



30 April 2009

19  
JG;rp

Mr John Carter  
Committee Secretary  
Senate Education, Employment and Workplace Relations Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

**Inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009***

The relevant provisions:

**Schedule 17: Amendments relating to the Fair Work Divisions of the Federal Court and the Federal Magistrates Court.**

**Part 5: Jurisdiction of courts**

**Clause 24 Appeals from eligible State or Territory Courts**

- (1) *An appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act or the WR Act as it continues to apply because of this Act.*
- (2) *It is not necessary to obtain the leave of the Federal Court, or the court appealed from, in relation to an appeal under subitem (1).*
- (3) *No appeal lies from a decision referred to in subitem (1) except as provided for by this item.*

This Schedule contains amendments relating to the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates Court.

Part 5 deals with the general powers of the Federal Court and the Federal Magistrates Court, and the conferral on the Federal Court of a general appellate jurisdiction from decisions of eligible State and Territory courts exercising jurisdiction under the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (T&C Bill), or the WR Act as continued in operation by the T&C Bill.

Clause 24 provides that the Federal Court has jurisdiction to hear an appeal from a decision of an eligible State or Territory Court exercising jurisdiction under the T&C Bill or the WR Act as continued in operation by the T&C Bill.



The Federal Court's appellate jurisdiction will be exclusive. No appeal will lie to other State or Territory Courts or to the High Court, from an eligible State or Territory Court exercising jurisdiction under this Bill or under the WR Act as continued in operation by the T&C Bill.

## Issues

The Industrial Relations Court of South Australia (SAIRC) is defined as an eligible court for the purposes of the Commonwealth legislation.

Recent South Australian decisions in *ISS Health Support Services Pty Ltd v Duthie* [2007] SAIRC 94 (*Duthie*), *Philps v Geoservices Overseas Oilfield Services SA* [2008] SAIRC 44 (*GeoServices*) and *Kronen V Commercial Motor Industries Pty Ltd (CMI Toyota) (CMI Toyota)* [2008] FCAFC 17 clarified the operation of the provisions of the *Workplace Relations Act 1996* (Cth) that gave exclusive appellate rights to the Federal Court in almost identical terms as those included in the *Fair Work Act 2009* (Cth) and the T&C Bill.

The relevant provisions under the WR Act that conferred exclusive appellate jurisdiction on the Federal Court are sections 853(1) and 850(2) (while the language has changed slightly from 'a matter arising under' to 'exercising jurisdiction under' the effect of providing exclusive appellate jurisdiction to the Federal Court is essentially the same).

The question asked by the Full Court of the SAIRC in *Duthie* was whether it had jurisdiction to hear an appeal from a State Court that had determined a claim enforceable under section 720 the WR Act.

It held that the right of appeal from a decision of the State Court following a hearing and determination of a claim for an amount allegedly due under an applicable provision pursuant to s720 of the WR Act is conferred by s853(1) of the WR Act to the Federal Court and by reason of s850(2) of the WR Act that appeal right is exclusive to the Federal Court (at 46).

The *GeoServices* decision held that the statement of principle in *Duthie* applies with no less force to an appeal to a single judge of the SAIRC as it does to an appeal to the Full Court of the SAIRC (at 54).

The *CMI Toyota* decision of the Federal Court of Australia reinforced the exclusive nature of that Court's appeals jurisdiction:

*By virtue of s853(1) of the WR Act, this Court has jurisdiction to hear an appeal from a judgement of a court of a State in a matter arising under the WRA Act. By s850(2), that jurisdiction is exclusive of the jurisdiction of any court of a State to hear and determine an appeal from a judgement from which an appeal may be brought to this Court. A good deal of time and money was wasted in fruitless appeals within the IRCSA [sic] and to the Supreme Court of South Australia (at 7).*

A particular concern for the Law Society of South Australia is that proceedings may be brought before the Industrial Relations Court of South Australia in one action to include a claim for underpayment of wages under a federal instrument and a claim for underpayment of an amount due under State legislation (for example a long service leave entitlement enforceable pursuant to s13(5) of the *Long Service Leave Act (SA)* and s14 of the *Fair Work Act (SA)*) It is very common for claims of these types



to be brought together in one action before the Industrial Relations Court of South Australia and, of course, they will frequently involve the same questions of fact and law.

In this situation the part of the decision dealing with wages is appealable only to the Federal Court whereas the part of the decision dealing with long service leave is appealable to the local court. This would lead to two different sets of procedures, costs, timeframes and potentially two different outcomes. This is neither a good legal result nor a good public policy result.

The Law Society has concerns that the "associated jurisdiction" of the Federal Court of Australia may not be invoked in every such appeal. It may be necessary for prudent appellants in such a case to institute appeals both to a single judge of the Industrial Relations Court of South Australia and to the Federal Court of Australia. Of course, such would only add to the very significant cost of an appeal, especially of an appeal to the Federal Court. It is worth bearing in mind that there may be little or no prospect of recovering any of those costs of a successful appeal.

The amendments necessary to avoid a dual appeal process need to be made to federal legislation by amendments to the T&C Bill.

The Full Court in *Duthie* considered that the intention of Parliament in enacting sections 850 and 853 was to avoid the 'idiosyncrasies' of State systems and to ensure a consistent approach to the construction of industrial instruments enforceable under the WR Act.

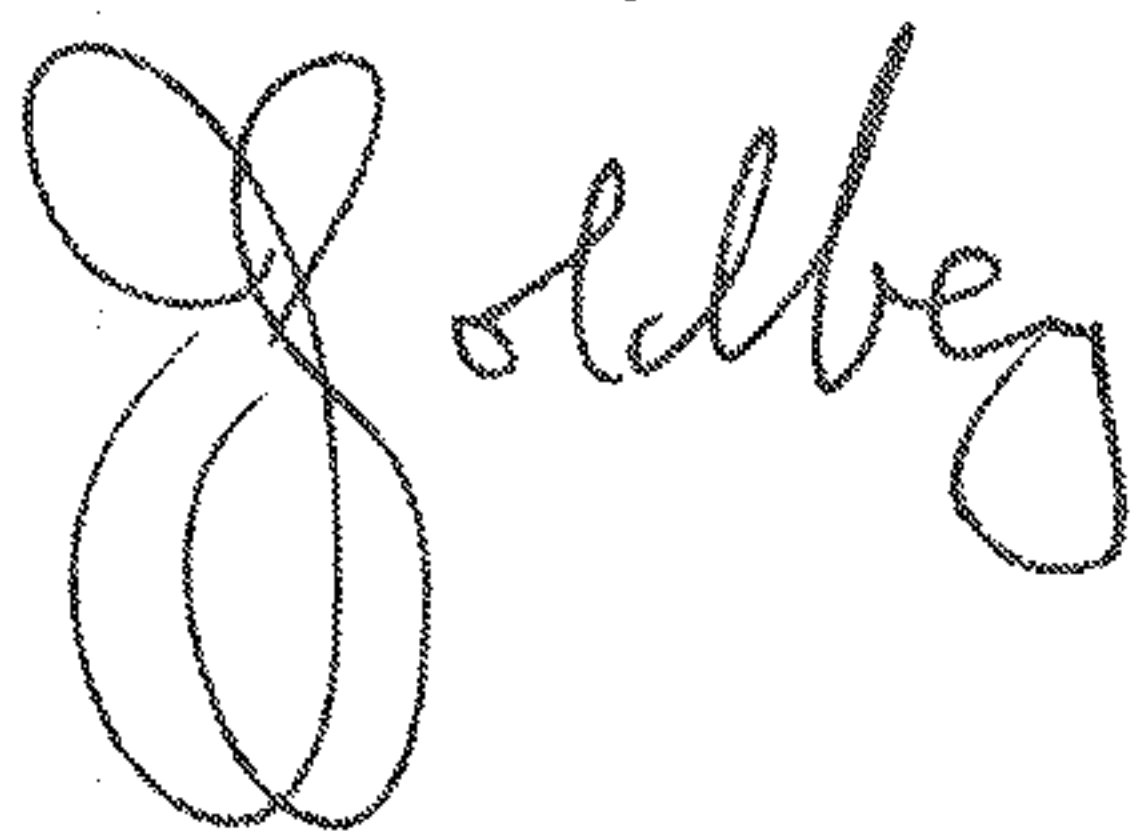
The Law Society of South Australia suggests that whilst recognising the benefit of the oversight of the Federal Court, the balance of convenience and policy considerations lead to a conclusion that full appeal rights should be established within the South Australian State jurisdiction.

As far as we are aware the situation in South Australia is unique in that the *Fair Work Act 1994 (SA)* is the only relevant State legislation to provide for a right of appeal from the decision of an Industrial Magistrate on such issues to a single judge and from there to the Full Bench of the Industrial Relations Court of South Australia. The judges of the South Australian Industrial Relations Court comprise an expert panel and are appointed with substantial legal experience and are expert in issues of industrial and employment law.

If the Commonwealth Government is disinclined to establish full appeal rights within the State jurisdiction, the Law Society of South Australia suggests an alternative approach might be taken to resolve the issues outlined above.

This alternative suggests amendments be made to the T&C Bill providing jurisdiction to the Full Court of the Industrial Relations Court of South Australia to hear appeals from Industrial Magistrates with any further appeals resting exclusively with the Federal Court as the superior court of appeal. In the South Australian context this would not create a Court precedent problem because the Industrial Relations Court of South Australia is not a superior court of record.

Yours sincerely



John Goldberg  
**PRESIDENT**