SUPREME COURT OF QUEENSLAND

CITATION:	*AMACSU v Ergon Energy Corporation Ltd & Ors* [2005] QCA 351
PARTIES:	**AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION, CENTRAL AND SOUTHERN QUEENSLAND CLERICAL AND ADMINISTRATIVE BRANCH, UNION OF EMPLOYEES (AMACSU)** (appellant/respondent) **v** **ERGON ENERGY CORPORATION LTD** ACN 087 646 062 (first respondent/applicant) **ERGON ENERGY PTY LTD** ACN 078 875 902 (second respondent/applicant) **QUEENSLAND SERVICES INDUSTRIAL UNION OF EMPLOYEES (QSU)** (third respondent) **THE ELECTRICAL TRADES UNION OF EMPLOYEES OF AUSTRALIA, QUEENSLAND BRANCH (ETU)** (fourth respondent) **AUTOMOTIVE, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND (AMWU)** (fifth respondent) **FEDERATED ENGINE DRIVERS' AND FIREMANS ASSOCIATION OF AUSTRALASIA QUEENSLAND BRANCH, UNION OF EMPLOYEES (FEDFA)** (sixth respondent) **THE FEDERATED CLERKS' UNION OF AUSTRALIA, NORTH QUEENSLAND BRANCH, UNION OF EMPLOYEES (FCUNQ)** (seventh respondent) **ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS, AUSTRALIA, QUEENSLAND BRANCH, UNION OF EMPLOYEES (APESMA)** (eighth respondent) **ANTI-DISCRIMINATION COMMISSION OF QUEENSLAND (ADCQ)** (ninth respondent) **THE HONOURABLE MR THOMAS BARTON MINISTER FOR INDUSTRIAL RELATIONS** (tenth respondent)
FILE NO/S:	Appeal No 4829 of 2005 CA 140 of 2005

DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out
ORIGINATING COURT:	Queensland Industrial Relations Commission
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2005
JUDGES:	Jerrard and Keane JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal No 4829 of 2005 is permanently stayed on the ground that it is futile** **2. Parties, within seven days, to exchange and deliver to the Court submissions in relation to costs**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – AGREEMENTS – APPROVAL OR CERTIFICATION – agreement made between employer and employee organisations – signatories to agreement brought application to the Vice President of the Queensland Industrial Relations Commission ("QIRC") for certification of the agreement – appellant had not signed the agreement but was a relevant employee organisation with a right to be heard – appellant applied for certain directions at certification hearing which were opposed on the basis that the appellant was not a party to the agreement – application referred to the QIRC full bench for directions – appellant made submissions to the full bench regarding its objections to certification – full bench concluded that appellant had been heard on that issue and should not be further heard – certification hearing remitted back to QIRC Vice President – appellant signed agreement before the certification hearing resumed and made no submissions in opposition to certification – agreement was certified on 30 May 2005 and is currently in operation – appeals against decisions of a single member of the QIRC lie to the Industrial Court – appeals against QIRC full bench decisions lie to the Court of Appeal – appellant appealed the certification decision to the full bench of the QIRC but also appealed the interlocutory decision of the full bench to the Court of Appeal – appeal based on the full bench denying the appellant its entitlement to be heard – respondents applied to have the appeal struck out or permanently stayed – whether it would be futile to grant the orders sought in the appeal INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO SUPREME COURT – appeal that respondents sought to strike out or permanently stay was seeking the suspension of both the full bench decision and subsequent

decision to certify the agreement – appeal also seeking to have the matter remitted to the QIRC for rehearing according to law – at the hearing of the strike out application the appellant intended to seek leave to amend its grounds of appeal to seek a declaration that the certification decision was a nullity – this declaration would normally be sought by way of judicial review proceedings – Court of Appeal has power to set aside, amend or suspend a decision of the full bench – whether any orders able to be granted by the Court regarding the full bench decision could invalidate or otherwise affect the certification decision itself

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – STAYING PROCEEDINGS – respondents sought to either strike out the appeal or permanently stay the proceedings – the hearing of the appeal by the Court of Appeal would have no practical effect given its inability to affect the certification decision – line of authority suggests that where a decision of the Court would be futile the appropriate course is to permanently stay the proceedings – whether the proceedings should be struck out or permanently stayed

Constitution of Queensland 2001 (Qld), s 58(1)
Industrial Relations Act 1999 (Qld), s 7, s 155, s 156, s 256, s 281, s 320, s 329, s 331, s 340, s 341, s 349
Judicial Review Act 1991 (Qld), s 43

Carey v President of the Industrial Court of Queensland [2004] QCA 62; [2004] 2 Qd R 359, cited
Dey v Victorian Railways Commissioners (1949) 78 CLR 62, applied
Gerlach v Clifton Bricks Pty Ltd [2002] HCA 22; (2002) 209 CLR 478, distinguished
Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476, cited
Walton v Gardiner (1993) 177 CLR 378, cited

COUNSEL: A K Herbert for the first and second respondents/applicants
M D Hinson SC with D R Kent for the third, fourth, sixth, seventh and eighth respondents (to the appeal)
J E Murdoch SC for the tenth respondent (to the appeal)
M Bromberg SC for the appellant/respondent

SOLICITORS: McCullough Robertson for the first and second respondents/applicants
Hall Payne for the third, fourth, sixth, seventh and eighth respondents (to the appeal)
McCullough Robertson for the tenth respondent (to the appeal)
Slater & Gordon for the appellant/respondent

[1] **JERRARD JA:** The proceeding heard in this matter was an application by the first and second respondents, Ergon Energy Corporation Ltd and Ergon Energy Pty Ltd

("Ergon") for an order striking out the appeal to this Court, by the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch Union of Employees ("AMACSU"), from a decision of the full bench of the Queensland Industrial Relations Commission ("QIRC"). That appeal was available under s 340(2) of the *Industrial Relations Act* 1999 (Qld) ("the Act"), since the full bench provided for by s 256 of the Act was constituted by the President, the Vice President and a Commissioner. The right of appeal given by s 340(2), from a decision of the full bench of the QIRC when the constitution of that full bench includes the President, is limited to an appeal on the ground of error of law, or excess, or want, of jurisdiction. The sole ground of appeal by the AMACSU in its notice of appeal dated and filed 15 June 2005 was that the full bench had erred by denying to AMACSU its entitlement to be heard conferred by s 155(1) of the Act, by determining that the AMACSU had been heard, had nothing further to say, and pursuant to s 331(b) of the Act should not be further heard.

[2] The third, fourth, sixth, seventh and eighth respondents, respectively the Queensland Services Industrial Union of Employees ("QSU"), the Electrical Trade Union of Employees of Australia, Queensland Branch ("ETU"), the Federated Engine Drivers' and Firemans Association of Australasia Queensland Branch, Union of Employees ("FEDFA"), the Federated Clerks' Union of Australia, North Queensland Branch, Union of Employees ("FCUNQ"), and the Association of Professional Engineers, Scientists and Managers, Australia (Queensland Branch) Union of Employees ("APESMA"), appeared by the same counsel on the strike out application in support of the first and second respondents; the tenth respondent, the Honourable the Minister for Industrial Relations, also supported the application. There was no appearance on the application by either the fifth or ninth respondents, except as to costs, those respondents being respectively the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland ("AMWU"), and the Anti-Discrimination Commission of Queensland ("ADCQ"). As the number and nature of those other respondents would suggest, to understand the grounds of appeal it is necessary to grasp the history behind the proceedings.

The application for certification

[3] That history relevantly began with an application filed in the QIRC on 4 April 2005 by Ergon, the APESMA, the QSU, the ETU, the AMWU, the FEDFA, and the FCUNQ for the certification of an agreement made under the Act, entitled the Ergon Energy Certified Agreement 2005. That application initiated a proceeding in the QIRC titled CA No 140 of 2005. That application for certification by the QIRC was made under Chapter 6 Part 1 Division 2 of the Act, which in s 155(1) provides that all relevant employee organisations are entitled to be heard on an application for the certification of an agreement. It was common ground that the AMACSU, although not one of the parties to the agreement seeking certification in the application filed on 4 April 2005, was a relevant employee organisation in respect of that agreement. Chapter 6 Part 1 Division 1 permits agreements to be made between two or more associated employers and relevant employee organisations; where there are two or more associated employers, an agreement between those employers and relevant employee organisations is described as a multi-employer agreement. Ergon is a multi-employer as defined in the dictionary to the Act, and the other parties applying for certification of the agreement were

relevant employee organisations. The agreement for which certification was sought on 4 April 2005 provided for the AMACSU to sign it, although it had not signed the agreement by 4 April 2005 and was not an original applicant party.

Opposition by the AMACSU

[4] Instead, before 4 April 2005, the AMACSU had advised the ETU Secretary (in writing, on 24 March 2005) that the AMACSU would appear on the application for certification of the agreement, and oppose it. That advice resulted in the ETU making an application, filed 5 April 2005, under s 281 of the Act, asking for the QIRC to refer the matter of CA 140 of 2005 to a full bench of the QIRC. An affidavit filed in support of that application outlined as its grounds that public statements by the State Secretary of the AMACSU, quoted in the media, described the agreement as overwhelmingly benefiting male workers, and as "blatant discrimination" in which the vast majority of women workers would be disadvantaged by up to $13,000 per year. The affidavit explained that it appeared that the AMACSU would contend on the application for certification that because Administrative Stream employees are female, and Technical Stream employees are male, and because the Administrative Stream employees perform work of equal value to those of the Technical Stream employees but would receive different rates of remuneration under the agreement, it offended s 156(1) of the Act. That affidavit also advised that s 156(1)(l) and (m) had not been the subject of any determination by the QIRC or any other Tribunal, and that those sections enshrined important principles supported by the ETU, which union wanted that principle definitively interpreted and applied in the certification proceedings as soon as possible, in the public interest. That application also advised that the certification application raised for the first time the relevance of the equal pay principle as it applied to attraction and retention allowances.

CA 140 was referred to the full bench

[5] On 13 April 2005 Vice President Linnane granted the application under s 281 to refer CA 140 of 2005 to a full bench. The Vice President's reasons were publicised in the Queensland Government Industrial Gazette on 27 April 2005. Those reasons explained that on 24 March 2005 the AMACSU had indicated an intention to oppose the certification of the agreement, and the Secretary of the AMACSU had made public pronouncements questioning the lawfulness of the proposed agreement, and in particular advising that opposition to the certificate would be based on s 156(1)(l) or (m) of the Act. As the Vice President's reasons reveal, s 156(1)(m) relevantly provides that the QIRC must certify the agreement if, and must not certify the agreement unless, it is satisfied:

> "(m) for a multi-employer agreement or project agreement – the agreement provides for equal remuneration for all men and women employees covered by the agreement for work of equal or comparable value."

[6] Section 281(1) gives the QIRC power, at any stage of proceedings, to refer a matter to which proceedings relate to the full bench; s 281(4) allows a party to proceedings, before the hearing of a matter by the QIRC, to apply to the Vice President for an order referring the matter to the full bench. The Vice President is empowered by s 281(7) to refer a matter to the full bench only if satisfied that it is of substantial industrial significance. Section 281(8) provides that the full bench

may hear and decide a matter referred to it, and make the decision it considers appropriate. The Vice President's reasons record that the proposed payment contained in the agreement which had caused the AMACSU concern was the Electricity Distribution Service Delivery Network Recovery Attraction and Retention Allowance ("EDSD allowance") which would apply to the Technical Classification Stream under the *Electricity General, Transmission and Supply Award – State* 2002 (Award); whereas the proposed payment to the Administration Stream and the Professional & Management Stream in the Agreement was the Electricity Distribution Service Delivery Network Recovery Attraction and Retention Payment ("EDSD payment"). There was a substantial difference in amount between the EDSD allowance and the EDSD payment. The Vice President remarked that the AMACSU objection had the potential to raise for the first time the relevance or otherwise of the equal pay principle as it applied to attraction and retention allowances, and that the matter was of substantial industrial significance, sufficient to warrant it being referred to a full bench of the QIRC. The AMACSU does not complain at all about that referral to the full bench, and indeed it supported the application.

Proceedings before the full bench

[7] Those referred proceedings began with preliminary argument about the extent of the rights the AMACSU had under s 155. It had pressed for orders for discovery, which the full bench declined to make, and the full bench held that an organisation with a right to be heard under s 155 was not a party. That ruling was given on 22 April 2005, on an application by the AMACSU for orders for discovery directed to the parties to the application for certification, and for other directions. The QIRC held, in reasons published on 28 April 2005, that s 155 did not automatically make an employee organisation entitled to be heard a party to the proceedings on the application, and dismissed an application the AMACSU had made on 22 April for an order under s 329(b)(i) of the Act that the QIRC direct that the AMACSU be a party. The full bench refused to make that order because, firstly, it considered s 329(b)(i) was directed to the determination of who were "parties" where the identity of the parties was an issue; secondly, on the ground that it would be wrong to join a person as a party where the explicit purpose for seeking the order was to give that person an opportunity for discovery to which that person was not otherwise entitled; further, the full bench was unable to find what it regarded as convincing or authoritative examples of orders for discovery in favour of a person with the status only of a right to be heard.

A preliminary hearing settled upon

[8] On that same day, 22 April 2005, and after the full bench had advised that the AMACSU was not a party as of right and would not be joined as a party by order of the full bench, and that reasons for those rulings would be published subsequently, counsel for Ergon made a lengthy submission. It ultimately became an application that there be what that counsel described as a "preliminary determination" of Ergon's contention that the AMACSU could not succeed on its argument under s 156(1)(m) that the QIRC would not be satisfied that the agreement provided for equal remuneration for men and women employees for work of equal or comparable value. Counsel for Ergon argued that the AMACSU were actually proposing what Ergon described as a "work value case", about "whether an electrician climbing a pole as to whether his [sic] work is more valuable than a word processor operator at

a city office, and if so, by how much".[1] Counsel submitted that a case along those lines "in order to compare the work of clerical and administrative workers to field workers in this industry, a case of that kind has never been run in the State of Queensland in the electricity industry and it would be, it appears, necessary if the [AMACSU's] contentions….are to be pressed, a case of that kind will need to be run, and that could tie up a Full Bench for weeks if not months".[2]

[9] Ergon's counsel had earlier submitted that day, by way of background information, that it had affidavit evidence that in the Technical Stream there were 2083 males and 37 females, whereas in the Administration Stream and Professional & Management Stream there were 53 per cent male and 47 per cent female employees covered by the agreement for which certification was sought. Ergon's counsel contended that those figures demonstrated that a complaint about a higher EDSD allowance to the Technical Stream than the EDSD payment to the other stream could not succeed in disturbing Ergon's claim that the agreement provided for equal pay for men and women doing work of equal or comparable value. On Ergon's submission, that argument by AMACSU would fail because there were more men than women being disadvantaged by the fact that the proposed EDSD payment was less than the proposed EDSD allowance.

Directions for the preliminary hearing

[10] Ergon's application for a preliminary hearing was supported by counsel for the ADCQ, who described it as a proposal for a preliminary hearing to determine whether there was a prima facie case for the application of s 156(1)(m); by counsel for the ETU and FEDFA; and not actually opposed by Mr Healy for the AMACSU. Mr Healy sought directions, and directions were made that day by consent, relevantly requiring the AMACSU to file and serve on the other parties a notice containing its grounds of objections, its contentions, and a brief outline of the factual matters and evidence it would rely on, to be filed by 4.00 pm on 28 April 2005. The other parties were permitted to file and serve an outline of contentions in response to those of the AMACSU, with a brief outline of factual matters and evidence to be relied on, with that to be done by 4.00 pm on 29 April 2005. The AMACSU was permitted to file and serve a reply, and a preliminary hearing was ordered for 3 and 4 May 2005. Those directions required the AMACSU to put forward its case; the flavour of the submissions made by other parties on 22 April 2005 to the full bench suggested that the AMACSU had not yet shown its hand.

[11] The AMACSU filed a 29 page outline of contentions, which argued (in paragraph 99) that there was a factual and evidentiary basis for a finding that all of the parties to the agreement had conducted what the AMACSU said was in effect a work value assessment in the early 1990's, and that the result had been that all employees had broadly enjoyed equal remuneration for work of equal or comparable value from approximately 1993 to the present. This relativity was fractured by the difference between the EDSD allowance and EDSD payment. The AMACSU then contended that if any other party argued, or the QIRC held the view, that the existing classification and salary structures were not a reflection of comparable work value across the organisation, then the AMACSU would lead "very strong evidence" that work performed by employees in the Administrative Stream was of comparable

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1 AR 108

2 AR 108

value to that performed by employees in the Technical Stream. It advised in paragraph 101 of an intention to file and serve affidavits from members working in various areas of the organisation, including those in call-centres, supply officers in depots, members working in power stations and members at head-office (naming three), and an intention to call a pay equity expert who had given evidence to the New South Wales Inquiry and Equal Remuneration Principle case. This evidence was to be called in support of a contention that the work of Administrative Stream employees was of equal or comparable value to that of Technical Stream employees.

[12] The AMACSU's outline of contentions included submissions – paragraphs 102 to 144 – on the proposed attraction and retention allowances and payments, contending that it had never been provided with any evidence to support Ergon's claim that there was a major attraction and retention problem necessitating the provision of the substantial allowance across the entire Technical Stream, that the manner in which the QIRC dealt with those allowances and applied s 156(1)(m) was a key issue in the proceedings, that such allowances created a gender pay gap which provisions such as s 156(1)(m) sought to remedy, and that there were very serious questions as to whether the correct characterisation of the EDSD allowance was not simply that of a pay rise for all, or at least some, of the employees in the Technical Stream. The AMACSU's outline of contentions then submitted that if it was a pay rise, it undisputedly fell within the definition of remuneration within the meaning of s 156(1)(m), and that the circumstances in which attraction and retention rates could legitimately be used by the parties needed to be fully explored before the full bench.

[13] That outline of contentions included the observation that the AMACSU understood the purpose of the preliminary hearing was to determine whether or not its right to be heard pursuant to s 155 ought to continue beyond the preliminary hearing, although its written contentions in response to those of the other parties ended with the submission that the "test which should be applied by the commission is to ascertain whether the AMACSU has an 'arguable' or 'prima facie' case." Neither submission accurately stated the purpose of the hearing on 3 and 4 May 2005, which was to give the QIRC the necessary opportunity to decide if the evidence the AMACSU said it wanted to call, and the arguments it then made, showed that the QIRC could not decide the issue under s 156(1)(m) without hearing that evidence or further argument. The issue was whether the QIRC would fail its important obligations under s 156(1)(m) without the fuller hearings for which the AMACSU argued, not whether it would fail to accord the AMACSU its right under s 155 without a further hearing. Giving the AMACSU a hearing was not an end in itself, but part of a process by which performance of statutory obligations could be achieved.

The decisions of the full bench

[14] The full bench conducted a hearing on 3 and 4 May 2005, and published its decision on 25 May 2005.[3] Relevantly the full bench held:

- Ergon's argument that a majority of males in the non-Technical Stream meant it could not fail to be satisfied the s 156(1)(m) requirement had been met should be rejected;

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[3] Is reproduced at AR 127-130

- the purpose of s 156(1)(m) is to prohibit certification of an agreement which does not provide for equality of remuneration as between male and female workers, where work of equal or comparable value was undertaken by those workers;

- s 156(1)(m) requires only that the agreement must provide for equal remuneration *for work* of equal or comparable value;

- payment for reasons unrelated to the value of the work performed, eg attraction or retention loadings, are not to cause refusal of certification pursuant to s 156(1)(m);

- the AMACSU had submitted that the effect of clause 3.8 of the agreement would be that the base rate for every employee in the Technical Stream, regardless of location, level or position, would be approximately $10,000 (for power workers) or $13,000 (for other Technical Stream) employees, higher than employees in the other stream at equivalent salary point levels, because of the different amount to be paid for the EDSD allowance and the EDSD payment;

- ordinarily the material before the QIRC on an application for certification would be the agreement and an affidavit containing the statement required by s 9(1)(p) of the *Industrial Relations Regulation* 2000 (Qld), ie a statement that the requirements for equal remuneration for employers under s 156(1)(m) had been met;

- "satisfied" means no more than "made up one's mind";

- an organisation exercising a right to be heard may well enlarge the information upon which the QIRC is to make up its mind, and may well inform the QIRC of matters which will cause the QIRC to make enquiries about whether the agreement meets the requirements of s 156(1)(m), and matters the organisation raises may be so compelling as to enliven the duty to inquire; however it is no part of the function of the QIRC to enter upon a speculative enquiry because an organisation addressing the Commissioner pursuant to s 155(1) voices suspicions or opinions about whether an agreement provides for equal remuneration for all men and women employees covered by the agreement for work of equal or comparable value;

- the voluminous documents submitted by the AMACSU demonstrated that the award restructuring process, which took place pursuant to the Structural Efficiency Principle between 1989 and 1993, and which produced the *Electricity Supply Industry Employees Transitional Restructuring Award*, forming the basis of the current award, was a restructuring exercise, the purpose of which was to ensure that employees received recognition for prior learning, additional training, and demonstrated competency, and to "broadband" classifications; and that that exercise was very far from being tantamount to a work value exercise, as the AMACSU now argued to the full bench;

- that while the AMACSU had submitted that the payments provided for in the proposed attraction and retention allowances were entirely colourable, with the money amounts being common, folded into the base rate and targeted neither at particular positions nor particular skills, the ETU had put in an extract from a report which claimed that Ergon faced an urgent need to recruit additional staff

within the Technical Stream; and the point had been reached at which the full bench should be satisfied about the bona fides in the submission that the allowances were by way of attraction and retention;

- the AMACSU sought the opportunity to present a work value case, but it had the opportunity under Chapter 2 Part 5 of the Act to do that, which opportunity could be pursued by the AMACSU without delaying employees within the Technical Stream immediate access to the monies promised by the agreement;

- it was difficult to conclude that the legislature had intended that attempts at certification of multi-employer agreement would be attended by work value cases, which were inevitably lengthy, and the conduct of which could delay any application for certification, as would the availability of Commissioners (delay any application if there was a work value case);

- for those reasons, the full bench would not embark upon any such work value case exercise on this occasion;

- while the AMACSU had a statutory right to be heard, and if the matter went further its assertions would be supported by affidavits and documents, s 155 could not be construed as empowering the QIRC to conduct a roving inquiry into the matter of "equal remuneration" for work of equal or comparable value, whenever a multi-employer or project agreement was presented for certification;

- AMACSU had been heard; AMACSU had nothing further to say; AMACSU should not be further heard, "see s 331(b)";

- the remaining issues relating to certification "may be dealt with by a single member of the Commission"; the Vice President would mention the matter on 26 May 2005.

Steps taken and not taken

[15] The AMACSU has purported to exercise the right of appeal to this Court, given by s 340(2) to a person dissatisfied with a decision of a full bench the constitution of which includes the President, against only the observations in the second last dot point above. It has not appealed the interlocutory ruling that its status under s 155 did not make it a party to the application, nor the dismissal of its application for an order directing that it be a party, or any of the rulings given by the full bench on 25 May 2005. It did not contend in its grounds of appeal or in argument that the full bench had failed to hear and decide the matter referred to it and make the decision(s) that bench considered appropriate. Instead, it has characterised as a decision, albeit interlocutory, the observations that it had been heard, had nothing further to say, and should not be further heard, and appealed those.

[16] There were further appearances before the Vice President on 26 May 2005 and 30 May 2005. On the latter date the Vice President certified the agreement. By then, the AMACSU had signed the agreement, doing so on 26 May 2005, and it appeared in the proceedings that day before the Vice President. She asked on 26 May 2005 for further affidavit material on "the applicant's" need to attract and recruit persons to whom the EDSD allowance was to apply, and Ergon filed a further affidavit in response to that request. The matter came on again on 30 May 2005, and Ergon advised that its deponent to that affidavit was available to give evidence if required,

and after further submissions, in which the AMACSU were extended the opportunity to make submissions, the Vice President caused the agreement to be amended slightly and certified it. The certification describes the agreement being certified as one made between the parties listed in the certificate, who are those who signed it; the list includes the AMACSU.

[17] The latter organisation did not apply to the full bench for any stay of its order or direction on 25 May 2005 remitting the matter to a single member of the QIRC, nor ask the Vice President to stay certification of the agreement pending an appeal from the decision or decisions of the full bench on CA 140 referred to the full bench. It did not seek to exercise any of the rights of a party on 30 May 2005, such as cross-examining the available deponent, or pressing for the discovery it had wanted before. Instead, the AMACSU signed the agreement on 26 May 2005, and then on 15 June 2005 filed its curiously limited appeal in this Court. Five days later, on 20 June 2005, it filed an application to appeal in the Industrial Court the decision of the Vice President on 30 May 2005 to certify the agreement, (and presumably the certification), on the grounds that:

(a) The QIRC erred in certifying the Ergon Energy Certified Agreement 2005 ("the Agreement") because it denied the appellant its entitlement to be heard conferred by s 155(1) of the Act;

(b) Further, and/or in the alternative the QIRC erred in certifying the agreement because on the material before it, it could not have been satisfied of the requirements of s 156(1)(m) of the Act.

[18] The provisions of the Act allow only for an appeal to the Industrial Court from a decision of the QIRC when it is constituted by a single member, and accordingly the Vice President's decision to certify the agreement, when she constituted the QIRC setting alone, can be appealed only to that court and not to this one, to which the appeal lies from the decisions in the proceedings conducted before the full bench. There is no relevant appeal provided in the Act from the Industrial Court to this Court.

The appeal to this Court

[19] The statutory exclusion of appeals to this Court from decisions of the Industrial Court, or from the QIRC constituted by a single member, creates obvious difficulties for the AMACSU on this appeal, irrespective of its merits. There has been a final order made in the proceedings by a tribunal from which there is no appeal to this Court, and the AMACSU is therefore not even in the position described in *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 (at [6]), namely that on an appeal from a final order an appellate court can correct any interlocutory order which affected the final result. There is no appeal to this Court from the final order. This appeal is, at best, from remarks that might qualify as a decision which was interlocutory, that the AMACSU be heard no more; if the well established principles applicable to appeals from interlocutory orders are applied, the AMACSU will be obliged to show both an error of principle and that an injustice to it has flowed from that.[4]

[20] There is no obvious error of principle in the remarks under appeal. The orders the AMACSU asked for on its appeal to this Court were:

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[4] See *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177

- that the appeal be allowed;
- that the operation of the decisions the subject of the appeal be suspended;
- that the industrial cause, being proceedings CA 140 of 2005 in the QIRC, be remitted to the QIRC to be reheard according to law;
- that the operation of decision of Vice President Linnane of the QIRC, made on 30 May 2005 in pursuance of the decision the subject of the appeal, be suspended.

[21] The absence of any right of appeal to this Court from the decision of Vice President Linnane on 30 May 2005 makes it peculiarly difficult for this Court on this appeal to suspend the operation of that order. That difficulty is added to by the provisions of s 349 of the Act, the effect of which is that a decision of the QIRC within its jurisdiction is exclusive of any other Court's jurisdiction; no injunction or prerogative order can be issued, granted, or made in relation to proceedings in the QIRC within its jurisdiction, and its decisions cannot be appealed against, reviewed, quashed, or invalidated in any court, except on the appeal allowed by s 341 of the Act from the QIRC to the Industrial Court on the ground of error of law or excess, or want of jurisdiction.

[22] The fact that the agreement has been certified and is now in force, that the AMACSU can bring an application under Chapter 2 Part 5 of the Act for a comparable work value case, and the fact that benefits have been paid under the agreement to employees, are all matters in favour of exercising any relevant discretion against the AMACSU on this application to strike out its appeal. That includes on the foreshadowed – but not raised in argument – application to amend its grounds of appeal.

[23] The orders sought in the appeal appear to be either incapable of having any effect (the second order sought), or beyond the power of this Court (the fourth order), or both (the third order sought). It is unnecessary to reach a firm characterisation of those orders, because what the AMACSU has sought to appeal cannot be characterised as a decision of the full bench. Senior Counsel for the AMACSU was unable, when responding to the application to strike out, to inform the Court of any arguments that the AMACSU had wanted to put to the full bench on 3 and 4 May 2005, or thereafter, in support of its argument for the opportunity to present a work value case, and which had not been put on 3 and 4 May either in oral argument or in the lengthy points of contention, or the ones in reply. The AMACSU had been heard in oral argument for two days. It failed to persuade the full bench, and has not appealed to this Court the decision of the full bench on the point, that s 156(1)(m) did not apply to payments made for reasons described by the full bench as unrelated to the value of the work performed, such as attraction or retention loadings.

[24] On the strike out application now under consideration, the AMACSU submitted that it had not expected that ruling to be made on that preliminary hearing, without what it described as the opportunity to present full argument on the point. A study of its contentions to the full bench shows that it did present argument on that point, which it described as probably the key issue. That argument suggested the full bench should regard those allowances as really being salary, because there was no evidence that retention or attraction loadings were necessary, but the full bench

accepted evidence put before it that they were. The problem with the AMACSU argument on this application, that it was not expecting a ruling on that point on the preliminary hearing, is that it has not appealed that ruling, whether expected or not. The AMACSU also failed to persuade the full bench that it should be given the opportunity to present a work value case, and it was heard in full in its arguments in support of that. It has not appealed the ruling that the full bench would not embark on a work value case. The remarks the full bench made, that the AMACSU had been heard, had nothing further to say, and should not be further heard, were made in relation to that argument for a work value case. Those remarks were unnecessary and oddly provocative, and have resulted in this appeal. They were not remarks that actually resulted in the AMACSU not being further heard in the proceedings, because it appeared on both 26 May and 30 May, and chose what submissions it would make.

[25] The full bench not only need not have made the remarks complained about in the appeal, they being irrelevant to the matters that were actually decided by the full bench in its judgment published that day, but it also made a clear error in referring to s 331(b) of the Act in support of those remarks. That section empowers the QIRC, in an industrial cause, to dismiss the cause, or refrain from hearing or further hearing or deciding the cause, if the QIRC considers the cause is trivial or that further proceedings are not necessary or desirable in the public interest. None of those were applicable to the AMACSU or the industrial matter before the full bench. It was an industrial matter of significance, in which there were to be further proceedings. The AMACSU had presented an argument about how those proceedings should be conducted and what was required to satisfy the statutory obligations cast on the full bench. It was entitled to be heard and it was, and no more need have been said about that.

Conclusion

[26] Because the appeal in this Court is not against a decision of the full bench, because it has no merit in that the AMACSU was heard in full and failed in its arguments, because none of the actual decisions made by the full bench on 25 May have been appealed, because a final decision has been made on the certification application and is under appeal to the Industrial Court on the same grounds on the appeal to this Court together with a wider ground, and because the orders sought on this appeal suffer from the disadvantages already described, I would uphold the application of the first and second respondents, supported by so many other respondents, that the appeal be struck out. No purpose would be served by it being heard.

[27] I add that in a case where a clear injustice had resulted from an error of law, an appeal to this Court from the full bench might succeed, even where there had been a further final order made by a Commissioner sitting alone, and accordingly a final order not subject to an appeal to this Court. Section 58(1) of the *Constitution of Queensland 2001* (Qld) preserves for this Court all the jurisdiction necessary for the administration of justice in Queensland, including unlimited jurisdiction at law, in equity and otherwise, and this Court would be astute to ensure that an obvious injustice caused by error could be corrected. In an appropriate case there is always the possibility too of prerogative orders being available under the *Judicial Review*

Act 1991 (Qld), where there has been jurisdictional error on the part of an Industrial Tribunal.[5]

[28] Since writing these reasons, I have had the benefit of reading the reasons and orders proposed by Keane JA; I agree with those, and with the orders he suggests.

[29] **KEANE JA:** On 25 May 2005, the Full Bench of the Queensland Industrial Relations Commission ("the QIRC"), in the course of proceedings relating to the determination by the QIRC of an application for the certification by the QIRC of an industrial agreement entitled Ergon Energy Certified Agreement 2005 ("the Agreement"), ordered that the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch Union of Employees ("AMACSU") "should not be further heard" in relation to the certification of the Agreement.[6] AMACSU was not at that time a party to the Agreement. AMACSU's right to be heard on the application was conferred by s 155 of the *Industrial Relations Act* 1999 (Qld) ("the Act").

[30] On 15 June 2005, AMACSU appealed to this Court pursuant to s 340(2) of the Act, contending that the Full Bench of the QIRC erroneously denied AMACSU's entitlement under s 155 of the Act.

[31] On 4 August 2005, the first and second respondents to AMACSU's appeal ("the Ergon parties") applied to strike out the appeal on the grounds that this Court has no jurisdiction to make the orders sought by AMACSU and, alternatively, on the ground that the orders sought in the appeal are futile. The other respondents to the appeal, save for the fifth and ninth respondents, support the application of the Ergon parties. The fifth and ninth respondents have not sought to be heard on the application of the Ergon parties.

[32] On behalf of AMACSU, it is observed that, having regard to the arguments advanced on behalf of the Ergon parties, the application by those parties is properly considered as an application for a permanent stay of the appeal. As will appear, there is force in this observation. The respondents who support the application of the Ergon parties put their case as one for either the summary dismissal of the appeal or its permanent stay.

[33] In order to appreciate the arguments advanced by the parties on the application, it is necessary to refer first to the factual and statutory background to the proceedings, the decision of the Full Bench and related decisions of the QIRC along with the relief sought by AMACSU on the appeal. It is then possible to discuss the merits of the arguments which have been agitated on the application. In the end, I conclude that AMACSU's appeal is futile because the relief which it seeks cannot be granted. As a result, I am of the opinion that AMACSU's appeal to this Court should be permanently stayed.

Background to the proceedings

[34] The proceedings in the QIRC began when the Ergon parties sought the certification under Ch 6 Pt 1 of the Act of an agreement between them and employee organisations other than AMACSU. A certified agreement is an agreement that

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5 See *Carey v President of the Industrial Court Queensland & Anor* [2004] QCA 62 at [4] and [9]; and *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 at [76] and [83]

6 *Ergon Energy Corporation Ltd v ETU* [2005] QIRComm 73; 179 QGIG 140.

defines the relationship between an employer and a group of that employer's employees.[7] Such an agreement can be made between an employer and an employee organisation that represents, or is entitled to represent, the relevant group of employees or can be made directly between the employer and the employees.[8]

[35] A certified agreement only commences to operate once it has been formally certified.[9] Once an agreement is certified it will apply to every person who is a member of the relevant group of employees, whether or not a person was a member of that group at the time the agreement was made.[10] A certified agreement will also bind a new employer who succeeds to any part of the business of the employer who entered into the agreement.[11] While a certified agreement is in force it prevails, in the event of any inconsistency, over any other award or industrial agreement.[12] Such an agreement does not only bind the employer and the relevant group of employees but, if certain preconditions are satisfied, can also apply to employee organisations.[13]

[36] Section 156 of the Act provides that the QIRC must be satisfied about certain matters if it is to certify an agreement. Of particular relevance for present purposes is s 156(1)(m) which provides:

> "(1) The Commission must certify the agreement if, and must not certify the agreement unless, it is satisfied -
>
> …
>
> (m) for a multi-employer agreement or project agreement - the agreement provides for equal remuneration for all men and women employees covered by the agreement for work of equal or comparable value."

[37] Even if an employee organisation has not been involved in the negotiation of the agreement to be certified it may still have the opportunity to be heard by the QIRC. Section 155 of the Act provides:

> "**Right of employee organisation to be heard**
>
> (1) All relevant employee organisations are entitled to be heard on an application for the certification of an agreement.
>
> (2) As soon as practicable after the application is made, the commission must notify all relevant employee organisations that -
>
> (a) the application has been made; and
>
> (b) the organisation is entitled to be heard on the application.
>
> (3) This section does not affect another right of an employee organisation, or anyone else, to be heard on or intervene in an application.
>
> (4) In this section -
>
> ***'relevant employee organisation'*** means an employee organisation that -

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7 *Industrial Relations Act* 1999 (Qld), s 141(1).
8 *Industrial Relations Act* 1999 (Qld), s 142.
9 *Industrial Relations Act* 1999 (Qld), s 164(1).
10 *Industrial Relations Act* 1999 (Qld), s 141(2).
11 *Industrial Relations Act* 1999 (Qld), s 167.
12 *Industrial Relations Act* 1999 (Qld), s 165(1).
13 *Industrial Relations Act* 1999 (Qld), s 166.

> (a) is bound by an award or industrial agreement that binds the employer, or would bind the employer apart from an award under the Commonwealth Act; or
> (b) if there is no award or agreement that binds, or would bind, the employer - is entitled to represent the industrial interests of the relevant employees."

[38] It is common ground that AMACSU is a relevant employee organisation within the meaning of s 155 of the Act.

[39] Section 281 of the Act provides relevantly as follows:

> "(1) The commission may, at any stage of proceedings and on the terms the commission considers appropriate, refer the matter to which the proceedings relate to the full bench.
> …
> (8) The full bench may hear and decide a matter referred to it and make the decision it considers appropriate."

[40] Section 320 of the Act provides relevantly as follows:

> "(1) …
> (2) In proceedings, the commission … -
> (a) is not bound by technicalities, legal forms or rules of evidence; and
> (b) may inform itself on a matter it considers appropriate in the exercise of its jurisdiction.
> (3) Also, the commission … 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
> (b) the community as a whole.
> (4) …"

The effect of a provision in these terms is to free the QIRC, at least to some extent, from "constraints otherwise applicable to courts of law".[14]

[41] Section 329(b) of the Act provides relevantly as follows:

> "Except as otherwise prescribed by this Act or the rules, the court, commission and registrar may -
> (a) …
> (b) direct, for proceedings -
> (i) who the parties to the proceedings are; and
> (ii) by whom the parties may be represented; and
> (iii) persons to be called to attend the proceedings, if they have not been called and it appears they should attend the proceedings; and
> (iv) parties to be joined or struck out; and
> (v) who may be heard and on what conditions; and
> (c) …"

[42] Section 331 of the Act provides relevantly as follows:

> "The … commission may, in an industrial cause -

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[14] *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 at [49]; (1999) 197 CLR 611 at 628.

> (a) make a decision it considers just, and include in the decision a provision it considers appropriate for preventing or settling the industrial dispute, or dealing with the industrial matter, the cause relates to, without being restricted to any specific relief claimed by the parties to the cause; or
>
> (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the … commission considers -
>
> (i) the cause is trivial; or
>
> (ii) further proceedings by the … commission are not necessary or desirable in the public interest; or
>
> (c) … "

[43] An "industrial cause" is defined in Sch 5 to the Act as including an industrial matter or an industrial dispute. Pursuant to s 7(1) of the Act, an "industrial matter" is any matter that affects, or relates to, work or to the privileges, rights and functions of employers or employees. Under s 7(3) of the Act, a matter will be deemed to be an "industrial matter" if it relates to a matter mentioned in Sch 1 of the Act. Matters mentioned in Sch 1 include remuneration, leave entitlements, superannuation, dismissal procedures and other basic conditions of employment. The relevant industrial cause for present purposes was the controversy relating to whether the Agreement, which did relate to matters of the kind mentioned in Sch 1, should or should not be certified by the QIRC.

[44] The Ergon parties filed their application for certification of the Agreement in the QIRC on 4 April 2005. This application for certification was referred to a Full Bench of the QIRC on 13 April 2005 pursuant to s 281 of the Act.[15] On 19 April 2005, AMACSU applied for directions including orders for discovery against other parties to the application for certification. That was opposed on the ground that AMACSU was not a party to the proceedings and, on 22 April 2005, AMACSU sought an order pursuant to s 329(b)(i) of the Act to be made a party to the certification application. The Full Bench of the QIRC rejected AMACSU's application in this regard.[16] There has been no appeal from that order.

[45] On 22 April 2005, at the request of the AMACSU, the Full Bench also made directions for the hearing of the appellant's objections to certification of the Agreement on 3 and 4 May 2005. As a result, AMACSU was directed to file and serve on all parties a notice containing its grounds of objection to the certification of the Agreement, and the contentions which it sought to advance in that regard, together with a brief outline of "the factual matters and evidence relied upon in support of the grounds". There were further directions in relation to responses by the parties to the Agreement and contentions in reply by AMACSU.

[46] Clause 3.8.1. and cl 3.8.2 of the proposed agreement were in the following terms:

> "3.8.1 EDSD Network Recovery Allowance
>
> In recognition of the outcomes related to the EDSD Network Recovery, the allowance will apply to employees classified in the Technical Classification Stream of the Award classification structure. Employees that have access to this allowance shall be:

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15 The reasons given by the QIRC for this referral are reported as *ETU v Ergon Energy Corporation Ltd* [2005] QIRComm 60; 179 QGIG 19.

16 See *Ergon Energy Corporation Ltd v ETU* [2005] QIRComm 61; 179 QGIG 21.

> • Power Worker – e.g. trades assistants, store work, labouring, plant/vehicle operation, cleaning, tracing.
> • Technical Service Person – e.g. line work, cable jointing, customer services, inspections, trade and advanced trade technical field and workshop roles (e.g. electrical/electronic, mechanical, fabrication/vehicle building or building services).
> • Electricity System Designer/Adviser – e.g. layout/mains design work, marketing advice.
> • Supervisor – e.g. employees whose primary function is that of trainer/supervisor/coordinator.
> • Para-professional – e.g. technical roles requiring competencies obtained through Para-professional (Associate Diploma) qualifications such as installation and repair of technical equipment, technical investigations and design.
> • System Operator – e.g. operators within designated control rooms within distribution/transmission.
>
> Power Workers in the Technical Stream will be paid a pro rata allowance of 70% of the EDSD Network Recovery Allowance as annually adjusted. Employees that are engaged on a part time or casual basis will be paid on a pro rata basis as applicable. Technical apprentices/trainees shall receive the allowance on a pro rata basis in accordance with the relevant percentage level for their respective year, based on the State Training Order 100% tradesman rate, i.e. Salary Point 4.0, 4.2 or 7.0 as applicable...
>
> Employees in the Technical Classification Stream who receive the EDSD Network Recovery Allowance will not be eligible to receive the EDSD Network Recovery Payment.
>
> 3.8.2 EDSD Network Recovery Payment
>
> Employees classified in the Administration Stream and the Professional & Managerial Streams of the Award Classification Structure in recognition of their contribution to the EDSD network recovery program will receive a payment of $3000 (less applicable tax) delivered over the life of this Agreement...
>
> Employees in the Administration and Professional & Managerial Streams will not be eligible to receive the EDSD Network Recovery Allowance."

[47] AMACSU objected to the certification of the Agreement by the QIRC on the basis that the effect of these clauses of the Agreement would be that those employees in the male dominated technical stream will receive greater remuneration than employees in the female dominated administrative stream, despite the fact that they are performing work of comparable value. This, it was argued, would mean that the QIRC could not be satisfied as to the requirements of s 156(1)(m) of the Act and so could not proceed to certify the Agreement.

The decisions of the QIRC

[48] The Full Bench of the QIRC recognized that "[a]n organisation availing itself of the right at s 155(1) may well inform the Commission of matters which will cause the Commission to make inquiries about whether the agreement meets the requirements of s 156(1)(m)". The Full Bench went on to say:

> "However, it is no part of the function of the Commission to enter upon a speculative inquiry because an organisation addressing the Commission pursuant to s 155(1) voices suspicions or opinions about whether an agreement provides for equal remuneration for all men and women employees covered by the agreement for work of equal or comparable value."[17]

[49] The Full Bench noted that AMACSU "have two things to say". The reasons of the Full Bench then record the contentions advanced by AMACSU. Having discussed these contentions, the Full Bench concluded:

> "AMACSU seeks the opportunity to present a work value case. The organisation has that opportunity under Chapter 2 Part 5 of the Act. Given that statutory opportunity which, it might be added, may be pursued without denying employers within the technical scheme immediate access to the monies promised by the agreement, it is very difficult to conclude that the legislature intended attempts at certification of multi-employer agreements to be attended by … work value cases. Such cases are inevitably lengthy. The conduct of such cases could delay any particular application for certification. The availability of Commissioners would further delay the process. The bench will not embark upon such an exercise on this occasion.
>
> Notwithstanding that AMACSU holds itself out as an 'objector' and that some parties to the agreement have sought to have the 'objection' dismissed, the truth is that AMACSU is an organisation with a statutory right to be heard. The Commission has now heard that which it is that AMACSU is able to tell it. Doubtless, if the matter went further, assertions would be supported by affidavits and the documents relating to 'award history' would be put into admissible form. But that is all about polishing. Section 155 cannot be construed as empowering the Commission to conduct a roving inquiry into the matter of 'equal remuneration for work of equal or comparable value' whenever a multi-employer or project agreement is presented with certification and a relevant employer organisation volunteers to take up the role of Counsel assisting the Inquiry; see also Pay Equity Inquiry of 2001 at p. 63. AMACSU has been heard. AMACSU has nothing further to say. AMACSU should … not be further heard, see s 331(b).
>
> The remaining issues relating to certification may be dealt with by a single member of the Commission."[18]

[50] On 26 May 2005, AMACSU signed the Agreement.

[51] The QIRC resumed the hearing of the application for certification of the Agreement on 26 May 2005, when directions requiring additional affidavit evidence to be provided for a further hearing were made. AMACSU was legally represented at this hearing and made no objection to the course proposed. The hearing of the substantive application for certification was adjourned to 30 May 2005.

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17 *Ergon Energy Corporation Ltd v ETU* [2005] QIRComm 73 at [12]; 179 QGIG 140 at 141.

18 *Ergon Energy Corporation Ltd v ETU* [2005] QIRComm 73 at [16] - [18]; 179 QGIG 140 at 142.

[52] On 30 May 2005, the parties to the Agreement appeared before the QIRC. On that occasion, AMACSU did not seek to make any further objection to the certification of the Agreement. It made no intimation of its intention to challenge the decision of the Full Bench by way of appeal to this Court and did not seek a stay of the decision or an adjournment of the certification proceedings to enable that appeal to be determined before the certification application proceeded; nor did it seek further to oppose certification.

[53] If an appeal had been taken from the decision of the Full Bench to this Court prior to the certification hearing before the QIRC, then there would have been power under the Act to stay the decision of the Full Bench pending the determination of the appeal.[19] A right of appeal lies to this Court from a decision of the Full Bench whether or not that decision might be properly characterised as 'final' or 'interlocutory'.[20] As the QIRC was only dealing with the certification application pursuant to the direction of the Full Bench, a stay of that decision would have meant there would have been no power in the QIRC to continue hearing the certification application until the appeal had been finalised. As it was, the QIRC certified the Agreement on 30 May 2005.

[54] On 20 June 2005, AMACSU appealed to the Industrial Court against the certification on the grounds that the QIRC "erred in certifying [the Agreement] because it denied the appellant its entitlement to be heard conferred by s 155(1)" of the Act and "because on the material before [the QIRC] it could not have been satisfied of the requirements of s 156(1)(m) of the Act".

The relief claimed on the appeal

[55] The orders sought by AMACSU on the appeal to this Court lodged on 15 June 2005 are as follows:

> "1. That the Appeal be allowed;
>
> 2. That the operation of the decisions the subject of the Appeal be suspended;
>
> 3. That the industrial cause, being proceeding CA 140 of 2005 in the Queensland Industrial Relations Commission, be remitted to the Queensland Industrial Relations Commission to be re-heard according to law;
>
> 4. That the operation of the decision of Vice President Linnane of the Queensland Industrial Relations Commission, made on 30 May 2005 in pursuance of the decision the subject of the Appeal, be suspended."

I shall refer to the orders sought as Order 1, Order 2, Order 3 and Order 4.

Discussion

[56] In support of its appeal AMACSU mounts a compelling argument that s 331(b) of the Act, on which the Full Bench relied, is not relevant to the truncation of the entitlement conferred by s 155 of the Act. Section 331(b) is concerned with termination of an industrial cause, not the termination of a person's participation in that cause. The relevant industrial cause here was the application for certification of the Agreement, not AMACSU's objection to certification.

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19 *Industrial Relations Act* 1999 (Qld), s 345, s 347(2).

20 *Transport Workers' Union of Australia, Union of Employees (Queensland Branch) v Australian Document Exchange Pty Ltd* [2000] QCA 142 at [2] - [4]; [2001] 1 Qd R 659 at 660.

[57] Nevertheless, AMACSU's case on appeal is not without its difficulties. The extent of the entitlement of a non-party to be heard on a certification application must be under the control of the QIRC, at least in relation to relevance to the issues before it, and the extent of the assistance which a person is able to afford in resolving those issues. If such control could not be exercised then the proceedings of the QIRC would become unworkable. To ensure that the proceedings of the QIRC are not bedevilled by filibusters, the Industrial Court and the QIRC are expressly given the power to determine who may be heard in proceedings and the conditions that will govern any such hearing by s 329(b)(v) of the Act. It may be accepted that s 155 means that an employee organisation does not require an exercise of discretion in its favour to be heard, but s 155 does not circumscribe the power of the Industrial Court or the QIRC under s 329(b)(v) to determine on what conditions that right will be exercised. In truth, s 155 assumes the existence of that power. The Full Bench's approach to AMACSU's "entitlement" may also be said to draw support from s 281(8), s 320(2), s 320(3) and s 331(a) of the Act which suggest that the QIRC is expected to adopt an approach to the management of proceedings before it guided by common sense rather than any undue focus on legal technicalities. Accordingly, an erroneous reliance by the Full Bench on s 331(b) of the Act to justify such an approach does not demonstrate that the Full Bench's decision was wrong: *falsa demonstratio non nocet*. That the Full Bench may have been mistaken as to the provision that gave effect to their decision does not, of itself, suggest that the basis on which the decision was made was unsound.

[58] Further, AMACSU's principal contention, namely that its entitlement to be heard under s 155 of the Act was not adequately observed sits uneasily with the approach actually taken by the Full Bench. At the hearing of the present application, it appeared that AMACSU's real complaint was that it had been "shut out" from being properly heard on the certification application as a result of the Full Bench decision because that decision precluded AMACSU from adducing what was said to be a large amount of evidence in support of its argument that the terms of the agreement to be certified did not satisfy the requirements of s 156(1)(m) of the Act. In this regard, the conclusion of the Full Bench in relation to the evidence that AMACSU proposed to lead was put in the following terms:

> "The Commission has now heard that which it is that AMACSU is able to tell it. Doubtless, if the matter went further, assertions would be supported by affidavits and the documents relating to "award history" would be put into admissible form. But that is all about polishing. Section 155 cannot be construed as empowering the Commission to conduct a roving inquiry into the matter of 'equal remuneration for work of equal or comparable value' whenever a multi-employer or project agreement is presented with certification and a relevant employer organisation volunteers to take up the role of Counsel assisting the Inquiry; see also Pay Equity Inquiry of 2001 at p. 63. AMACSU has been heard. AMACSU has nothing further to say. AMACSU should … not be further heard …"[21]

[59] There is no indication in this statement that the Full Bench considered that AMACSU's position could be advanced or strengthened in any way relevant to the resolution of the issue raised by s 156(1)(m) of the Act by additional evidence. Indeed, the comment that the admission of such evidence would only amount to

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21 *Ergon Energy Corporation Ltd v ETU* [2005] QIRComm 73 at [17]; 179 QGIG 140 at 142.

"polishing" suggests that, far from discounting AMACSU's concerns without considering the evidence that was to be adduced, the Full Bench was content to dispose of AMACSU's objection on the basis that the further evidence would support the contentions AMACSU had put forward. The Full Bench was apparently of the opinion that, even if these contentions were substantiated, they were insufficient reason not to certify the proposed agreement. It was on this basis that opportunity to lead this evidence was not afforded to AMACSU.

[60] Whether these difficulties in AMACSU's appeal should ultimately be resolved against it, the present applications by the Ergon parties are not advanced on the basis that AMACSU's appeal is so unarguable that it should be struck out on the ground that it is frivolous or vexatious. Rather, the Ergon parties, and those respondents who support them, urge that it would be futile for this Court to grant the orders which have been sought even if the appeal were ultimately to be allowed.

The relief sought by AMACSU cannot be granted

[61] For reasons which I will explain, I do not consider that this Court has power to make Order 1 as a "stand alone" order. As to Order 2, which seeks the suspension of the operation of the decisions the subject of the appeal, the Ergon parties and those supporting them point out that the decision the subject of the appeal is that of the Full Bench of 25 May 2005. In relation to that decision, its operation is spent and there is nothing for this Court to suspend. To the extent that Order 2 could be taken to refer to the certification decision of 30 May 2005 by the QIRC, there is no appeal against that decision before this Court and, indeed, the Court has no jurisdiction to entertain an appeal against that decision because it is not a decision from which a right of appeal lies to this Court pursuant to s 340 of the Act.[22] The extent of AMACSU's right of appeal is a matter to which I shall return.

[62] In order to meet the contention that its appeal is, therefore, futile, AMACSU argues that the certification decision was made without compliance with s 156(1)(m) because of the denial of its entitlement to be heard under s 155. It is submitted that the decision of the Full Bench resulted in AMACSU not being able to properly exercise its right to be heard in the certification proceedings. Accordingly, it is said that the certification decision is a nullity. AMACSU has foreshadowed an intention to apply for leave to amend its prayer for relief on the appeal to seek a declaration to this effect. Leave is required because what is sought is, in substance, leave to amend AMACSU's notice of appeal.[23] No application for leave to amend was actually made, in terms, by AMACSU, but the considerations relevant to the exercise of the discretion to permit an amendment to the notice of appeal were canvassed at the hearing of this application. In my view, any such application should be refused.

[63] In order to deal with the question of whether or not this amendment should be allowed, it is necessary first to consider the elaborate limitations placed by the Act on the ability of litigants disappointed with the result they have obtained before the QIRC or the Industrial Court to come to this Court seeking relief. In particular in this regard, s 349 of the Act provides in relation to decisions of the Full Bench and the QIRC relevantly as follows:

> "(2) The decision -

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22 This section provides that an appeal will only lie to the Court of Appeal from a decision of the Industrial Court in relation to contempt proceedings or from a decision of a Full Bench of which the President of the QIRC is a member on a matter of law or question of jurisdiction.

23 *Uniform Civil Procedure Rules* 1999 (Qld), r 751.

> (a) is final and conclusive; and
> (b) cannot be impeached for informality or want of form; and
> (c) cannot be appealed against, reviewed, quashed or invalidated in any court.
>
> (3) The industrial tribunal's jurisdiction is exclusive of any court's jurisdiction and an injunction or prerogative order cannot be issued, granted or made in relation to proceedings in the court within its jurisdiction.
>
> …
>
> (5) In this section -
>
> 'industrial tribunal' includes an Industrial Magistrates Court and the registrar."

[64] AMACSU argues that the protection afforded by s 349 of the Act is not applicable to QIRC decisions involving jurisdictional error. This argument must, in my respectful opinion, be accepted. Only a "decision" of the QIRC is protected by s 349(2). This protection does not extend to decisions infected by jurisdictional error because, as AMACSU rightly points out, the High Court said in *Plaintiff S157/2002 v Commonwealth of Australia*[24] that:

> "… an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'".

[65] As to s 349(3), McPherson JA, with whom Davies JA and Mackenzie J agreed, said in relation to the scope of that section in *Carey v President of the Industrial Court of Queensland*[25] that:

> " … it appears that the jurisdiction of the Supreme Court and the Court of Appeal to entertain this application for relief under the *Judicial Review Act* or otherwise is severely curtailed, if not excluded, by the provisions of the *Industrial Relations Act*, s 349(2) and s 349(3). What is more, the operation of those provisions of the Act is expressly preserved from judicial review by s 18(2) of the *Judicial Review Act* and pt 1 of sch. 1 to that Act, which identifies s 349 of the *Industrial Relations Act* as one of the enactments to which the review process does not apply … however … it is, despite these legislative exemptions or privative clauses, still possible for this Court to exercise jurisdiction in such a matter if there has been jurisdictional error on the part of the Industrial Court in determining the appeal to it from the Commission. The restriction imposed in s 349(3) is confined to proceedings in the Industrial Court 'within its jurisdiction'."

[66] On that view, it would seem that the Supreme Court retains jurisdiction to review decisions of the QIRC or the Industrial Court, despite s 349 of the Act, if jurisdictional error can be shown to infect their "proceedings". While a declaration of the type foreshadowed by the respondent might be available, whether by way of judicial review proceedings or otherwise, and by available I mean only that the possibility of obtaining the remedy exists and not that it would necessarily be granted, it must be remembered that the present proceedings are couched in the

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24 [2003] HCA 2 at [76]; (2003) 211 CLR 476 at 506.

25 [2004] QCA 62 at [4]; [2004] 2 Qd R 359 at 365 - 366.

form of an appeal from a decision of the Full Bench of the QIRC under s 340(2) of the Act, which relevantly provides:

> "(1) A defendant who is dissatisfied with a decision of the court in proceedings mentioned in section 251 may appeal to the Court of Appeal.
> (2) The Minister, or a person who is dissatisfied with a decision of the full bench, may appeal to the Court of Appeal only on the ground of -
> (a) error of law; or
> (b) excess, or want, of jurisdiction.
> (3) Subsection (2) applies only if the constitution of the full bench included the president …"

[67] The right of appeal to this Court which AMACSU seeks to exercise is that contained in s 340(2) of the Act. AMACSU is a "person who is dissatisfied with a decision of the full bench". The difficulty this poses for any claim by AMACSU for declaratory relief is that the certification decision that AMACSU seeks to impeach for jurisdictional error was not a "decision of the full bench" but a decision of a single member of the QIRC. AMACSU concedes in its written submissions that the decision of the Full Bench was separate from the decision of the QIRC which certified the agreement. While, as I have discussed, s 349 of the Act may not protect decisions of the QIRC, including the decision to certify an agreement, from judicial review if they are attended by jurisdictional error, there is no power to appeal directly to this Court from a decision of the QIRC on such grounds. If AMACSU wishes to seek judicial review of the certification decision or a declaration that it is a nullity then there is no reason why it should not make any such application in the first instance to a judge of the Trial Division in line with the requirements of the *Judicial Review Act* 1991 (Qld).[26]

[68] Even if it were to be assumed that this Court was able to grant leave to AMACSU to amend its notice of appeal so as to include a claim for a declaration that the certification decision is a nullity by reason of non-compliance with s 155 of the Act, there are powerful reasons why this Court would not exercise its discretion to permit the amendment. First, AMACSU has already appealed against the certification decision to the Industrial Court. There is no suggestion that AMACSU's choice of forum to agitate the invalidity of the certification decision was not deliberate. Further, in those proceedings, unlike these, the certification decision is open to direct review rather than collateral challenge. Secondly, to the extent that an action for a declaration might have some merit, it should be made to the Trial Division rather than to this Court as a tactic to give utility to what might otherwise be a futile appeal. Thirdly, AMACSU's conduct before the Commission in allowing the certification to be made was such that this Court would not be disposed to assist AMACSU to "blow hot and cold" on the issue of certification. In this regard, AMACSU did not take steps which it could have taken to preserve its position whether by seeking a stay of the proceedings in the QIRC pending an appeal to this Court from the decision of the Full Bench or by seeking an adjournment of the final certification hearing to enable that appeal to be brought. I

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[26] *Judicial Review Act* 1991 (Qld), s 43. Cf *Squires v President of the Industrial Court of Queensland* [2002] QSC 272; SC No 3990 of 2002, 11 September 2002; *Carey v President of the Industrial Court of Queensland* [2003] QSC 272; SC No 1157 of 2003, 29 August 2003.

shall say something more about AMACSU's conduct presently; but as counsel for the third, fourth, sixth, seventh and eighth respondents point out, the employees of the first and second respondent would be prejudiced in their rights to remuneration if the certification decision were to be declared void. Those employees are not parties to the appeal. It would be quite unjust to put their rights at risk in these circumstances. At this stage, it is sufficient to say that the application for amendment of the notice of appeal foreshadowed by AMACSU could not properly be granted in this case.

[69] As a result, the fundamental difficulty with AMACSU's position, and one reason why it is possible to characterise this appeal as futile, remains, ie, that even if this Court were to hold that the decision of the Full Bench as to the scope of the right afforded by s 155 was erroneous in point of law, that would not entitle this Court to invalidate the later certification decision. When an appeal is brought to this Court pursuant to s 340 of the Act the actions that the Court may take in disposing of such an appeal are limited by s 340(4) which provides that:

> "(4) The Court of Appeal may—
>
> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the decision and substitute another decision; or
>
> (c) allow the appeal and amend the decision; or
>
> (d) allow the appeal, suspend the operation of the decision and remit the industrial cause (with or without directions) to the court or full bench—
>
> (i) for report to the Court of Appeal; or
>
> (ii) to act according to law."

[70] The section empowers this Court, if an error of law or jurisdictional error is demonstrated, to allow an appeal and to set aside, amend or suspend the decision of the Full Bench that has been appealed against. There is no power to alter or invalidate other decisions of the QIRC. It follows that Order 4 sought by AMACSU on its appeal, that the certification decision be suspended, could not be granted by this Court. The same conclusion must follow, as I have already noted, with respect to Order 2, in so far as that order is to be taken as referring to the certification decision rather than the decision of the Full Bench.

[71] Order 3 asks, effectively, for the certification proceedings to be remitted to the Full Bench to be reheard according to law. The order specifically asks that the proceedings be remitted to the "Queensland Industrial Relations Commission" but, as s 340(4)(d) makes clear, this Court can only remit matters to either the Full Bench or the Industrial Court. The greater difficulty is that the terms of s 340(4)(d), while allowing suspension of the Full Bench's decision prior to the matter being remitted, do not empower this Court to do anything to any other decision of the QIRC. The certification decision would stand whatever the Full Bench was to decide once the matter was remitted. It is therefore apparent that there would be no real utility in granting any of the orders sought by AMACSU on its appeal.

AMACSU's attitude to certification

[72] Further, whatever might be said about the decision of the Full Bench concerning the scope of the right to be heard granted by s 155 of the Act, it was no longer relevant to AMACSU's position by the time of the certification hearing. In the time between the decision of the Full Bench and the certification hearing AMACSU had signed

the proposed agreement. The certificate issued as a result of the certification hearing records that AMACSU was a party to the agreement. There was also the following exchange between Mr Healy, appearing for AMACSU, and the Commission during the course of the certification hearing:

> "THE VICE PRESIDENT: … Yes, Mr Healy?
> MR HEALY: Your Honour, the Full Bench decision of the 25th of May 2005 precludes AMACSU from making any submission in relation to the EDSD attraction and retraction allowance, and we have no other submission to make about the agreement.
> THE VICE PRESIDENT: Thank you. And, yes, so - but you've signed the agreement subsequently.
> MR HEALY: Yes, we have, your Honour."

If nothing else, this exchange makes it clear that AMACSU decided not to attempt to ventilate the concerns about the agreement which had been raised before the Full Bench prior to the final certification of the agreement by the QIRC.

Whether the appeal should be struck out or permanently stayed

[73] It is apparent that AMACSU's appeal will not result in any change in the rights of the parties. The relief that is sought cannot be granted by this Court. Both of these factors lead to the conclusion that to allow these proceedings to continue would amount to an abuse of process. In *Dey v Victorian Railways Commissioners*,[27] Latham CJ, in words that are directly applicable to the present case, said that:

> " … there is nothing frivolous about the action, but if a court is of opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile."

[74] A court will usually be slow to come to the conclusion that a proceeding amounts to an abuse of process if there is a real question to be determined. AMACSU submits that the scope of the right afforded by s 155 is squarely raised by the decision of the Full Bench and so should be dealt with by this Court. It is important to remember that the existence of a real question to be determined is only part of the proviso that courts will apply when deciding whether or not to dispose summarily of proceedings. As Dixon J said in *Dey*:[28]

> " … once it appears that there is a real question to be determined whether of fact or law **and that the rights of the parties depend upon it**, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

[75] Simply to allow the appeal and to set aside the decision of the Full Bench would serve no purpose unless the certification decision was also to be set aside. Indeed, so far as Order 1 is concerned, the limits placed on the relief that may be granted by this Court under s 340(4) mean that there is no power to simply allow an appeal to this Court without making express provision for the determination of the substantive rights of the parties. The right of appeal to this Court is entirely the creature of statute. As to the disposition of the appeal, this Court has only those powers conferred on it by s 340(4) of the Act. The legislature may be taken deliberately to have withheld from this Court a power to allow an appeal without going on to make provision for the final determination of the substantive rights of the parties because

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27 (1949) 78 CLR 62 at 84.

28 (1949) 78 CLR 62 at 91 (emphasis added).

simply to allow an appeal and leave the parties in limbo as to the final determination of their rights would be, in the context of a regime concerned to resolve industrial disputes, a piece of judicial mischief.

[76] The certification decision is, for the reasons I have already given above, not one which is, or can be, challenged on this appeal. Without the possibility of setting aside the certification decision, a debate about the correctness of the decision of the Full Bench is academic because it cannot affect the rights of the parties. It is well established that a court should be reluctant to give what amounts to no more than an advisory opinion having no practical effect.[29] It is wrong for judicial power to be exercised in answering questions which are hypothetical or moot.[30]

[77] There is a substantial line of authority in the Full Court of the Federal Court to the effect that the appropriate course is to stay an appeal that appears to have no practical utility.[31] A similar discretion is available to this Court as part of its inherent power to control the proceedings taking place before it. As Mason CJ, Deane and Dawson JJ said in *Walton v Gardiner*:[32]

> "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exists to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has been long established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail. Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them."

[78] In my opinion, having regard to these considerations, the appropriate course is for this Court to decline to deal any further with the matters which are the subject of AMACSU's appeal.

Conclusion and orders

[79] AMACSU's appeal should be permanently stayed on the ground that it is futile.

[80] The parties should, within seven days, exchange and deliver to the Court submissions in relation to costs.

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29 *Bass v Permanent Trustee Company Ltd* [1999] HCA 9 at [47] - [49]; (1999) 198 CLR 334 at 355 - 357.

30 *Victims Compensation Fund Corporation v District Court of New South Wales & Anor* [2002] NSWCA 355; CA 40160/02, 23 October 2002 at [27]; *Miller v Commissioner of Police (NSW)* [2004] NSWCA 356; CA 41114/03, 30 September 2004 at [28]. See also *Secretary, Dept of Human Services v Magistrates' Court* [2002] VSCA 171 at [19]; (2002) 6 VR 140 at 147.

31 See, eg, *Beitseen v Johnson* (1989) 29 IR 336 at 337; *Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd* [1999] FCA 1652 at [13]; (2000) ATPR 41-733 at 40,504; *Long v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 438; W200 of 2002, 20 December 2002 at [16].

32 (1993) 177 CLR 378 at 392 - 393 (citations omitted).

[81] **CULLINANE J:** I have read the separate reasons of Jerrard JA and Keane JA in this matter and agree with each of them. I agree with Keane JA that the appeal of AMACSU should be permanently stayed. I also agree with his proposed order on the issue of costs.