

The industrial jurisdiction of the Federal Court – then and now

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Like Gaul, the history of the industrial jurisdiction in the Federal Court over the first 50 years may be divided into three parts. First, there was what I will call the early period from the establishment of the Court in 1977 until the removal of the Court's industrial jurisdiction in 1994. Secondly, there was what I will call the middle period from 1996 until 2009 when the Act originally passed as the *Industrial Relations Act 1988* ("the IR Act") was in force as the *Workplace Relations Act 1996* ("the WR Act"). And thirdly, there was, and still is, what I will call the Fair Work period when the industrial work of the Court has largely, but not solely, arisen under the *Fair Work Act 2009* ("the FW Act").

But we must commence with a bit of background. The industrial jurisdiction of the Federal Court was the end result of one of the most iconic developments ever seen in Australian constitutional law. Created under the *Commonwealth Conciliation and Arbitration Act 1904* ("the C&A Act"), the Commonwealth Court of Conciliation and Arbitration ("the Arbitration Court") was a court of record and was originally constituted by a serving member of the High Court.¹ Central to its jurisdiction was the prevention and settlement of industrial disputes² – not, it may be noted, a Ch III function.

Over the next 50 years or so, the legislation governing the exercise of this jurisdiction was frequently amended in response to the changing politics of the times, but the gravitas provided by the circumstance that presidential members were, ostensibly at least, part of the federal judiciary remained central to the authority of the court in the settlement of disputes in what were often rather robust settings. In 1956, however, it was held in *The Boilermakers' Case* that, under *The Constitution*, the functions of a Ch III

¹ C&A Act, ss 11 & 12.

² C&A Act as enacted in 1904, s 18.

judge and of an arbitrator charged with settling industrial disputes could not be admixed in the one body.³ In the result, two new bodies were established to carry out the erstwhile functions of the abolished Arbitration Court: the Conciliation and Arbitration Commission (“the C&A Commission”) with dispute-settling functions, and a court established under Ch III, the Commonwealth – later the Australian – Industrial Court (“the Industrial Court”). For about the next 20 years the Industrial Court exercised the judicial functions required by the C&A Act.

To describe this court as an industrial one, while not a misnomer so far as it went, in due course came to convey an incomplete picture of its functions. From the commencement of the *Trade Practices Act 1965*, the court had both civil and criminal jurisdictions under that Act and its successors in the area of trade practices.⁴ Then in the late 1960s and the early 1970s, the idea that Australia should have a federal superior court of record of broad jurisdiction gained currency in policy-making circles. The ultimate ascendancy of that concept led to the passage of the *Federal Court of Australia Act 1976* (“the Federal Court Act”) and to the commencement of the jurisdiction of the Federal Court on 1 February 1977.

The early period

The Federal Court originally had two divisions, an Industrial Division and a General Division. Why was the court set up this way? There was, for instance, no Bankruptcy Division and no Trade Practices Division. In the Second Reading Speech for the Bill which became the Federal Court Act, the establishment of an Industrial Division was

³ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (High Court) and *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529.

⁴ The Act of 1965 was succeeded by the *Restrictive Trade Practices Act 1971* which was in turn succeeded by the *Trade Practices Act 1974*. The Industrial Court published 13 judgments in matters arising under the Act of 1974: *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286; *Hartnell v Sharp Corporation of Australia Pty Ltd* (1975) 5 ALR 493; *Trade Practices Commission v Vaponordic (Aust) Pty Ltd* (1975) 6 ALR 248; *Trade Practices Commission v Glen Ion* [1975] ATPR 40-008; *Ballard v Sperry Rand Australia Ltd* (1975) 6 ALR 696; *Trades Practices Commission v Total Australia Ltd* (1975) 24 FLR 413; *Wells v John R Lewis (International) Pty Ltd* (1975) 25 FLR 194; *Ransley v Spare Parts & Reconditioning Co Pty Ltd* (1975) ATPR 40-055; *Sydney Building Information Centre Ltd v Hornsby Building Information Centre Ltd* (1975) 8 ALR 230; *Trade Practices Commission v Sharp Corporation of Australia Pty Ltd* (1975) 8 ALR 255; *Websters Investigations Pty Ltd v Dykes Investigations Pty Ltd* (1976) 9 ALR 537; *Given v Optional Extras Pty Ltd* (1976) 10 ALR 627; and *Trade Practices Commission v Guest’s Garage Pty Ltd* [1976] ATPR 40-016.

justified as preserving “the special character of the industrial jurisdiction under the Conciliation and Arbitration Act”. In that speech, the Attorney-General also said:

A judge of the Court, other than the chief judge, may be assigned to only one Division of the Court by the Governor-General on his appointment. If so assigned, he may not sit in the other Division, except by virtue of special arrangements made by the chief judge in any particular case.

Under the legislation itself, a judge need not have been attached to a division, and in such a case he or she could take part in the exercise of the jurisdiction of the Court in either division. But, subject to any arrangement made by the Chief Judge, with the consent of the judge in question, a judge attached to a division could sit in that division only.⁵

Of the 18 original puisne judges appointed to the Court with effect from 1 February 1977, nine had been judges of the Industrial Court.⁶ Of the nine, two were assigned to the Industrial Division,⁷ a further four were not assigned to a division,⁸ and the remaining three were assigned to the General Division.⁹ The only judge appointed to the Court with effect from 1 February 1977 who had not previously been a judge, Keely J, was assigned to the Industrial Division.¹⁰ Over the next decade or so, the practice of assigning judges to divisions appears to have lapsed, and those judges who had, on appointment, been assigned to a division were assigned to the other division.¹¹ In the result, by 1991, all members of the Court either had been assigned to both divisions or were not assigned to either division.

The new court handed down its first two industrial judgments on 6 April 1977. In the first, the Full Court accepted the unopposed argument of Mr D M Ryan on a question of construction arising under the agreement covering pilots employed by TAA.¹² In the

⁵ Federal Court Act as enacted in 1976, subs 13(3).

⁶ Smithers, Nimmo, Woodward, Franki, JB Sweeney, Evatt, St John, Northrop and Brennan JJ.

⁷ JB Sweeney and Evatt JJ. Both were additionally assigned to the General Division on 31 May 1979.

⁸ Smithers, Woodward, Northrop and Brennan JJ. Not having been assigned to a division, these judges could exercise the jurisdiction of the Court in either division.

⁹ Nimmo, Franki and St John JJ. On 2 August 1978 St John J was additionally assigned to the Industrial Division.

¹⁰ Keely J was additionally assigned to the General Division on 31 May 1979.

¹¹ Aside from the judges already referred to, the only assignment of a judge to the Industrial Division only occurred on the appointment of Gray J in 1984. That assignment was varied in 1991 when his Honour was assigned also to the General Division.

¹² *Re Pilots (TAA) Agreement 1975* [1977] FCA 13.

second, the Full Court held that the summary dismissal of the Shire Clerk at Yalgoo in Western Australia had been in breach of the applicable award.¹³

It might be considered that neither of those judgements was of great moment at the general level, but a ruling given by Keely J in June 1978 was. In a penal proceeding for breach of an award made under the C&A Act, the question arose whether the proceeding was criminal or civil in nature. In favour of the criminal point of view, his Honour's attention was drawn to a closely-reasoned, recent, judgment of the Full Court of the Industrial Court.¹⁴ However, and having given the matter no longer consideration than was permitted by an overnight adjournment in the running of the trial, his Honour declined to follow the Full Court, a course available to him because it was not a Full Court of the court of which he was a member.¹⁵ His Honour held that such a proceeding, though penal, was civil, not criminal, in nature.

On the very same day when that ruling was given, a Full Court held that an appeal did not lie at the suit of the disappointed prosecutor after what had been an acquittal, after a trial on the merits, in a criminal proceeding under the *Trade Practices Act 1974*.¹⁶ That case did not concern the industrial jurisdiction of the Court, but the principle for which it stood soon enough did. In October 1979, in *Gapes v The Commercial Bank of Australia Ltd*,¹⁷ it was held by a 5-member Full Court that a proceeding for breach of award under the C&A Act was not a criminal proceeding and, therefore, that an appeal lay against the dismissal on the merits of such a proceeding.

The *Gapes* outcome was relevant not only in its own forensic setting – an appeal by the disappointed applicant in a penal proceeding – but also with respect to the relevant standard of proof in such a proceeding. In some other procedural settings, however, penal proceedings continued to wear much the same garments as criminal prosecutions, such as the situation involving a claim, made in response to a notice for discovery, based on the privilege against self-exposure to a penalty.¹⁸

¹³ *Municipal Officers' Association of Australia v Shire of Yalgoo* [1977] FCA 14.

¹⁴ *Vehicle Builders' Employees' Federation of Australia v General Motors Holden Pty Ltd* (1977) 32 FLR 100.

¹⁵ *Harris v Ansett Transport Industries (Operations) Pty Ltd* [1978] FCA 118, Keely J.

¹⁶ *Thompson v Mastertouch TV Service Pty Ltd* (1978) 38 FLR 397.

¹⁷ (1979) 38 FLR 431.

¹⁸ *Birrell v Australian National Airlines Commission* (1984) 1 FCR 526.

Another early development followed upon the 1983 judgment of the High Court in *Fencott v Muller*¹⁹ upholding the existence of what came to be called the accrued jurisdiction of the Federal Court, whereby a non-federal claim could be litigated in a proceeding based on a federal, ie a statutory, claim where both were part of the same justiciable controversy. Six months later, that judgment was applied by Beaumont J in the Federal Court in the following circumstances. In an application under s 144 of the C&A Act, a ruling was sought that the applicant was entitled to membership of the registered organisation that would have been appropriate for him if he were employed in the relevant industry. There was no dispute about the “industry” point, the issue at stake being whether the applicant was employed at all. He alleged that he was employed, but the organisation denied it. Having originally sued the organisation, the applicant then sought to join the company by which he claimed to be employed. The Court had the benefit of submissions made by MJ Finnane QC for the applicant, of WM Gummow intervening in support on behalf of the Commonwealth, and of JD Shaw and AP Whitlam, on behalf of the organisation and the company respectively, resisting the application. Beaumont J summarised the position as follows:

The respondents submit ... that the claim sought to be made against the [company] arises, if at all, under the general law; that it does not arise under any federal law; that it is a claim which is quite distinct from the claim sought to be made against the [organisation], based as it is on s 144 of the Act; and that this is not even a case of an attempt to join a non-federal claim to a federal claim made against the same party, since the claims here are sought to be made against different parties who are at arms’ length with each other.²⁰

His Honour held that the circumstances of the case came within the principle for which *Fencott v Muller* stood.

Thus the door was opened for the agitation of issues which did not arise under the relevant industrial relations legislation, but which were part of the same controversy as issues which did. An early example of such an issue was the endorsement on a claim alleging a breach of an industrial award of a claim alleging a breach of the relevant contract of employment. After *Fencott v Muller*, the making of such an endorsement would have been uncontroversial as a matter of jurisdiction and procedure, but it was

¹⁹ (1983) 152 CLR 570.

²⁰ *Kennedy v The Australian Coal and Shale Employees Federation* (1983) 78 FLR 252, 259.

soon proposed by some enterprising litigants that the prohibition on harsh, unjust or unreasonable terminations of employment which had been incorporated into federal awards generally as a result of the *Termination, Change and Redundancy Case* in the C&A Commission²¹ thereby became a term of every relevant contract of employment, opening the way for the recovery of contractual damages referable to time periods vastly in excess of what the common law would have held to be a reasonable period of notice. That proposal was initially accepted by the Full Court,²² but, six years later, was rejected by a 5-member Full Court in a judgment²³ which survived an appeal to the High Court.²⁴

The middle period

The commencement of this period defines itself by the renaming of the IR Act as the WR Act but more importantly by the strong policy shift towards regulation by collectively negotiated agreements made under laws which had their constitutional basis in s 51(xx), the corporations power. Over the first nine years of the implementation of this policy, certified agreements could be made in settlement of industrial disputes in the traditional way or between trading corporations and their employees. By the reporting year 2004-05, 93.5% of agreements lodged for certification had been made under the corporations power.²⁵ Then, as a result of the amendments made in 2005,²⁶ the award system was effectively closed down and replaced by directly-legislated obligations of universal application and the various collectively-bargained regimes chosen by the industrial parties themselves.

A result of these changes was that, in a number of areas, contentious issues which might traditionally have been wrestled to some kind of mutually accommodating outcome in the murky waters of industrial arbitration now found themselves being justiciable in the Court. I shall mention three.

²¹ *Termination, Change and Redundancy Case* (1984) 8 IR 34.

²² *Gregory v Philip Morris Ltd* (1988) 24 IR 397.

²³ *Byrne v Australian Airlines Ltd* (1994) 47 FCR 300.

²⁴ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

²⁵ This figure is taken from the Annual Report of the Industrial Relations Commission.

²⁶ *The Workplace Relations Amendment (Work Choices) Act 2005*.

One issue was whether a picket line was caught by the formula, “ban, limitation or restriction on the performance of work” used in relevant legislation since 1977,²⁷ and for many years previously in industrial awards.²⁸ This issue was considered by a Full Court in *Dauids Distribution* in 1999,²⁹ where it was held – amongst a number of other things in what was a rather complex factual setting – that a picket line which actually restricted the performance of work would come within the formula only if the relevant work was work normally done by the picketers themselves. This judgment remains the leading authority on the matter.

Another issue arose in relation to the formula “intent to coerce” first seen in the WR Act and retained in the FW Act. The two-part requirement that the intent must be to overbear the will or to negate the choice of the person affected, and that the action must be otherwise unlawful, illegitimate or unconscionable, was developed first in a number of first-instance judgments in the early 2000s and has been consistently applied since.³⁰

A third issue was the troublesome question of casual employment. In 2001, a Full Court decided the unremarkable case of *Hamzy v Tricon International Restaurants*,³¹ the facts of which concerned the termination of the employment of someone who had worked in a takeaway food outlet. The procedure by which the matter came before the Full Court was messy to a degree, but the end result was that certain regulations which were said to be relevant to the question whether or not the employee was a casual were held to be invalid. The Full Court did not decide whether the employee had been a casual.

However, in the course of its reasons, it observed that “the essence of casualness is the absence of a firm advance commitment to continuing and indefinite work”.³² That observation was not, it seems, noted in any subsequent judgment of the Court until after the repeal of the WR Act³³ but, seven years later again, it was treated as definitional by

²⁷ As part of the definition of “industrial action”, by the *Conciliation and Arbitration Amendment Act (No 3) 1977*, para 3(b).

²⁸ For example, and typically, the Metal Trades Award 1952.

²⁹ *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463.

³⁰ The principal authorities are collected in the *Inner City South State Secondary College Case (No 2)* [2023] FCA 1302.

³¹ [2001] FCA 1589.

³² [2001] FCA 1589 at [38].

³³ Researches for the purposes of this paper suggest that the first occasion upon which the observation was picked up in a Federal Court judgment was in *Williams v McMahon Mining Services Pty Ltd* [2010] FCA 3121 at [35].

the Full Court in *WorkPac Pty Ltd v Skene*.³⁴ It was another four years later again, in 2021, when the legislature – for the first time – introduced a definition of “casual employee”, and that was based squarely on what the court had first said in *Hamzy*,³⁵ a judgment which did not address the question whether the former employee had been, or had not been, a casual.

So much for the tips of some substantive law icebergs that appeared in this period. What was happening in relation to the organisation and work of the Court at this time? At the organisational level, when the Industrial Relations Court (“the IR Court”) was abolished in 1996 and the Federal Court resumed its traditional role, the provisions of the Federal Court Act constituting an Industrial Division and a General Division were repealed,³⁶ after which, for the time being at least, there were no divisions in the Court.

The significance of the High Court to the industrial jurisdiction of the Federal Court was also undergoing important changes in this period. From the very beginning, the C&A Act had contained a privative clause protecting the Arbitration Court, and later the C&A Commission, from proceedings in any other court challenging the validity of their awards.³⁷ This remained the case when the C&A Act was replaced by the IR Act.³⁸ However, that was subject to para 75(v) of *The Constitution* which gave the High Court original jurisdiction in any matter in which mandamus or prohibition was sought against an officer of the Commonwealth. The result was that any challenge to a federal industrial award could not be taken to the Industrial Court, or later to the Federal Court.

The burden thus imposed on the High Court of dealing with first-instance jurisdictional challenges to the awards of the C&A Commission, and after 1988 the Industrial Relations Commission (“the IR Commission”), was not alleviated by the general power of remitter under s 44 of the *Judiciary Act 1903* (“the Judiciary Act”) because the Federal Court was not a court that had jurisdiction with respect to the subject matter and the parties, as required by that section. The policy behind this legislative reticence was set

³⁴ [2018] FCAFC 131 at [169].

³⁵ The definition is now to be found in s 15A of the FW Act, introduced by the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021*.

³⁶ By the *Workplace Relations and Other Legislation Amendment Act 1996*.

³⁷ C&A Act, subs 31(1).

³⁸ IR Act, subs 150(1).

aside with the establishment of the IR Court in 1994, and the introduction of s 412 of the IR Act, subss (2) and (3) of which invested that court with jurisdiction with respect to a matter which had been remitted under s 44 of the Judiciary Act.³⁹ The first judgment involving the exercise of that jurisdiction was delivered a fortnight after the relevant amendments came into effect,⁴⁰ after which s 75(v) challenges to the work of the IR Commission were, seemingly as a matter of course, remitted under s 44 to that court.

The jurisdiction to deal with such s 75(v) challenges remitted by the High Court was transferred to the Federal Court by the amendments of 1996,⁴¹ and the Court's first prerogative writ orders in relation to the IR Commission were made on 21 August 1998.⁴²

The Fair Work period

Section 75(v) of the Constitution is a convenient point at which to pick up some features of the industrial jurisdiction of the Court in the Fair Work period. Since 1985, the Court had had direct, ie non-remitted, jurisdiction under s 39B of the Judiciary Act with respect to any matter in which an application for a s 75(v) remedy was sought against an officer of the Commonwealth.⁴³ But persons holding office under the C&A Act, and later the IR/WR Act, were excluded from that process. It was not until the commencement of the FW Act that members of the new tribunal, Fair Work Australia, were, apparently without controversy and certainly without fanfare, made subject to the direct jurisdiction of the Court in mandamus and prohibition under s 39B.

Another reform quietly introduced by the FW Act was the reintroduction of a divisional structure in the Court. Supporting legislation for the FW Act⁴⁴ gave us what are referred to as the General Division and the Fair Work Division "for the purpose of the

³⁹ By the *Industrial Relations Reform Act 1993* (Cth).

⁴⁰ *Re Printing and Kindred Industries Union*, an interlocutory ruling given on 13 April 1994.

⁴¹ By the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

⁴² *The Transport Workers' Union v Mayne Nickless Ltd* [1998] FCA 1022.

⁴³ By the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983*, s 3 & Sched 1, relevantly commencing on 31 May 1985.

⁴⁴ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, relevantly commencing on 1 July 2009.

organisation and conduct of the business of the Court”.⁴⁵ This formulary, it must be said, was not overly revealing about what was actually going on here, but it was stated in the relevant Explanatory Memorandum that the Fair Work Division “will specialise in workplace relations matters and complement the work” of the tribunal, Fair Work Australia. This legislative idealism has not been reflected in the practices of the Attorneys-General following the enactment of the FW Act: the power to assign a judge to a Division vested in the Governor-General under s 6A of the Federal Court Act has never been exercised.

Neither has the power, vested in the Chief Justice under s 13A of the Federal Court Act, to authorise a judge to “manage” a specified class of proceeding. There was, however, a significant innovation in the administration of different areas of the jurisdiction of the Court introduced by Allsop CJ in 2015: the National Court Framework. What this involved remains current, and is explained on the Court’s website. It will be well-understood by all of you and needs no further explanation. It lies atop the moribund divisional structure of the Court and applies, of course, not only to the employment and industrial work of the Court but to all other areas of the Court’s jurisdiction.

Procedurally, the most striking recent development in the doings of those who have recourse to the court has been the growth of class action litigation. Detailed provisions for the conduct of class actions were introduced into the Federal Court Act in 1991.⁴⁶ Although the policy driver for this development had no particular connection to the industrial jurisdiction, the legislation covered every area of the Court’s work and indeed, only two years later, mirror-image provisions were made applicable to the work of the IR Court,⁴⁷ so the policy-makers must have contemplated, or at least assumed, that class action procedures would be relevant in the industrial context. From all that appears, however, there never was a representative proceeding commenced in that court.⁴⁸

⁴⁵ Federal Court Act, subs 13(1).

⁴⁶ By the *Federal Court of Australia Amendment Act 1991*, commencing on 4 March 1992. There is no reference, in terms, to “class actions” in the Federal Court Act.

⁴⁷ By the Reform Act, commencing on 30 March 1994.

⁴⁸ This proposition is advanced cautiously, and is based on the absence of any recorded – even unreported – judgment of the IR Court which discloses that the proceeding in question was so commenced. The only recorded judgments of that court in a representative proceeding were given in a proceeding commenced

In the early years after the Federal Court had resumed its role as the Ch III court with a specific industrial jurisdiction, there was a minor flurry of litigation which invoked the representative proceeding provisions of the Federal Court Act, but, so far as the record reveals, only one case reached the point of final judgment on substantive issues, and even that judgment was confined to the claims of four individuals.⁴⁹ Otherwise, the Court's published decisions related to procedural questions at times, but not always, concerned with Pt IVA of the Act. The most recent published judgment in a representative proceeding which involved the litigation of issues under the WR Act seems to have been that handed down on 22 August 2003,⁵⁰ after which there appears to have been little or no interest in resorting to class actions in the industrial context.

And that appeared to remain the case for about the first seven years of the operation of the FW Act. Then, commencing in about 2017, litigants have ramped up their recourse to Pt IVA of the Federal Court Act for the enforcement of obligations arising under the FW Act. This trend was referred to by Lee J in a judgment given in October 2019,⁵¹ and is continuing.⁵² The trend itself should not be so surprising as the fact that it took so long to get started. Since 1996 the legislation has provided for the making of non-union collective agreements, the result of which, presumably, was the growth of employer obligations delivering benefits to all members of the relevant workforces in enforcement environments which, it might be expected, were not so exposed to ongoing union surveillance. But the application of Pt IVA to industrial proceedings was, it seems, a sleeping giant which took more than 20 years to wake up. That trend would undoubtedly be in the forefront of any catalogue of the circumstances in which the industrial jurisdiction of the Court has changed in the last 50 years.

in the Federal Court and transferred to the IR Court: *Gerrard v Mayne Nickless Ltd* [1995] IRCA 25 and, on appeal, *Gerrard v Mayne Nickless Ltd* [1996] IRCA 67.

⁴⁹ *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 579.

⁵⁰ *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2003] FCAFC 212, a judgment of the Full Court dismissing an application for leave to appeal.

⁵¹ *Turner v TESA Mining (NSW) Pty Ltd* [2019] FCA 1644 at [1].

⁵² As at 11 June 2028, there were 56 Pt IVA proceedings in the files of the Court in the Employment and Industrial Relations NPA, 30 of which were brought by the same association and centred on the same issue.

Before closing, it may be of some interest to cast an eye on the impact which rulings of the High Court have had on the exercise of the industrial jurisdiction of the Court. In the period presently under discussion, there are five instances which readily come to mind.

First, in *Bendigo TAFE v Barclay*,⁵³ it was held that the question whether a person acted for a prohibited reason for the purposes of s 346 of the FW Act was to be answered by reference to the actual reason of the person, the section not requiring a purely objective approach. As clarified by Gageler J in a later case:

The protection afforded by s 346(b) is not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity. It is protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity.⁵⁴

While some – not the present speaker – may think that this distinction has a certain nuance about it, it has made itself felt in all subsequent decisions of the Court where the question why someone acted, or did not act, in a particular way arose in a general protections case.

Secondly, in *Commonwealth Bank v Barker*,⁵⁵ the High Court held that the so-called implied term of trust and confidence in employment contracts, which came with the support of the highest judicial authority in the United Kingdom,⁵⁶ was not part of the law in Australia. Depending on one's perspective, this ruling either throttled off what would have been a valuable remedy for deserving plaintiffs or put the brakes on a runaway train before it could cause irreparable harm in the development of the law of employment in this country.

Thirdly, in *ABCC v CFMEU*⁵⁷, the High Court held that, when the Court imposes a pecuniary penalty under 546 of the FW Act for contravention of a civil remedy provision, it has jurisdiction to order that the penalty be paid personally by the

⁵³ *The Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.

⁵⁴ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243, 269 [92].

⁵⁵ *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

⁵⁶ *Malik v Bank of Credit and Commerce International SA (In liq)* [1998] AC 20.

⁵⁷ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157.

individual upon whom it is imposed rather than, for example, by an employer of the person or a third-party benefactor.

Fourthly, in a series of cases, the High Court held that the question whether a contract to perform work for another person was a contract of employment, and the question whether a contract of employment was, or was not, of a casual nature, were to be answered by reference to the terms of the contract between the parties unembarrassed by judicial insights into how the contract had been performed in practice or into what had previously, even consistently, been seen as the real substance, practical reality and true nature of the relevant relationship.⁵⁸

And fifthly, in *Pattinson*,⁵⁹ the High Court held that, under the civil remedy regime of the FW Act, the purpose of a civil penalty was primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions, notions of proportionality drawn from the criminal law having no place in the determination of penalty

In each of these instances, the judgment of the High Court represented a reversal of the judgment of the Full Court in the case concerned. Thus, although, as we have seen, the Federal Court is presented in policy pronouncements as the centre of industrial law expertise, it has not always worked out that way.

⁵⁸ *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 175 CLR 165; *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254.

⁵⁹ *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450.