislation Act* 2015, as well as to include certain provisions that had been contained in relevant pre-modernisation awards.
>
> [5] On 17 July 2015 the Treasurer and Minister for Employment and Industrial Relations (Minister), pursuant to s 140CA(1) issued a variation notice and made a Consolidated Request. …
>
> [6] A differently constituted Full Bench dealt with the Consolidated Request and the requirement of s 844 that the Commission consider an increase to the number of awards covering the Queensland local government industry (Excluding Brisbane City Council) ("Queensland local government industry"). That Full Bench declined to increase the

---

[1] *Re: Variation and renaming of a modern award - Queensland Local Government Industry Award - State 2015* [2015] QIRC 186.

number of awards governing the Queensland local government industry deciding that one award is appropriate.

[7] Following that decision, pursuant to the Consolidated Request, the Commission's award modernisation team (AMOD Team) conducted conferences with interested parties in an attempt to come to an agreed position in relation to amending the 2014 Award in conformity with the Consolidated Request. No agreement was reached and, on 10 September 2015, Deputy President Bloomfield referred the variation of the award to the Vice President who constituted this Full Bench to deal with the matter and to vary the 2014 Award in conformity with the Consolidated Request. The Referral included an Exposure Draft of a proposed new modern award for this Full Bench to consider."

The Full Bench's decision

[3] Before dealing with the contents of a new award, the Full Bench considered what it described as a "threshold issue". It identified the issue in the following way:

> "[20] A preliminary, or threshold, issue relates to the extent to which the Consolidated Request may be said to direct the Commission as to the content of any variation to the 2014 award made in response to the Consolidated Request. In particular:
>
> (a) whether the Minister can direct the Commission about what should be included in the varied award;
>
> (b) whether the Consolidated Request contains directions to the Commission about what the varied award must contain; and
>
> (c) if so, what weight the Commission should give to any directions contained in the Consolidated Request and how much discretion the Commission has in the way in which it gives effect to a specific direction or directions from the Minister."

[4] The Minister's submission was recorded as being that "'it was envisaged' in the Consolidated Request that, in determining the varied award, 'employee entitlements and conditions would not be reduced or removed from what was available in pre-modernisation awards.'"[2]

[5] The position advanced by the Minister was drawn from an exchange during submissions:

> "DEPUTY PRESIDENT KAUFMAN: … Are you saying that what the Minister is directing this Full Bench to do is to review the various allowance arrangements previously in place to ensure that a certain objective is reached, and that so long as we ensure that that objective is reached, how we get to that point is entirely up to us? In other words, the terms of the award are for us to make, so long as the net effect is to ensure that employee

---

[2] *Re: Variation and renaming of a modern award - Queensland Local Government Industry Award - State 2015* [2015] QIRC 186 at [26].

entitlements have not been reduced in comparison with allowance arrangements prescribed in the pre-modernisation awards?

MR JAMES: Your Honour, I would suggest that the Minister's intent through this process is to ensure that it is not – it is **not a consequence of process for entitlements to be removed or lost.**

…

DEPUTY PRESIDENT KAUFMAN: But how we get to that point is up to us. Is that your submission?

MR JAMES: Yes.

DEPUTY PRESIDENT KAUFMAN: As long as that objective is reached, the form of the award which achieves that outcome could be expressed, notionally, in a number of ways.

MR JAMES: Yes, Commissioner.

DEPUTY PRESIDENT KAUFMAN: And so is your submission that we should ensure that that objective is reached, but, beyond that, the Minister isn't prescribing how we get to that objective?

MR JAMES: The Minister is not prescribing the detail of what will be in the award, but he does clearly contemplate that **the outcome should not be a reduction in the terms and conditions that were available to employees in the pre-modernised award**." (emphasis added)

[6] The Full Bench then referred to the Statement of Intent contained in the Consolidated Request and observed:

> "[34] We are reminded by the Minister's Statement of Intent that award modernisation is not intended to reduce or remove employee entitlements and conditions from what was available in pre-modernisation awards, and to that end we are to ensure wages and employment conditions continue to provide fair conditions in relation to living standards prevailing in the community."

[7] The centre of the debate concerns the requirement in the Consolidated Request that allowance arrangements be reviewed to ensure that employee entitlements have not been reduced in relation to those contained in pre-modernisation awards. After referring to other submissions which had been made the Full Bench concluded with the following:

> "[44] The Consolidated Request must, of course, be read in the context of the Act, which is paramount. **The Commission must comply with the Consolidated Request, but only insofar as it can do so conformably with the Act.**
>
> [45] Insofar as terms and conditions of employment and entitlements are concerned, the Act has not changed significantly since the making of the 2014 Award. The deletion of the references in the Act to "financial position" and "fiscal strategy" in ss 3(p) and 145D are not relevant to our decision, as they were not adverted to in the 2014 decision.

[46] It follows that the 2014 Award was made in a context that is substantially the same as that which currently pertains.

[47] **The restoration of the pre-existing allowances is not required by the Consolidated Reference, nor is it consistent with the award modernisation provisions of the Act. We refer in particular to ss 3(f), 140BA, 140BB, 140D and 273.**

[48] **Further in our view, the restoration of the pre-modernisation allowances would be antithetical to the requirements of ss 3(f), 140BA(a), (b), (c), and (d), and 140D(1), (2)(iii), (vi) and (vii).**

[49] Significantly, the evidence called by the unions does not demonstrate that any employee's actual entitlements have been reduced in comparison with what he or she would have received under the allowance arrangements prescribed in the pre-modernised awards. We will analyse the evidence later in these reasons." (emphasis added)

[8] The Full Bench then went on to consider the format of the varied award and the various allowances which the unions sought to have inserted in the new award.

[9] I will first consider the matters raised in the notices of appeal relating to the reasons given concerning the threshold issue.

Grounds of appeal – the threshold issue

[10] The Minister and the AWU advanced similar arguments under this heading and, thus, they can be considered together.

[11] The appellants contend that the Full Bench erred in two ways:

(a) with respect to the capacity of the Minister to direct the Commission; and

(b) by misinterpreting the terms of the Consolidated Request and making a modern award in which there was a loss or reduction of entitlements compared to relevant pre-modernisation awards.

What are the Minister's powers and what did the Consolidated Request require?

[12] The extent of the Minister's power is defined by the terms of the Act and, in particular, that part of the Act which deals with award modernisation. The Full Bench concluded that the Minister's request concerned "process" and not subject matter. In paragraph 30 of its reasons, the Full Bench said:

"[30] It is timely to refer to s 140C which makes it clear that the Minister's request is in relation to **process**. We note that the Minister may request that an award modernisation **process** be carried out by the Commission and the Commission is to carry out the award modernisation **process** in accordance with the award modernisation request. Beyond an ability

to direct the Commission as to subject matter to be included, or not, in the award, the Consolidated Request does not extend to the content of the subject matter." (emphasis in original)

[13] It is necessary, therefore, to examine s 140C. Section 140C provides:

"**140C Minister may make award modernisation request**

(1) The Minister may give the commission a written notice (an ***award modernisation request***) requesting that an award modernisation process be carried out.

(2) An award modernisation request must state—

(a) details of the award modernisation process that is to be carried out; and

(b) the day by which the process must be completed.

(3) The day stated in the notice under subsection (2)(b) must not be later than 2 years after the day on which the award modernisation request is given to the commission.

(4) An award modernisation request may state any other matter about the award modernisation process the Minister considers appropriate.

(5) Without limiting subsection (4), the award modernisation request may—

(a) require the commission to—

(i) prepare progress reports on stated matters about the award modernisation process; and

(ii) make the progress reports available as stated in the request; or

(b) state permitted matters about which provisions must be included in a modern award; or

(c) direct the commission to include in a modern award terms about particular permitted matters; or

(d) give other directions about how, or whether, the commission must deal with particular permitted matters.

(6) In this section—

permitted matter means a matter about which provisions may be included in a modern award under chapter 2A, part 3, division 1 or 2."

[14] The Full Bench drew a distinction between a direction as to the subject matter to be included, or not included, in the award and the content of the subject matter. It concluded that s 140C does not allow the Minister to direct the Commission as to the content of any

particular item. That, with respect, does not take into account s 140C(4). It provides that an award modernisation request may state any other matter about the award modernisation process the Minister considers appropriate. The reasoning employed by the Full Bench appears to have been that the use of the word "process" only refers to the means by which a modernised award may be determined but not the detail which must be contained in such a modernised award. The provisions of s 140C must be read in the light of s 140BA which sets out the objects of modernising awards. They include the object that a modernised award must, together with the Queensland Employment Standards, provide for a fair minimum safety net of enforceable conditions of employment for employees.

[15] The use of the word "process" in s 140C should not be interpreted as referring solely to the mechanical aspects of the modernisation of awards and the making of modernised awards. There is, for example, a distinction drawn between "procedure" and "process" and, in s 140CC(2)(a) the Commission is given the power to "decide the procedure for carrying out the award modernisation process". Given the power afforded the Minister in s 140C(4), the word "process" has a much wider meaning and includes the content of an award and the detail of that content.

[16] An argument mounted on appeal (which had been accepted by the Full Bench) is to the effect that, whatever the provisions of a Consolidated Request, a Full Bench can only implement so much as is possible under the Act more generally. It was put this way by the Full Bench:

> "[44] The Consolidated Request must, of course, be read in the context of the Act, which is paramount. The Commission must comply with the Consolidated Request, but only insofar as it can do so conformably with the Act."

[17] This reasoning leads to the conclusion that if there is a direction in the Consolidated Request which does not conform to a provision of the Act, then the direction must be read down in some way. There is a difficulty with this approach and it is caused by s 140CC which provides:

> "(1) The commission **must** carry out the award modernisation process in accordance with the award modernisation request.
>
> (2) Subject to subsection (1)—
>
> (a) the commission may decide the procedure for carrying out the award modernisation process; and
>
> (b) without limiting paragraph (a), the commission may inform itself in any way it thinks appropriate, including by consulting with any person, body or organisation in the way the commission considers appropriate.

(3) To remove any doubt, it is declared that subsection (2) does not limit the powers of the commission under any other provision of this Act." (emphasis added)

[18] Section 140CC does not allow for doubt as to the application of the Act to the request nor does it allow the Commission any discretion – the award modernisation process must be carried out in accordance with the award modernisation request. Section 32CA(2) of the *Acts Interpretation Act* 1954 provides: "In an Act, the word **must**, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised." (emphasis added) If the request or the effect of the request is, in some way, contrary to or inconsistent with another part of the Act then that conflict is resolved (in favour of the request) by the command in s 140CC(1).

[19] It follows then that it is necessary to determine what the Consolidated Request requires that the Commission do. The Consolidated Request consists of a number of sections of which the following are of immediate relevance to these proceedings:

- Objects
- Statement of Intent
- Priority awards
- Allowances
- Schedule 1 – Local Government (excluding Brisbane City Council) award modernisation priorities

[20] The "Objects" section repeats the objects set out in s 140BA of the Act.

[21] The "Statement of Intent" section contains these statements:

> "Award modernisation is **not intended to reduce or remove employee entitlements** and conditions from what is available in the pre-modernisation awards. Having regard to this, the Commission shall ensure wages and employment conditions continue to provide fair conditions in relation to the living standards prevailing in the community and what is afforded to employees and employers in the relevant pre-modernisation award/s." (emphasis added)

[22] The "Priority Awards" section identifies the *Queensland Local Government Industry Award – State 2014* as a modern award made prior to the passage of the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Act* 2015 which is to be reviewed and varied. It further identifies Schedule 1 as containing further requirements in relation to the review and variation of that Award.

[23] The "Allowances" section provides that allowances should be clearly and separately identified in modern awards and that the Commission is to ensure that all modern awards

include an appropriate method or formula for automatically adjusting relevant allowances when minimum wage rates are adjusted.

[24] Schedule 1 contains specific provisions relating to the Award. Of relevance to this matter are the statements under the subheading "Allowances and other provisions":

> "The Commission is to give **consideration** to a review of the allowances and other provisions in the *Queensland Local Government Industry Award – State 2014*. To this end the Commission is to give consideration to restoring the provision of locality allowance (including additional leave provisions attached to that allowance) where such provisions were available in the pre-modernisation award/s.
>
> Furthermore, the Commission is to review the consolidated and other allowance arrangements currently in the *Queensland Local Government Industry Award – State* 2014 to **ensure employee entitlements have not been reduced in comparison with the allowance arrangements in the pre-modernisation awards**.
>
> The Commission is to give consideration to the submissions of the parties in the review of the allowances and other provisions, in particular where a party can demonstrate a reduction in employee remuneration or an employee entitlement as a consequence of the consolidation of, or changes made to, the allowances and other provisions." (emphasis added)

[25] The language used in the first paragraph under the sub-heading "Allowances and other provisions" does not require more than that the Commission give consideration to a review of allowances and, to that end, give consideration to restoring the provision of locality allowances where they were available in pre-modernisation awards. It does not mandate a particular result.

[26] The direction given in the second paragraph is more detailed. It requires the Commission to review the consolidated and other allowances in the Award and then to ensure employee entitlements have not been reduced in comparison with the pre-modernisation awards. The word "ensure" appears in a number of statutes, in particular, statutes concerning workplace health and safety. The accepted meaning of the word in those circumstances is to "make certain" or "make sure"[3]. It is also the meaning most often given to the word in the usual authoritative dictionaries.

[27] It follows, then, that the Commission is required to **make certain** that employee entitlements have not been reduced in comparison with the allowance arrangements in the pre-modernisation awards. The term "employee entitlement" is not defined in the Consolidated Request but the reference to comparing them to "allowance arrangements" makes it clear that it concerns, at least, allowances. That meaning should be adopted here.

---

[3] See *Electrical Power Transmission Pty Ltd v Robinson* (1973) 2 QL 329 per Matthews P, approved and adopted in *Hardy v St Vincent's Hospital Toowoomba Ltd* [2000] 2 Qd R 19 at 22.

[28] This Request should, like all documents of this nature, be read as a whole in the light of the legislation from which it has emerged. Such a reading would take into account, at least, the following:

(a) The command in s 140CC(1) that: "The commission **must** carry out the award modernisation process in accordance with the award modernisation request." (emphasis added)

(b) The reference in the Statement of Intent that "Award modernisation is **not intended to reduce or remove employee entitlements** and conditions from what is available in the pre-modernisation awards." (emphasis added)

(c) The requirement in the Schedule 1 that "the Commission is to review the consolidated and other allowance arrangements currently in the *Queensland Local Government Industry Award – State 2014* to **ensure employee entitlements have not been reduced in comparison with the allowance arrangements in the pre-modernisation awards**." (emphasis added)

[29] The conclusion which is to be drawn from those statements is that the Commission must make certain that the variation of the Award results in the reinstatement of allowances of at least the same value as those which existed in the pre-modernisation awards.

[30] While the Statement of Intent does not contain any binding directions it provides the objects against which interpretation of later parts of the Consolidated Request can be tested. If there is uncertainty as to the proper construction to be given to the Consolidated Request then the Statement of Intent provides guidance as to the proper construction.

[31] In proceeding on the basis that it was not required to comply with the Consolidated Request unless it could do so conformably with the balance of the Act the Full Bench fell into error.

Separation of powers

[32] An issue considered by the Full Bench was whether the directions in the Consolidated Request extended to the content of the subject matter of the new award. The Full Bench held that it did not and, therefore, no "separation of powers issue" arose. Lest it be thought that my conclusions about the effect of the Consolidated Request do raise such an issue I will make some brief observations.

[33] In [21] of its decision the Full Bench said:

> "At first blush, it appeared that the terms of the Consolidated Request may have impermissibly breached the doctrine of the separation of powers between the executive and judicial arms of government. The Commission, albeit a tribunal, is a court of record and required to act judicially."

[34] The nature of a court of record was considered by Hall P in *Cameron v Q-COMP*[4] :

> "[4] A 'court of record' means, *inter alia* a court expressly declared by statute to be so, compare *Cooper and Sons v Dawson* at 392 to 393 per Madden CJ. Section 255 of the *Industrial Relations Act 1999* provides that the Commission as formerly established as a court of record, is continued in existence. By s. 36 of the *Acts Interpretation Act 1954*, 'establish' *inter alia*, includes constitute and continue in existence. It follows that *prima facie*, the Commission is a 'court of record' and a 'Queensland Court' for the purposes of Part 3A of the *Evidence Act 1977*.
>
> [5] I quite accept that a statutory description of a tribunal as a court of record does not have the effect that the tribunal is a court of record for all purposes. Here for example, given the terms of s. 251 of the *Industrial Relations Act 1999*, vesting this Court with the power to deal with contempt and the absence of a comparable investiture of power in the Commission and given that s. 660 of the *Industrial Relations Act 1999* operates to make many forms of contempt of the Commission an offence against the Act, it would be difficult to contend that the Commission had the powers of a Court of record in respect of contempt. More generally, it may be doubted that s. 255 of the *Industrial Relations Act 1999* enlarges the jurisdiction of the Commission to reach matters neither within the Commission's express powers nor incidental thereto. However, there is nothing to suggest that the remedial provisions of the *Evidence Act 1977* are not to apply to the Commission. Indeed, there is some commentary to suggest that such a conclusion would be remarkable; compare *Helm v Hansely Holdings Pty Ltd (In liq)* at paragraphs 9 and 10 and *The Bell Group Ltd (In liq) v Westpac Banking Corporation and Anor (4)* at paragraph 35 per Owen J. Further, it would be incongruous if the Commission, exercising judicial power, had not the powers of the Coroner's Court exercising administrative power. It may well be, as Counsel for the Respondent suggests, that the Queensland Civil and Administrative Tribunal (QCAT) has been declared a court for the purposes of the *Evidence Act 1977* because, unlike members of the Commission, members of QCAT largely do not enjoy tenure; compare *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania).* As a matter of comity, it seems to me preferable to observe that, the making of such a regulation by those exercising administrative power, impacts not at all on the issues of statutory construction that arise in determining whether the Commission is a 'court of record' for the purposes of the *Evidence Act 1977*." (citations omitted)

[35] Of greater importance in these circumstances is that the Commission, while created as a "court of record", is not restricted to the exercise of judicial functions. Queensland, like all other States, is not bound by the separation of powers doctrine which has been derived from, among other things, Chapter III of the Commonwealth Constitution. It has been held in many cases[5] that the doctrine does not apply to the States. Thus, the State can invest a body such as the Commission with both judicial and non-judicial functions. The

---

4 *Jennifer Cameron AND Q-COMP (C/2011/24) - Decision <http://www.qirc.qld.gov.au>*.

5 *Clyne v East* (1967) 68 SR(NSW) 385 at 395, 400; *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 381, 400, 407, 410, 419-420; *Nicholas v Western Australia* [1972] WAR 68; *Gilbertson v South Australia* (1976) 15 SASR 66 at 85; aff'd [1978] AC 772 at 783; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652; and *Kable v DPP (NSW)* (1996) 189 CLR 51.

making of awards is a non-judicial function and the Commission is not at large when making an award. The Commission can be, and often is, required by statute to include particular provisions in awards, for example, a dispute resolution procedure. And there is no difference between requiring that a provision of that type be included and requiring that particular allowances be included. The Commission must comply with the provisions of the Act and s 140CC is one of those provisions.

Locality allowances

[36] Further consideration needs to be given to "locality" allowances and the requirements of the Consolidated Request.

[37] In the first paragraph under the subheading "Allowances and other provisions" the Commission is directed only to give consideration to restoring the provision of locality allowances where they were available in pre-modernised awards. The provisions contained within the second paragraph commence with the word "Furthermore" which indicates that those provisions are in addition to those contained in the first paragraph. There is no requirement that the Commission "ensure" that locality allowances are to be reinstated. The Request draws a distinction between "locality allowances" and "consolidated and other allowance arrangements" in the way in which it deals with those subject matters.

[38] The Full Bench concluded that no grounds had been made out for the reinsertion of locality allowances in a modernised award. In particular, the members of the Full Bench relied upon a decision of Kaufman DP in *Re an Application for Amendment of the Queensland Local Governments Industry Award – State 2014*[6]. In that decision Kaufman DP reviewed the history of the allowances and made reference to s 273(1)(a) and s 320 of the Act.

[39] Section 273(1)(a) provides:

> "(1) The commission's functions include the following—
>
> (a) establishing and maintaining a system of non-discriminatory awards that, together with the Queensland Employment Standards, provide for a fair minimum safety net of enforceable conditions of employment for employees; …"

[40] Section 320(3) provides:

> "(3) Also, the commission or Industrial Magistrates Court is to be governed in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of—
>
> (a) the persons immediately concerned; and

---

6 [2015] QIRC 52.

(b) the community as a whole."

[41] In [36] of his reasons, Kaufman DP said "It is apparent that, if the applications were to be granted, the award would discriminate as between employees covered by it." That formed part of his Honour's conclusion that to restore locality allowances would mean the award would not comply with s 273(1)(a) because the entitlement to those allowances is based upon a discriminatory consideration.

[42] The discrimination referred to in s 273 is not the kind of discrimination upon which Kaufman DP relied. The word "discrimination" is defined in Schedule 5 (the Dictionary) of the Act in this way:

> "***discrimination*** means discrimination—
>
> (a) that would contravene the *Anti-Discrimination Act 1991*; or
>
> (b) on the basis of sexual preference; or
>
> (c) on the basis of family responsibilities."

[43] His Honour's application of the word "discriminate" was in the general sense of that word but not as defined in the Act. It must be acknowledged that his Honour also referred to the appropriateness of importing consent arrangements agreed to by some unions with the employers in respect of a portion of the workforce and the general requirements of the award modernisation provisions in the Act. But, the reliance upon the wrong definition of "discrimination" is an error of law and the Full Bench, by adopting that reasoning, engaged in the same error.

Specific allowances and entitlements

[44] The appellants raised a number of grounds of appeal concerning individual allowances and other entitlements. It was argued that the Full Bench fell into error or exceeded their jurisdiction with respect to:

(a) The arbitrary fixation of a local government industry allowance.

(b) The provision of an hourly allowance rather than an all-purpose weekly payment for employees engaged in construction, reconstruction, alteration, repair and/or maintenance work.

(c) The exclusion of a "direct aerial connection" from the live sewer work allowance.

(d) Saturday work rates (*Engineering Award – State 2012*).

(e) Overtime entitlements.

(f) The ability under the *Engineering Award – State 2012* for casual employees to convert their employment contract to full-time or part-time in certain circumstances.

(g) Reduction of personal leave days available under the *Municipal Officers (Aboriginal and Islander Community Councils) Award 2008*.

[45] Each of the above matters was proposed by the appellants as examples of the types of allowances and entitlements which had not been restored in the proposed award and, therefore, demonstrated a non-compliance by the Full Bench with the requirement of s 140CC(1) of the Act. In the light of the finding made above concerning the error of law demonstrated in the reasoning of the Full Bench it is unnecessary to venture upon a discussion of the nature of the allowances or entitlements referred to above. It is sufficient to say that the Full Bench erred in its treatment of those matters because of the view that it took about the effect of the Consolidated Request.

Conclusion

[46] The appellants have demonstrated that the Full Bench erred in its determination of the requirements of the Consolidated Request and, as a result, fell into error in the manner in which it proceeded to make the new award.

[47] The appeals are allowed. The decision of the Full Bench is set aside and the matter is remitted to the Commission to be heard and determined according to law.