Supreme Court

New South Wales

Case Name:	Fakhouri v The Secretary for the NSW Ministry of Health
Medium Neutral Citation:	[2022] NSWSC 233
Hearing Date(s):	1 December 2021; Final submissions 15 December 2021
Date of Orders:	9 March 2022
Decision Date:	9 March 2022
Jurisdiction:	Common Law
Before:	Beech-Jones CJ at CL
Decision:	(1) On or before 21 March 2022 the parties confer in relation to the orders necessary to give effect to this judgment. (2) On or before 23 March 2022 the parties file agreed proposed orders or, failing agreement, competing proposed orders. (3) List the matter for further directions on 30 March 2022 at 9.30am.
Catchwords:	REPRESENTATIVE PROCEEDINGS – Industrial Law – recovery of overtime and other award entitlements – whether representative proceedings can be maintained to recover group members' entitlements under Part 2 of Chapter 7 of Industrial Relations Act – whether scheme for recovery incompatible with Part 10 of Civil Procedure Act – s 376 of the Industrial Relations Act – alternative proceeding to recover award as a debt due – not an action under Part 2 of Chapter 7 of the Industrial Relations Act – can be the subject of proceedings under Part 10 of the Civil Procedure Act – draft

separate questions – consequential amendments

Legislation Cited:

Civil Procedure Act 2005
Competition and Consumer Act 2010 (Cth)
Federal Court of Australia Act 1976 (Cth)
Industrial Arbitration Act 1912
Industrial Relations Act 1996
Industrial Relations Amendment (Industrial Court) Act 2016
Judiciary Act 1903 (Cth)
Limitation of Actions Act 1974 (Qld)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Supreme Court Act 1970
Uniform Civil Procedure Rules 2005, r 28.2

Cases Cited:

Australian Workers' Union v Bluescope Steel (AIS) Pty Ltd [2018] FCA 80; (2018) 278 IR 170
Brighton Hall Pty Ltd (in liq) [2013] FCA 970
Byrne v Australian Airlines Ltd (1995) 185 CLR 410; [1995] HCA 24
Cameron v National Mutual Life Association of Australasia Limited (No 2) [1992] 1 Qd R 133
Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386; [2006] HCA 41
Fostif Pty Ltd V Campbells Cash & Carry Pty Ltd (2005) 63 NSWLR 203; [2005] NSWCA 83
John Robertson & Co Ltd v Ferguson Transformers Pty Ltd (1973) 129 CLR 65; [1973] HCA 21
Josephson v Walker (1914) 18 CLR 691; [1914] HCA 68
Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66; [1920] HCA 51
Masson v Parsons (2019) 266 CLR 555; [2019] HCA 21
Morgan, in the matter of Brighton Hall Securities Pty Ltd (in liq) [2013] FCA 970
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
Rizeq v Western Australia (2017) 262 CLR 1; [2017] HCA 23
Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd [2017] FCA 14
Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21

	Shergold v Tanner (2002) 209 CLR 126; [2002] HCA 19 The Ombudsman v Laughton (2005) 64 NSWLR 114; [2005] NSWCA 339 Timber Corp Finance Pty Ltd v Collins & Anor (2016) 259 CLR 212; [2016] HCA 44 WileyPark Pty Ltd v AMP Ltd (2018) 130 ACSR 66
Category:	Procedural rulings
Parties:	Amireh Fakhouri (Plaintiff) The Secretary for the NSW Ministry of Health (Defendant) The State of New South Wales (Proposed Second Defendant, Respondent to motion)
Representation:	Counsel: Mr Y Shariff SC; Ms V Bulut; Ms C Winnett (Plaintiff) Mr R Lancaster SC; Ms E Raper SC; Ms C Gleeson; Mr D Fuller (Defendant and Proposed Second Defendant) Solicitors: Maurice Blackburn Lawyers (Plaintiff) MinterEllison (Defendant and Proposed Second Defendant)
File Number(s):	2020/356588

JUDGMENT

1 The principal issue addressed by this judgment is whether representative proceedings under Part 10 of the *Civil Procedure Act 2005* (the "CPA") can be commenced and maintained in this Court seeking, on behalf of group members, the recovery of entitlements conferred by an award made under the *Industrial Relations Act 1996* (the "IRA") or a related form of relief. For the reasons that follow, while an application "under" Part 2 of Chapter 7 of the IRA cannot be commenced or maintained on behalf of group members, proceedings under Part 10 of the CPA can be commenced and maintained seeking relief in respect of any statutory debt that arises in favour of group members in respect of their award entitlements. To my understanding the practical consequence of this conclusion is that these proceedings will continue as representative proceedings.

Background

2 Between January 2015 and February 2018, the lead plaintiff in these proceedings, Dr Amireh Fakhouri, was variously employed as an intern, resident medical officer and senior resident medical officer.

3 On or about 16 December 2020 Dr Fakhouri filed a statement of claim commencing a representative action under Part 10 of the CPA against the defendant, the Secretary for the New South Wales Ministry of Health (the "Secretary"), seeking the recovery of amounts said to be owing for overtime and meal breaks under certain industrial awards made under the IRA. These awards included various iterations of the Public Hospital Medical Officers (State) Award and the Health Professional and Medical Salaries (State) Award (the "Awards").

4 Being a representative action, Dr Fakhouri's statement of claim pleads that she brings the proceedings "on behalf of all persons who, at any time in the period from 16 December 2014 to 16 December 2020" were employed by the Secretary as either a Junior Medical Officer, Intern, Resident Medical Officer, Registrar or Senior Registrar and worked overtime but "were not paid all their entitlements" ("group members"). The primary relief sought in the statement of claim is an order under s 365 of the IRA for the recovery of remuneration payable under the Awards. Subject to what is said below, I understand that claim to relief to relate to both Dr Fakhouri and group members.

The Notices of Motion and Separate Questions

5 By a notice of motion filed 1 November 2021, the Secretary seeks to amend her defence to include an allegation that, insofar as these proceedings raise issues and seek relief in respect of group members, the proceedings are not maintainable. The Secretary's fundamental contention is that an attempt to use Part 10 of the CPA to recover amounts owing under an award for group members is inconsistent with the scheme for the recovery of amounts owing under industrial instruments provided for in Part 2 of Chapter 7 of the IRA. The Secretary also sought leave to make other amendments to the defence, which are summarised below.

6 At least partly by way of response to the Secretary's notice of motion, on 18 November 2021 Dr Fakhouri filed her own notice of motion seeking to amend her statement of claim and, further and, in the alternative, to transfer the proceedings to the Federal Court. Some of the proposed amendments do not relate to the Secretary's notice of motion including the proposed addition of the State of New South Wales (the "State") as the second defendant on the basis that the State and not the Secretary may have been the employer of Dr Fakhouri and the group members. I understand that this aspect of Dr Fakhouri's notice of motion is not opposed. Dr Fakhouri also seeks to extend the employment period for persons who may qualify as group members up to April 2021.

7 The amendments to the statement of claim proposed by Dr Fakhouri that relate to the Secretary's notice of motion are, as I understand it, three-fold. First, by proposed amended prayers 1 and 2, Dr Fakhouri seeks to add claims for declaratory relief under any or all of ss 23 and 75 of the *Supreme Court Act 1970* and s 355C of the IRA to the effect that the defendants have contravened the Awards by failing to pay the plaintiff and group members their entitlements.

8 Second, by proposed amended prayers 4 and 6, Dr Fakhouri seeks orders for the "recovery of a debt, being remuneration payable under the Awards". As explained below, this aspect of the proposed relief seeks to engage s 376 of the IRA. On its face it appears to relate to Dr Fakhouri and all group members.

9 Third, by proposed amended prayers 8 and 9, Dr Fakhouri seeks to add declaratory relief that there has been an "underpayment of ordinary rates of pay [giving] rise to obligations …. pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth)".

10 In addition, proposed amended prayer 3 and proposed prayer 5 seek orders under s 365 of the IRA against the Secretary and the State for remuneration "payable under the Awards". On its face these claims appear to relate to Dr Fakhouri and group members.

11 The third aspect of these proposed amendments is related to the application to transfer the matter to the Federal Court. The reference to the *Superannuation Guarantee (Administration) Act 1992* is said to make this a matter "arising

under [a law] made by the [Commonwealth] Parliament" and thus engage the Federal Court's jurisdiction (*Judiciary Act 1903 (Cth*), s 39B(1A)(c); see for example *Australian Workers Union v Bluescope Steel (AIS) Pty Ltd* [2018] FCA 80; (2018) 278 IR 170). In the event that it is determined that Part 2 of Chapter 7 of the IRA precludes the bringing of a representative action in this Court under Part 10 of the CPA, Dr Fakhouri contends that such proceedings could still be brought as representative proceedings under Part IVA of the *Federal Court of Australia Act 1976 (Cth)* and should therefore be transferred to the Federal Court.

12 During the course of oral argument on the two motions, I raised with the parties whether it was appropriate that the matter noted in [5] of this judgment should be determined on a final basis via a separate question posed under the *Uniform Civil Procedure Rules* ("UCPR") r 28.2. The parties agreed with that course although the form of the questions was not developed. Having addressed the substantive issue in this judgment, I have set out below the suggested form of two questions that give effect to my conclusions. I will invite the parties to address on the form of those questions.

Part 2, Chapter 7 of the IRA

13 Part 2 of Chapter 7 of the IRA addresses the recovery of remuneration and other amounts owing under industrial instruments.

14 Section 365 provides:

> **"365 Order for recovery of remuneration and other amounts payable under industrial instrument**
>
> An industrial court may, *on application*, order an employer to pay any amount payable under an industrial instrument that remains unpaid to the person to whom it is payable." (emphasis added)

15 The definition of "industrial court" includes the Supreme Court (s 364) or the Local Court constituted by an Industrial Magistrate sitting alone. In the case of small claims proceedings under s 380, it consists of the Industrial Commission.

16 Sections 366 to 368 confer similar powers to s 365 on an industrial court to make orders in respect of over-award payments, payments not fixed by industrial instruments and unpaid superannuation respectively. All the forms of order are to be made "on application".

17 Section 369 of the IRA provides:

> **"369 Application for order**
>
> (1) *An application for an order under this Part* for the payment of money may be made—
>
> (a) by the person to whom the money is payable, or
>
> (b) with the written consent and on behalf of that person—by an inspector, by a person employed in a Public Service agency or by an officer of an industrial organisation concerned in the industry to which the proceedings relate.
>
> (2) A single application may be made by a person for 2 or more orders against the employer. A single application may also be made by an officer of an industrial organisation for orders against an employer on behalf of 2 or more persons.
>
> (3) An application for an order may only be made if the money became due within the period of 6 years immediately before the application was made." (emphasis added)

18 Section 370 confers on a court, before whom "an application for an order under this Part" is made, power to make such order as it considers just in the circumstances. Section 371 provides:

> **"371 Conciliation to be attempted before order made**
>
> (1) The industrial court is not to make *an order under this Part* until—
>
> (a) for proceedings before the Supreme Court—*the parties to the application* for the order satisfy the Court that they unsuccessfully attempted to settle the matter by means of a conciliation conducted by the Commission, or
>
> (b) for proceedings before another industrial court—the court has brought, or has used its best endeavours to bring, the parties to the application for the order to a settlement acceptable to those parties.
>
> (2) If such a settlement is made, the industrial court is required to make an order that, to the extent authorised by this Act, gives effect to the terms of the settlement." (emphasis added)

19 Similarly s 373 provides that *"[i]n any proceedings under this Part*, the industrial court may award costs to either party and assess the amount of those costs."

20 Section 376 provides:

> **"376 Alternative proceedings for debt recovery in other courts**
>
> A person entitled to apply for an order for the payment of money under this Part may, instead of applying for such an order, recover the money as a debt in any court of competent jurisdiction."

21 Sections 377, 378, 379 and 380 refer to “proceedings”, “orders” and “application[s]” under this Part.

22 On its face, Part 2 of Chapter 7 confers on an “industrial court” power to grant various remedies in an action or proceedings or an applicaiton “under this Part” and regulates that form of action. Hence it specifies how such an application may be made (s 369), mandates conciliation before an “order under this Part” can be made (s 371) and has its own costs regime for “proceedings under this Part” (s 373). However, s 376 also contemplates that an application “for an order … under this Part” is not the only means for recovering amounts owing in the circumstances contemplated by ss 365 to 368. The Secretary and the State submitted that “no general law cause of action in debt” arises in respect of remuneration payable under the awards, and award entitlements do not form part of the contract of employment (citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; [1995] HCA 24; “Byrne”) or a basis for recovery in quantum meruit.[1] These propositions are correct but they do not exhaust the possibilites. Section 376 either creates or at least confirms the existence of a statutory “debt” owed by an employer to “pay any amount payable under under an industrial instrument that remains unpaid” (s 365; *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 51; [1920] HCA 51; *Byrne* at 424). The debtor is the person to whom the amount remains unpaid.

23 As suggested by the heading to s 376, the provision creates an alternative to an action “under this Part”, namely the recovery of the statutory debt in a court of competent jurisdiction. It specifies that the person who may recover is a “person *entitled* to apply for an order for the payment of money under this Part”. There is some scope for argument as to whether that refers to “the person to whom the money is payable” in s 369(a) or extends to the persons specified in s 369(b). On one view only the former have an “entitlement” whereas the latter must obtain a written consent.[2] However the better view is that the opening words of s 376 extend to all the persons listed in s 369. I can see no reason for precluding an employee’s union from being able to sue in the District Court on their behalf. Thus, in the circumstances contemplated by s

[1] Defendants’ written submissions dated 29 November 2021 at [16].
[2] Plaintiff’s written submissions dated 8 December 2021 at [16].

365, s 376 either permits or at least contemplates recovery "*by* the person to whom the money is payable" or "with the written consent and on behalf of that person – *by* an inspector, *by* a person employed in a Public Service agency or *by* an officer of an industrial organisation concerned in the industry to which the proceedings relate." However, beyond specifying those matters, s 376 does not address *how* such proceedings can be brought "by" one of the specifed persons and nor does it regulate the manner in which those proceedings are to be conducted, including whether they must be mediated or the approach to costs. Put another way, it does not specify how they may "recover". Those matters are left to the relevant legislation and rules regulating the court of competent jurisdiciton. This is so because such proceedings are not "proceedings under this Part"; ie under Part 2 of Chapter 7. They are "alternative proceedings" to an action under Part 2 of Chapter 7.

24 In the Secretary and State's submissions in reply, they contended that the statutory debt created or at least acknowledged by s 376 is "available only to a 'person entitled to apply for an order for the payment of money under this Part'" being a person referred to in s 369.[3] The word "available" in this context is ambiguous. As noted, s 376 either creates or recognises the existence of a statutory debt owed to the person to whom it is payable. Each of the persons named in s 369 may recover that debt in a court of competent jurisdiction. However, how they recover the debt is a matter for that court. Nothing in s 376 requires that they be formally made parties to any such proceedings for recovery.

Supreme Court's Jurisidiction and Power

25 As noted, the Supreme Court is defined by s 364 to be an "industrial court" that can exercise jurisdiction under Part 2 of Chapter 7. Consequent upon the abolition of the Industrial Court in 2016 by the *Industrial Relations Amendment (Industrial Court) Act 2016*, Chapter 6A was inserted into the IRA conferring jurisdiction on the Supreme Court in respect of, inter alia, "proceedings for declarations of right under section 355C" (s 355B(f)) and "proceedings for recovery of money under [Part 2 of Chapter 7]".

[3] Defendants' submissions dated 15 December 2021 at [20].

26 Further, section 355C provides:

> "**355C Declaratory Jurisdiction**
>
> (1) The Supreme Court may make binding declarations of right in relation to a matter in which the Commission (however constituted) has jurisdiction. The Supreme Court may do so, whether or not any consequential relief is or could be claimed.
>
> (2) Proceedings before the Supreme Court are not open to objection on the ground that a declaration of right only is sought.
>
> (3) This section does not limit any jurisdiction or power that the Supreme Court has apart from this section to make binding declarations of right.
>
> Note—
>
> See, for example, section 75 of the *Supreme Court Act 1970*.

27 As indicated by s 355C(3), this grant of power does not purport to limit or restrict this Court's jurisdiction under s 75 of the *Supreme Court Act 1970* to make "binding declarations of right whether any consequential relief is or could be claimed or not". Section 23 of the *Supreme Court Act* grants this Court "all jurisdiction which may be necessary for the administration of justice in New South Wales". The combination of those grants and its status as a Supreme Court means that there can be no doubt that it has a wide grant of jurisdiction to grant declaratory or other relief in respect of debts including statutory debts. Given that there is no minimum amount of any "debt" that can be litigated in the Supreme Court, it follows that this Court is a "court of competent jurisdiction" in relation to any statutory "debt" created or acknowledged by s 376 of the IRA.

Part 10 of the Civil Procedure Act

28 Part 10 of the CPA deals with representative proceedings in the Supreme Court. Section 157(1) provides that, "subject to this Part", where seven or more persons have claims against the same person, the claims of all of those persons are in respect of, or arise out of, the same, similar or related circumstances and the claims all give rise to a substantial common question of law or fact then "proceedings may be commenced by one or more or those persons *as representing some or all of them*". Such proceedings can be commenced whether or not the relief includes equitable relief (such as a declaration) or a claim for damages (s 157(2)). Although group members are not "parties" to such actions they are nevertheless privies in interest with the representative plaintiff in respect of the common issues of fact and law

(*Timbercorp Finance Pty Ltd v Collins & Anor* (2016) 259 CLR 212; [2016] HCA 44 at [49]; "Timbercorp").

29 Section 158 of the CPA provides that a person has sufficient standing to commence representative proceedings against a person "on behalf of other persons" if the person had standing to commence proceedings on that person's own behalf against that other person (s 158(1)). They can do so whether or not they, and each of the group members, have a claim against every defendant (s 158(2)). Section 159 specifies that a person does not have to give consent to be group member. Instead, s 162 provides a means by which such group members may "opt out" of the representative proceedings.

30 The Secretary and the State contended that these provisions are inconsistent with the means for obtaining an order under s 365 of the IRA provided for in s 369 in that they contend the latter provides that the order may (only) be made on the application of the person to whom the money is owed or one of the persons specified in s 369(1)(b) provided they have the former's written consent.

31 During the course of argument, a further possible inconsistency was raised between an important aspect of Part 10 and an action "under Part 2 of Chapter 7". In contrast to s 371(1) of the IRA, there is nothing in Part 10 of the CPA which precludes the Court from granting relief in a representative action unless conciliation has been attempted. Moreover, whereas the effect of ss 371(1)(a) and 371(2) of the IRA is that, if the "parties" to the application have agreed upon a settlement then the Court must give effect to it, s 173(1) of the CPA provides that "[r]epresentative proceedings may not be settled or discontinued without the approval of the Court". In the context of this case, if this matter does involve an "application for an order under this Part" (i.e., Part 2 of Chapter 7) on behalf of Dr Fakhouri and the group members then the "parties" to the action for the purposes of Part 2 of Chapter 7 of the IRA and Part 10 of the CPA are still only Dr Fakhouri, the Secretary and the State. Contrary to Dr Fakhouri's submissions,[4] the difficulty is that s 371(2) of the IRA

[4] Plaintiff's written submissions dated 8 December 2021 at [12] to [14].

would enable those parties to settle the proceedings without the approval of the Court whereas s 173(1) of the CPA would preclude that.

32 As Part 10 of the CPA does not have the effect of making group members parties to an action, the question has arisen in representative actions whether limitation periods operate to extinguish group members' claims even though the proceedings were commenced on their behalf before the expiry of the relevant period. Although the answer is statute specific, generally the answer is "no". In *Cameron v National Mutual Life Association of Australasia Limited (No 2)* [1992] 1 Qd R 133 ("Cameron"), certain owners of units in a building sued the persons said to be responsible for its defective condition and purported to do so "on behalf of and for the benefit of themselves and the other proprietors of lots" in the building. Those latter words were struck out, but leave was granted to those proprietors to be joined as named parties. It was contended that the limitation period had expired in the meantime. Section 10(1) of the *Limitation of Actions Act 1974* (Qld) provides that "actions shall not be brought after the expiration of six years". McPherson SPJ and Moynihan J held that, even though the unnamed owners were not original parties to the action, the original pleading meant that action was "brought" (on their behalf) within time (at 137 and 144).

33 This aspect of *Cameron* was referred to with approval by Mason P, with whom Sheller JA and Hodgson JA agreed, in *Fostif Pty Ltd V Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 213 to 215; [2005] NSWCA 83 ("Fostif"). This issue was not addressed in the successful appeal from that decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41, however the outcome in *Cameron* is consistent with *Timbercorp* at [49].

34 The same conclusion has been reached in a number of first instance decisions in representative proceedings in the Federal Court (*Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* [2017] FCA 14 at [56] per Griffiths J; *Morgan, in the matter of Brighton Hall Securities Pty Ltd (in liq)* [2013] FCA 970 at [65] per McKerracher J). In *WileyPark Pty Ltd v AMP Ltd* (2018) 130 ACSR 66 at [68] ("WileyPark") Beach J summarised the position as "even though a

group member is not a party, nevertheless his claim is treated as having been made and brought on his behalf by the representative applicant at the time the representative proceedings were commenced". In *WileyPark*, Allsop CJ expressed doubt about that conclusion (at [53] and Middleton J preferred the contrary view (at [62]). However, whatever the position in the Federal Court, I am bound by *Fostif*.

The Parties Submissions

35 The primary contention of the Secretary and the State was that s 369 of the IRA designates the only persons who can bring an application for an order under s 365 of the IRA and that is incompatible with such an order being able to be sought on behalf of group members in proceedings under Part 10 of the CPA.[5] They seek orders that the statement of claim (or amended statement of claim) be struck out insofar as it seeks relief for, or in relation to, group members or orders that the proceedings no longer continue as a representative action (CPA, s 166).[6]

36 The Secretary and the State contended that the provisions of Part 2 of Chapter 7 of the IRA constitute "a code or an exclusive procedure for recovering money owed under an industrial agreement governed by the provisions." They cite *Josephson v Walker* (1914) 18 CLR 691 at 697 and 701; [1914] HCA 68 ("Josephson") which they described as referring to the "precursor provisions to the current regime". In *Josephson*, Griffith CJ referred to former s 49 of the *Industrial Arbitration Act 1912* as creating a "new obligation" and a "special mode of enforcing it" which was sufficient to invoke a general rule that it is presumed that that means "is exclusive of any other mode of enforc[ement]". However, in light of the present wording of s 376, the reliance on *Josephson* must be heavily qualified. The outcome in *Josephson* was that the regime for recovery provided for in former s 49 of the *Industrial Arbitration Act 1912* meant that this Court did not have jurisdiction to determine an action for the recovery of amounts owing under an industrial award. At the time *Josephson* was decided, s 49(2) of the *Industrial Arbitration Act 1912* enabled recovery by proceedings before an Industrial Magistrate and, similar to

[5] Defendants' written submissions dated 1 November 2021 at [10].
[6] Defendant's written submissions dated 1 November 2021 at [42] to [44].

s 376 of the IRA, s 49(3) enabled recovery of any "balance due … in any district court or court of petty sessions". The equivalent phrase in s 376 of the IRA is a "court of competent jurisdiction" which, as explained above, includes this Court. If s 49(3) of the *Industrial Relations Act 1912* had used that phrase, then it is likely that the outcome in *Josephson* would have been different.

37 Leaving aside actions of the kind contemplated by s 376, the Secretary and the State's submissions point to the differences between a proceeding of the kind contemplated by s 369 and those under Part 10 of the CPA.[7] They noted that the permission that must be granted to the entities described in s 369(1)(b), being the written consent of the person to whom the money is payable, and compared that to the opt-in procedure under Part 10, that does not require any such consent.[8] They contended that the provisions are in conflict and that conflict is resolved by treating Part 10 of the CPA as making general provision for causes of action which gives way to the special provisions in s 369.[9] They rely on the following passage from the judgment of Spigelman CJ in *Ombudsman v Laughton* (2005) 64 NSWLR 114 ("Laughton") at [19]:

> "The maxim of statutory construction *generalia specialibus non derogant* reflects an underlying principle that a legislature, which has created a detailed regime for regulating a particular matter, intends that regime to operate in accordance with its complete terms. Where any conflict arises with the general words of another provision, the very generality of the words of which indicates that the legislature is not able to identify or even anticipate every circumstance in which it may apply, the legislature is taken not to have intended to impinge upon its own comprehensive regime of a specific character."

38 Dr Fakhouri put her case in relation to the bringing of the proceedings on behalf of group members in three ways. First, she contended that the provisions of Part 10 of the CPA either "operate alongside" or, to the extent of any conflict, prevail over s 369 of the IRA. In relation to the provisions "operating alongside", the principal contention was that s 369 is facultative and not restrictive. Second, by reference to *Cameron* and the other cases noted above, she submitted that these proceedings fall within s 369(1)(a) of the IRA in that they are made "by" each person to whom money is payable (i.e., the group members). Third, in so far as the proceedings relate to group members,

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[7] Defendants' written submissions 1 November 2021 at [29] to [31].
[8] Defendant's written submissions dated 29 November 2021 at [3].
[9] Defendants written submissions dated 29 November 2021 at [9] to [11].

she contends that these proceedings are not an application for an order "under" Part 2 of Chapter 7 for the payment of money within the meaning of Part 2 of Chapter 7.[10] Instead, she contended that her proceedings, presumably in both their current and proposed amended form, only seek recovery of an amount for Dr Fakhouri and the balance of the claim seeks relief that would facilitate group members later recovering amounts owing to them under s 365.[11] As explained below I do not accept that accurately describes the relief sought. Otherwise, Dr Fakhouri sought to characterise this action as proceedings contemplated by s 376 of the IRA.

Determination

39 The principal debate between the parties concerned whether an action seeking orders under s 365 of the IRA could be brought on behalf of group members. As is apparent from the above, the debate was mainly focussed on s 369 and whether that constitutes an exhaustive statement of the only persons who could be the moving party for such an order and, if so, how the apparent inconsistency between that provision and s 158 (and following) of the CPA could have been resolved?

40 Had this issue solely turned on upon the terms of s 369 of the IRA then I would doubt that any such inconsistency arises. Subsection 369(b) of the IRA is clearly facultative in that it expands the class of persons or entities who can apply to recover wages and entitlements on behalf of persons owed money under an industrial instrument. Those provisions would sit comfortably with Part 10 of the CPA in that, unlike Dr Fakhouri, inspectors or officers of industrial organisations would not have any claim that raises an issue of fact or law in common with group members so that in their case written consent would be required. On its face, s 369 of the IRA does not expressly purport to limit the persons who may bring such an action and, in that respect, it can be contrasted with s 108 of the IRA which expressly provides that an application to the Supreme Court for an order under s 106 of the IRA, declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry that is found to be unfair, may be made by five classes of persons

[10] Plaintiff's written submissions dated 8 December 2021 at [2].
[11] Plaintiff's written submissions dated 8 December 2021 at [5].

"*and not otherwise*". Further, the cases noted above, including *Cameron* and *Fostif*, support the proposition that the commencement of a proceeding under Part 10 of the CPA constitutes, in the case of the group members, an application "*by* the person to whom the money is payable". Such an outcome would also be consistent with the numerous representative actions that have been commenced on behalf of consumers under the *Australian Consumer Law* (being Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) which confers an entitlement on the person affected to apply for relief (eg, ss 236, 237, 259, 267 and 271) and also on the regulator to apply on their behalf (eg, s 277). It has never been suggested that the effect of either or both sets of provisions precluded the conduct of representative proceedings.

41 However, the relevant inquiry is wider than simply considering whether the text of s 369 of the IRA could accommodate a proceeding under Part 10 of the CPA. Instead, it involves a consideration of the compatibility of an action under Part 2 of Chapter 7 of the IRA with representative proceedings under Part 10 of the CPA. In that regard s 365 of the IRA is an order that can only be made in an action "under" Part 2 of Chapter 7 of the IRA. It does not confer a substantive right in its own terms but simply a power on a court to grant a remedy "on application" being an application made under Part 2 of Chapter 7 of the IRA.

42 Further, while considered alone, s 369 of the IRA may be compatible with Part 10 of the CPA, considered together the provisions governing an action under Part 2 of Chapter 7 of the IRA are incompatible. This is best illustrated by the provisions concerning settlement which I have already discussed. Section 173 of the CPA is a critical component of the opt-out scheme provided for in Part 10. Even though Part 10 of the CPA contemplates orders being made for the notification of group members of the nature of the claim made on their behalf and for them to be given the opportunity to opt out, the reality is that it is possible for a group member to have a proceeding conducted on their behalf under Part 10 and for them to never become aware of it. Section 173 of the CPA operates to ensure that the interest of such persons as well other group members in what may be a very large class are considered before an order is made settling the proceedings which may affect their rights and interests. By

contrast, s 371 makes complete sense if the only active parties or persons involved in the proceedings are the person who owes the entitlement and either the person to whom the entitlement is owed or an inspector, public official or official of an industrial organisation acting with their written consent. In those circumstances, there is no obvious necessity for the Court to consider the interests of the parties before entering orders giving effect to a settlement. It would do considerable violence to the scheme of Part 10 of the CPA to attempt to superimpose the scheme of settlement in s 371 of the IRA on a representative action. On the other hand, it would undermine the scheme in Part 2 of Chapter 7 of the IRA to effectively replace s 371 of the IRA with s 173 of the CPA.

43 How is this inconsistency to be resolved? Dr Fakhouri's fallback position is that any such inconsistency is to be resolved by treating ss 156 to 159 of the CPA as the "leading provisions" to which s 369 of the IRA must yield (citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [70]).[12] The submissions described Part 10 as a "comprehensive statement of the law on the specialised topic of procedures for bringing representative claims in NSW."[13] They further contended that s 369 was included in the IRA from the time of its enactment in 1996 whereas Part 10 of the CPA was enacted in 2010. It was submitted that applying the "principles of implied repeal" the later in time should prevail.[14]

44 I reject those submissions. It is true at one level that Part 10 is comprehensive but, in relation to an action under Part 2 of Chapter 7 of the IRA, s 369 specifically deals with the topic of who may bring such an action and the balance of the provisions, including s 371, negate the possibility that it could be by way of a representative action. In so far as implied repeal is concerned, that is very much a rule of last resort to be deployed if one cannot determine that one set of provisions is subject to the other (*Saraswati v The Queen* (1991) 172 CLR 1 at 17; [1991] HCA 21 per Gaudron J; *Shergold v Tanner* (2002) 209 CLR 126; [2002] HCA 19 at [34]). In any event, if it was necessary to

[12] Plaintiff's written submissions dated 18 November 2021 at [18].
[13] Plaintiff's written submissions dated 18 November 2021 at [21].
[14] Plaintiff's written submissions dated 18 November 2021 at [22] to [23].

determine, the later enacted provisions are Part 2 of Chapter 7. It was in 2016 that this Court acquired the jurisdiction to hear actions under that Part and it was only then that the potential inconsistency between those provisions and Part 10 of the CPA arose.

45 The inconsistency between the provisions regulating an action under Part 2 of Chapter 7 of the IRA and Part 10 of the CPA is to be resolved by reference to the principle stated by Spigelman CJ in *Laughton* at [19] noted above and by treating Part 2 of Chapter 7 of the IRA as establishing the "detailed regime for regulating a particular matter". Accordingly, I am satisfied that Dr Fakhouri cannot bring an application or maintain proceedings "under" Part 2 of Chapter 7 on behalf of group members, although she can bring such an application in her own right.

46 However, this still leaves the "alternative action" contemplated by s 376 of the IRA. On the facts pleaded in the statement of claim, Dr Fakhouri and each group member are all persons "entitled to apply for an order for the payment of money under" Part 2 of Chapter 7 in that each of them could apply under s 369(1)(a). On those facts each of them is owed a "debt" and each of them could recover the debt in a court of competent jurisdiction, including this Court. The Secretary and the State submit that only the persons specifically named in s 369 can sue to recover that debt.[15] However, s 369 is only concerned with an application for an order "under this Part". An action for recovery of the statutory debt is not such an action and neither s 376 nor anything else in Part 2 of Chapter 7 has anything to say about how a person named in s 369 may recover that debt. Part 10 of the CPA does speak to that topic. Any representative action under Part 10 would be an action "on behalf of" all group members to recover the respective amounts owing to them regardless of whether or not they were parties (CPA, s 157(1); *Cameron supra*). That is, each group member, being a person entitled to apply under s 369(1)(a) of the IRA, would, via a proceeding under Part 10 of the CPA commenced on their behalf, be "recovering the money [owed to them] as a debt in [a] court of competent jurisdiction", namely this Court.

[15] Tr 01/12/2021 p 12.

47 Further, even if this Court did not grant relief ordering recovery of group member entitlements, it could grant declaratory relief in respect of some or all aspects of the entitlement of each such group member under s 75 of the *Supreme Court Act 1970*. Such a declaration would not, however, be authorised by s 355B of the IRA as such proceedings would not be for the "recovery of money under Part 2 of Chapter 7", nor would they invoke section 355C because the Industrial Commission has no power to grant declaratory relief in respect of statutory debts generally. Thus, such proceedings would not be an action "under" Part 2 of Chapter 7 and would not be subject to s 371 or the cost regime in s 373. Instead, settlement of the proceedings would be subject to approval under s 173 of the CPA and the costs regime in the CPA and the UCPR would apply.

48 It follows that I do not accept that Dr Fakhouri can bring an application or maintain proceedings "under" Part 2 of Chapter 7 of the IRA on behalf of group members, although she can bring such an application on her own behalf. However, I accept that she can bring a representative proceeding in respect of any statutory debt that may be owing to each group member including various declaratory forms of relief reflecting questions common to group members.

49 The State and the Secretary also submitted that, to the extent that Dr Fakhouri's proposed amendments seek to rely on ss 23 and 75 of the *Supreme Court Act 1970* to seek declaratory relief in respect of the entitlements of group members, then they should not be "permitted because they achieve nothing to further the recovery of amounts claimed as unpaid award entitlements, because no consequential or actual relief is either possible or within the jurisdiction of the Court.[16] I reject this contention because it follows from the above that a grant of consequential or actual relief is both possible and within the jurisdiction of the Court in that this Court can order the recovery of amounts declared to be owing in respect of the statutory debts owed to group members. Such relief is sought by proposed prayer 6.

50 As noted above, my reading of both the current statement of claim and the proposed amended statement of claim is that they purport to seek orders under

[16] Tr 01/12/2021 p 28.10.

s 365 of the IRA on behalf of Dr Fakhouri and group members. Thus, contrary to Dr Fakhouri's submissions, they purport to be both proceedings under Part 2 of Chapter 7 of the IRA in respect of group members and proceedings in respect of the statutory debts owing to group members. It follows from my findings that, to the extent they are the former, they cannot be sustained, and to the extent they are the latter, they can be continued.

51 As noted above, I have addressed these issues on a final basis. To formalise these conclusions, it will be necessary to pose and answer separate questions under UCPR 28.2. The following draft is for the parties to consider:

> "Q. Is the plaintiff entitled to bring and maintain proceedings under Part 10 of the Civil Procedure Act 2005 on behalf of group members for orders under s 365 of the Industrial Relations Act 1996 in respect of the remuneration payable to them under industrial instruments made under the Industrial Relations Act 1996 and identified in paragraph 6 of the Statement of Claim?"
>
> Proposed answer: No
>
> Q. Is the plaintiff entitled to bring and maintain proceedings under Part 10 of the Civil Procedure Act 2005 on behalf of group members to seek recovery of, or declarations respecting, any amount that a group member can recover as a debt from the defendants in a court of competent jurisdiction in respect of the remuneration payable to them under industrial instruments made under the Industrial Relations Act 1996 identified in paragraph 6 of the Statement of Claim?"
>
> Proposed answer: Yes"

The Plaintiffs' Remaining Amendments

52 As noted, proposed prayers 9 and 10 seek declarations to the effect that any underpayment of entitlements to Dr Fakhouri and group members "gives rise to obligations" pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth). One of the objections to this amendment is the substantive obligations said to be engaged are not pleaded so that there is no issue joined on the pleadings about them and any alleged failure to observe them. This contention appears to have considerable force. It is unclear whether Dr Fakhouri will wish to pursue these amendments in light of the above conclusion. If they are pursued then, at the very least, the "obligations" said to have arisen will need to be pleaded.

53 Otherwise, I do not understand the State to oppose its joinder and the amendments seeking relief against it, as an alternative to relief against the Secretary.

The Defendants' Remaining Amendments

54 There were three sets of other amendments proposed by the Secretary and the State. These are described in their submissions as follows:[17]

> (a) An allegation that, when it comes to considering whether the Plaintiff or Group Members were not paid for "time worked" for the purposes of the Awards, whether the Plaintiff or Group Members were required to work Unrostered Overtime on each occasion will depend on the circumstances of each case (paragraphs 1(ba) and 23(a2)) which is relevant to the amendments to the estoppel case described in paragraph (c) below, and already pleaded in the existing pleading (see for example paragraph 24(a) of the amended defence);
>
> (b) An allegation that the Plaintiff has not pleaded or particularised an amount payable under an industrial instrument that remains unpaid within the meaning of s 365 of the *Industrial Relations Act 1996* (NSW) (paragraph 42(a1)), which merely repeats, in respect of that paragraph, the same point already made in paragraphs 1(b), 13(b)(ii), 29(c), 32(c), 33(c), 34(b), 35(c), 36(b), 37(c), 38(b), and 39(c) of the amended defence; and
>
> (c) Amendments to the assumptions and content of the estoppel alleged to be raised by the Plaintiff and Group Members' conduct, namely that, by failing to submit records of the time not claimed to have been worked, the Plaintiff and Group Members represented that the time worked was that recorded in the documents submitted in accordance with the obligations imposed by their contracts of employment, which caused the Defendants detriment due to the costs and time that will now be occasioned by investigating and verifying that the Unrostered Overtime claimed to have been worked (i) was in fact worked; and (ii) was worked at the Defendants' direction, so that the Plaintiff and Group Members are estopped from asserting that the time worked was other than as recorded in the documents they submitted (paragraphs 1(c)(ii)(B), 51(e), 54(aa) and (b), 54A, 56(ab) and 57(c)).

55 The only basis for the opposition to these proposed amendments was that the explanation for the delay in the making of them was said to be inadequate given that they were applied for some 12 months after the proceedings commenced and after pleadings had closed.[18] The explanation was proffered in an affidavit of Katherine Plowman sworn 1 November 2021. In so far as the amendments concern the estoppel claim described in (c) above, Ms Plowman states that it was not until she investigated the scope of discovery in June 2021

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[17] Defendant's written submissions dated 1 November 2018 at [46].
[18] Tr 01/12/2021 p 67.

that she realised the extent of the detriment that had been occasioned to her client.

56 These proceedings are still at a relatively early age. As is evident from this judgment, their format and scope are still being developed. Most of these amendments will add very little to the overall time and cost to the proceedings and to deny them has the potential to disadvantage the defendants (CPA, s 58). I will allow the amendments.

Cross Vesting Application

57 In light of the above conclusions, I expect that the application to transfer the proceedings to the Federal Court falls away. Although Dr Fakhouri cannot bring an action "under" Part 2 of Chapter 7 of the IRA on behalf of group members, she can pursue proceedings under Part 10 of the CPA that seek recovery or relief in respect of the statutory debts said to be owing to group members.[19]

58 In these circumstances I will not embark upon a detailed consideration of the respective arguments in relation to the proposed transfer. If I am wrong in apprehending that, in light of the above conclusions, Dr Fakhouri would not seek to transfer the proceedings to the Federal Court then the matter can be considered further. However, I would observe that the basis for the transfer appears to rest on the premise that, if s 369 of the IRA operates in the manner contended for by the Secretary and the State, then s 79 of the *Judiciary Act 1903* (Cth) would "pick up and apply" as a law of the Commonwealth s 365 of the IRA but not s 369 (*Rizeq v Western Australia* (2017) 262 CLR 1; [2017] HCA 23 at [81]; "Rizeq").[20] However, s 79(1) of the Judiciary Act 1903 (Cth) does not confer any authority on a court exercising federal jurisdiction to alter the language of a state statute and apply it in that altered form (*John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1973] HCA 21 at 95). According to the Secretary and State's analysis, which in this respect, I accept, both ss 365 and 369 are part of a scheme of "actions under this Part", that is Part 2 of Chapter 7 of the IRA. It follows that to pick up and apply s 365 without also picking up and applying s 369 would result in a substantial alteration of the statutory scheme. On this approach, if they were

[19] Tr 01/12/2021 at pp 54 to 55.
[20] Dr Fakhouri's written submissions dated 18 November 2021 at [30(e)].

picked up and applied as Commonwealth law then the same conflict between those provisions and Part IVA of the *Federal Court of Australia Act 1976* (Cth) would arise between those provisions and Part 10 of the CPA. However, the correct position is that such a conflict would mean that they would not be picked up and applied at all as Commonwealth law would "otherwise provide" (*Masson v Parsons* (2019) 266 CLR 555; [2019] HCA 21 at [51]). Either way, there would not appear to be any relevant utility in transferring the proceedings.

Orders

59 It will be necessary for the parties to consider the form of the proposed separate questions and the consequences of the findings in this judgment for each of their respective motions (and their proposed amendments). The orders that I will make at this point are that the parties confer in relation to the orders necessary to give effect to this judgment. Subject to submissions to the contrary, those orders would presumably include the following:

1. Proposed orders under UCPR 28.2 posing questions and answers of the kind noted in [51] above;

2. An order striking out so much of Dr Fakhouri's statement of claim to the extent that it includes a claim for relief under Part 2 of Chapter 7 of the IRA on behalf of group members (or at least providing that she replead to make it clear that no such claim is being made);

3. An order granting leave to Dr Fakhouri to amend her statement of claim to the extent she seeks to add claims for relief on behalf of group members in respect of the statutory debts said to be owing to them;

4. Orders in respect of the Defendants' application to amend their defence to reflect Orders (1) and (2) as well as the allowance of the other amendments noted above; and

5. Orders otherwise dismissing the respective parties' notices of motion.

60 I will direct the parties to file either agreed orders or competing orders and list the matter before me for directions to resolve any disagreement over those orders. If the orders are agreed I will vacate the listing date.

61 Accordingly, the Court orders that:

(1) On or before 21 March 2022 the parties confer in relation to the orders necessary to give effect to this judgment.

(2) On or before 23 March 2022 the parties file agreed proposed orders, or failing agreement, competing proposed orders.

(3) List the matter for further directions on 30 March 2022 at 9.30am.

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