

FEDERAL COURT OF AUSTRALIA

Industry Research & Development Board v IMT Ltd
[2001] FCA 85

INDUSTRY RESEARCH AND DEVELOPMENT BOARD V IMT LIMITED
W 16 OF 2000

R D NICHOLSON J
16 FEBRUARY 2001

PERTH

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

W 16 OF 2000

BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD
 Applicant

AND: IMT LIMITED
 Respondent

JUDGES: R D NICHOLSON J

DATE: 16 FEBRUARY 2001

PLACE: PERTH

CORRIGENDA

On page 14 of the judgment the letter “A” in the name “Mr S A Leslie” as Counsel for the Respondent should be deleted and substituted with the letter “G”.

.....
Tania McCaskie
Associate to R D Nicholson J
21 February 2001

FEDERAL COURT OF AUSTRALIA

Industry Research and Development Board v IMT Ltd [2001] FCA 85

PROCEDURE – appeals - conceded appeal from tribunal – whether court should determine non-conceded grounds of appeal before remission – whether remission should be to tribunal differently constituted

Industry Research and Development Act 1986 (Cth), ss 39L, 39LA
Administrative Appeals Tribunal Act 1975 (Cth), s 44
Income Tax Assessment Act 1936 (Cth), s 73B

Kovalev v Minister for Immigration & Multicultural Affairs (1999) 59 ALD 71, considered
Kapagama v Minister for Immigration & Multicultural Affairs [1999] FCA 1881, referred to
Northern NSW FM Pty Limited v Australian Broadcasting Tribunal (1990) 26 FCR 39,
followed
Versatile Carpets Pty Ltd v Collector of Customs (unreported, Federal Court of Australia,
Sweeney, Woodward and Davies JJ, 21 February 1985), considered
Australian Railways Union & Ors; Ex parte Public Transport Corporation (1993) 117 ALR
17 at 25, referred to
Australian Trade Commission v Underwood Exports Pty Ltd (1997) 49 ALD 426, referred to
Brackenreg v Comcare Australia (1995) 56 FCR 335 at 343-52, referred to
*Mabru Nominees Pty Ltd as Trustee of the Urban Family Trust No. 2 Trust v Commissioner
of Taxation* (1997) ATC 4902 at 4911; 37 ATR 97, referred to
Steedman v Baulkham Hills Shire Council (No. 2) (Court of Appeal NSW, 13 August 1993),
referred to

INDUSTRY RESEARCH AND DEVELOPMENT BOARD v IMT LIMITED
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PERTH

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

W 16 of 2000

**BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD
 APPLICANT**

**AND: IMT LIMITED
 RESPONDENT**

JUDGE: R D NICHOLSON J

DATE OF ORDER: 16 FEBRUARY 2001

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Administrative Appeals Tribunal made on 20 January 2000 be set aside.
3. The matter be remitted to the Administrative Appeals Tribunal as differently constituted to be determined according to law.
4. The hearing dates for the appeal on 13/14 March 2001 be vacated.
5. There be no order as to costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT
REGISTRY**

W 16 of 2000

**BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD
 APPLICANT**

**AND: IMT LIMITED
 RESPONDENT**

**JUDGE: R D NICHOLSON J
DATE: 16 FEBRUARY 2001
PLACE: PERTH**

REASONS FOR JUDGMENT

1 The respondent brings a motion seeking an order that the matter be remitted to the Administrative Appeals Tribunal (“the Tribunal”), as originally constituted (subject to the availability of the relevant members) to be determined according to law without the hearing of further evidence other than as determined by the Tribunal.

2 The motion arises as the consequence of the lodgement of a notice of appeal by the applicant from the decision or determination of the Tribunal on 20 January 2000. The Tribunal then decided or determined that “with regard to the projects referred to as the 3.3M craft, the 5M craft and the sail powered Wild Thing, a certificate pursuant to s 39L(1) be issued that the activity set out in Table 1, in so far as they can be substantiated and quantified, are research and development activities.” The questions of law said to be raised by the appeal are identified in the notice as the following:

- “2.1 *Whether in reaching a decision under s 39L(1) of the Industry Research and Development Act 1986, it is necessary to decide what activities have in fact been carried on by the claimant.*
- 2.2 *Whether the Administrative Appeals Tribunal erred by failing to give reasons (including findings on material questions of fact and a reference to the evidence or other material on which those findings were based) for deciding that the activities were “systematic, investigative or experimental” activities within the meaning of the Act.*

2.3 *Whether in reaching a decision under s 39L(1), it is necessary for the Tribunal to decide whether the activities claimed involved innovation or technical risk and to include its reasons for decision finding on those issues and a reference to the evidence or other material on which the findings were based.*

2.4 *Whether the Tribunal erred in failing to address and make findings as to whether the technology was core technology in relation to the activities claimed.”*

3 The powers of the Federal Court to hear and determine an appeal and to make orders as it thinks appropriate by reason of its decision arises from s 44(4) of the *Administrative Appeals Tribunal Act*. Among the orders authorised by s 44(5) is an order “remitting the case to be heard and decided again, either with or without the hearing of further evidence by the tribunal in accordance with the directions of the Court”. If the Court makes an order remitting a case to be heard and decided again by the Tribunal, s 44(6) provides that the tribunal need not be constituted for the hearing by the persons who made the decision to which the appeal relates.

Statutory provision

4 This matter came before the Tribunal as the consequence of an application by the respondent for review of a decision made by the applicant in certificates issued on 11 April 1997 which determined that activities conducted by the respondent were not research and development activities and the technology acquired was not core technology. The certificates were issued under ss 39L and 39LA of the *Industry Research and Development Act 1986* (Cth) (“the Act”) and related to four research and development projects involving the “Wild Thing” recreational boat.

5 Section 39L of the Act reads:

“(1) *The Board may, and shall if requested in writing by the Commissioner to do so, give to the Commissioner a certificate stating whether particular activities that have been or are being carried on by or on behalf of a person were or are research and development activities.*

(2) *If the Board issues a certificate to the effect that particular activities were not or are not research and development activities, the Board must give notice in writing to the person concerned stating the reasons for issuing the certificate.”*

Section 39LA reads:

- “(1) The Board may, and must if requested in writing by the Commissioner to do so, give to the Commissioner a certificate stating whether particular technology that an eligible company has acquired, or has acquired the right to use, for the purposes of particular research and development activities that have been or are being carried on by or on behalf of the company was core technology in relation to those activities.*
- “(2) If the Board issues a certificate to the effect that particular technology was not core technology, the Board must give notice in writing to the eligible company concerned stating the reasons for issuing the certificate.”*

The “Board” is defined in the s 4 of the Act to mean the applicant. Each of the above sections appears in Pt IIIA of the Act in which it is provided in s 39A(2) that subject to subs (1) – which relevantly has no effect here – expressions used in the Part that are defined by s 73B of the *Income Tax Assessment Act 1936* (Cth) have in the Part (in the absence of a contrary intention) the same meanings as in that section. The definition of “core technology” therefore derives from provisions of ss 73B(1) and (1ab) and similarly so does the definition of “eligible company”. By s 39A(3) expressions used in the Part that are defined by the *Income Tax Assessment Act 1936* (other than s 73B) have (in the absence of contrary intention and subject to the provisions of the section) the same meanings as in that Act. Consequently the reference to “Commissioner” is to be read as meaning a reference to the Commissioner of Taxation.

6 Section 73B of the *Income Tax Assessment Act* contains provisions with respect to expenditure on research and development activities. The definition of “research and development activities” appears in s 73B(1) and reads:

- “(a) systematic, investigative and experimental activities that involve innovation or high levels of technical risk and are carried on for the purpose of:*

 - (i) acquiring new knowledge (whether or not that knowledge will have a specific practical application; or*
 - (ii) creating new or improved materials, products, devices, processes or services; or*
- “(b) other activities that are carried on for a purpose directly related to the carrying on of activities of the kind referred to in paragraph (a)”*

The definition of “core technology” in the same section reads:

“For the purposes of this section, technology is core technology in relation to particular research and development activities if:

- (a) the purpose of the activities was or is:
 - (i) to obtain new knowledge based on that technology; or*
 - (ii) to create new or improved materials, products, devices, processes, technologies or services to be based on that technology; or**
- (b) the activities were or are an extension, continuation, development or completion of the activities that produced that technology.”*

Tribunal hearing

7 The applicant and the respondent were each represented at the hearing before the Tribunal. The hearing was conducted between 3 and 7 May 1999 with submissions subsequently being made on 31 May and 7 July of that year. The Tribunal heard evidence from Mr D Fisher, Mr C MacKinnon and Mr G Thomas for the respondent and Mr J Harman, Mr McLarty, Mr I Stephens and Mr M Seward for the applicant. The appeal papers contained 3721 pages of which 430 pages record oral evidence and 657 pages are constituted by exhibits at the hearing.

Tribunal reasoning

8 The reasons of the Tribunal set out that, in response to the respondent’s contentions that the activities carried out were “research and development activities”, the applicant contended the project was not conducted in a manner that was “systematic, investigative or experimental” and did not involve “innovation or technical risk”. The Tribunal then reviewed the legislative framework and the evidence.

9 In reviewing the evidence the Tribunal recorded it had heard evidence that Mr J Harman had designed, patented, marketed and constructed the 3.3M craft known as the Wild Thing. The respondent had provided funds to Mr Harman’s company which was engaged to undertake research and development activities. However, the Tribunal found:

“26 During the project personality conflicts emerged between Mr Harman

and Mr Danny Fisher. Mr Harman found that Mr Fisher was not genuine in the pursuit of research and development activities and Mr Fisher found that Mr Harman was a difficult person to deal with. The hearing raised questions about the credibility of the two men and of the evidence they tendered.”

10 In reviewing the evidence the Tribunal said Mr Harman had testified that no monies or approval were given by the respondent to do the projects that were set out in the program submitted to the applicant. It recorded his testimony that he had sent numerous letters requesting approval and funding from the respondent but to no avail. Under cross-examination he had said that various modifications to the design and hull of the 3M craft were made throughout the research and development program; there were a large number of prototypes; and a range of alterations had been made to the design of the first two craft and their hulls during the program.

11 The Tribunal also recorded that Mr Fisher’s evidence included a consideration of what research and development activities were performed and reported to the applicant, the work which he had contributed to the management of the project and his direct involvement in the alternative power system and wave ski projects. It recorded he had closely monitored the research and development work throughout the life of the program, but it had been the intention of the respondent not to stifle Mr Harman’s creativity. His visits had involved systematic reviewing each prototype under way, examining its progress, considering any problems arising in defining the next step. However, his evidence was that difficulties had been experienced in working with Mr Harman and he had employed a Mr Phillips to work on the project. When asked about the absence of supporting documents Mr Fisher had said there was “physical evidence and he denied having made the claim that Mr Harman had destroyed records”.

12 After reviewing the requirements of the legislation the Tribunal recorded that the applicant had submitted the Tribunal had first to identify the particular activities that were carried out and then to determine whether they were research and development activities. Under a heading reading “Findings about detailed activities” the Tribunal then set out in tabular form under the headings “systematic”, “investigative”, “experimental”, “innovative” and “technical risk” its findings relation to the 3.3M craft, the 5M craft, the wave ski, the alternative power system pulse jet and the alternative power system sail. The following is

the first line of the Table to give the scheme of its arrangement:

ACTIVITY	SYSTEMATIC	INVESTIGATIVE	EXPERIMENTAL	INNOVATIVE	TECHNICAL RISK
3.3m • Evaluation of plastics	No	Yes	No	N/a	N/a

One distinctive feature of the Table is that in all the columns relating to “innovative” and “technical risk” the response “not applicable” appeared through its abbreviation N/a.

13 Following the Table the Tribunal concluded that, after considering all evidence and submissions, it was reasonably satisfied that “such activities” took place on “those three projects” and that they were carried on for the purpose of acquiring new knowledge or creating new or improved products. The descriptions in parentheses were a reference back to the previous paragraph where the activities were described as those “of the sort outlined in the Table” and referred to the three projects as the 3.3M craft, the 5M craft and the sail powered Wild Thing. It did not accept that it could be satisfied that activities on the construction of the wave ski and the pulse jet could be considered to be in pursuance of the research and development project or carried out for the requisite purposes.

14 The Tribunal then made an ultimate finding reflecting the findings just referred to and encompassed in the decision previously referred to.

Grounds of appeal

15 The grounds of appeal, which reflect the questions of law previously set out, are as follows:

- “4.1 The Tribunal erred in failing to decide what activities had been substantiated.
- 4.2 The Tribunal erred in failing to give reasons for its decision (including findings on material questions of fact and a reference to the evidence or other material on which those findings were based) that the activities set out in Table 1 were “systematic, investigative or experimental” activities.
- 4.3 The Tribunal erred in failing to make findings, or to give reasons including its findings and a reference to the evidence or other material

on which the findings were based, as to whether the activities claimed involved innovation or technical risk.

4.4 *The Tribunal erred in failing to address and make findings as to whether the technology was core technology in relation to the activities claimed.”*

16 For the respondent there is a concession that the Tribunal made an error of law in terms of ground 4.3; that is, in failing to make an express finding as to whether or not the respondent’s activities were innovative or involved technical risk. There is therefore common ground that the appeal should be allowed for that reason.

Whether appeal should be heard or remitted to Tribunal

17 The primary submission made for the applicant in opposing the respondent’s motion for remittal to the Tribunal is that the Court should deal with the entire appeal. The submission is that the Court should do this in order to identify to the Tribunal the errors in addition to the conceded error in terms of the questions of law raised by and the grounds in the notice of appeal. As a second limb to this argument it is said that the Court could only properly determine whether the matter should be remitted to the same or a differently constituted tribunal after having disposed of the other grounds of appeal. For that reason it is said that for the Court to proceed to hear the appeal on the non-conceded grounds would not be an academic exercise.

18 In support of the first limb of the above argument the case for the applicant relies on the decision in *Kovalev v Minister for Immigration & Multicultural Affairs* (1999) 59 ALD 71. There French J made an order by consent remitting a matter to a differently constituted tribunal with a direction that the tribunal comply with the procedures in s 430 of the *Migration Act 1958* (Cth) and state all such findings of fact as are necessary on the material before it including one specific fact relevant to the particular proceeding. He did so because the court in exercising judicial power should, on his view, be self-explanatory. He said it was not appropriate that an order be made of uncertain content or the content of which is to be derived from materials which are not on the public record. For that reason the Court ought not to make an order remitting a matter to a decision-maker or tribunal to be decided “according to law” where the Court itself was not informed of the nature of the error conceded one reason. One reason why he considered this was so was that in a practical

sense the decision-maker or tribunal lacks the benefit of any binding direction from the court as to precisely what it is that the decision-maker or tribunal is required to do. He said in making a consent order or in accepting undertakings a court must have regard to the limits of its power and the making of an order “according to law”, albeit by consent, was a purported exercise of judicial power that may fall short of the exercise of that power.

19 The reasoning in *Kovalev* has not won universal acceptance. In *Kapagama v Minister for Immigration & Multicultural Affairs* [1999] FCA 1881 Whitlam J, after hearing submissions from senior counsel on *Kovalev*, made an order by consent that a matter be remitted to the tribunal “for reconsideration”. Practical difficulties may also arise in following the approach in *Kovalev*, namely that the formulation of the error of law by the respondent may prove limited in some way and the tribunal applying the order may face difficulties in its application.

20 In any event, there is not here any absence of specification of the ground on which the appeal is conceded by the respondent save that that ground is not itself incorporated in the terms of the order. The grounds of the application in support of the respondent’s notice of motion state precisely the nature of the error conceded. This Court is not therefore in any doubt that it can properly exercise the power of remittal in this case, nor is there any absence of guidance to the Tribunal because here the error of law is identified in common cause. Even if not part of the order of the Court, the error is able to be identified from the records of the Court and conveyed by the parties as a matter of common cause to the Tribunal.

21 However, it is said additionally for the applicant that the Tribunal would be placed in an invidious position if it does not have the rulings of the Court on the non-conceded grounds of appeal. Specifically it is submitted that if the Court does not rule on whether the unorthodox manner in which the Tribunal has stated its findings in the tabular form satisfies s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal will not know how to express its conclusions on the questions of innovation or technical risk.

22 There are two principal answers to this further submission. The first is that it is a feature of the appellate system that if a court upholds an appeal on one ground of appeal it will not address other grounds of appeal unless there is some particular reason to do so. The alternative approach urged for the appellant would have the feature of adding to the duration

and cost of the appellate process. The second is that the reason advanced for determination of the non-conceded grounds here has no force to it. Clearly the Tribunal (however constituted) will know from the nature of the conceded error that it must make its findings on the questions of innovation or technical risk in a manner which properly communicates those findings to others.

23 In my opinion the primary contentions made for the applicant in these arguments are without merit.

Whether matter should be remitted to same or differently constituted tribunal

24 For the applicant it is then contended in further opposition to the respondent's motion seeking remittal to the same Tribunal that the issues of credibility referred to in par 26 of the Tribunal's reasons quoted above have affected the approach of the Tribunal even in the absence of express findings as to credibility. It is said the Court should infer this from the way the Tribunal has chosen to recount the evidence.

25 The first example said to be of this is a sentence which appears at the end of par 75 of the Tribunal's reasons reading "Mr McLarty said he had a disagreement with Mr Fisher over the way in which an invoice was to be paid". The remainder of the paragraph recounted Mr McLarty's evidence that he regularly visited Mr Harman at the workshop in 1995 and his knowledge of the boat. The submission is that the final sentence is irrelevant to the preceding portion of the paragraph so that the inference urged should be drawn by the Court. However, the paragraph is recounting the evidence of Mr McLarty so that the reference to the disagreement flows from the evidence being recounted and does not give rise to a necessary inference as sought for the applicant.

26 Likewise in par 76 it was recorded by the Tribunal that in cross-examination Mr McLarty acknowledged he was friend of Mr Harman's and he had a very limited involvement in relation to the project. It is said that the reference to friendship is irrelevant except to the issue of credibility. That may be so but it does not mean that the Tribunal has itself formed any view as to the credibility, only that it has recounted that evidence as part of the evidentiary matrix which may be relevant depending on how the Tribunal approached its findings.

27 Reference is then made to pars 96 and 97 of the Tribunal's reasons in which it drew its conclusions following the Table. The submission for the applicant is that from these it is clear the Tribunal has formed a view as to whether the claimed acts were undertaken and it could not have done this without resolving the issues of credibility referred to in par 26.

28 To test this submission it is necessary to go to the evidence of each of the witnesses in question.

29 In the evidence of Mr Fisher there was put into evidence a rebuttal statement to a statement made by Mr Harman to an officer of the Australian Federal Police. It challenged 94 of the 96 statements said to be contained in that statement of Mr Harman on the ground that they were false and that Mr Harman knew the statements to be untrue or false or deliberate distortions. It was said by Mr Fisher that Mr Harman had deliberately made these to convey the impression that the entire research and development scheme was a sham and fraud.

30 Mr Fisher was taken through Mr Harman's witness statement. In par 50 of that statement Mr Harman stated that Mr Fisher had an agenda that was not aligned with the proposal that had been made to the applicant and was not aligned with what he thought was in the interests of the viability of Wild Thing in the long term. In the same statement he said he found Mr Fisher constantly antagonistic and abusive towards him and he had sought a restraining order against him. In an annexed response to Mr Fisher's witness statement to the Tribunal, Mr Harman recounted the ways that Mr Fisher had suggested that Mr Harman had sabotaged the program for his own gain. These assertions were explored in the cross-examination of Mr Fisher. Mr Harman had claimed in par 55 of his witness statement that the claims for expenditure for research and development were "a sham". This was put to and denied by Mr Fisher. There was conflicting evidence between each of them as to what materials has been turned over by Mr Harman on completion of the projects. There was conflicting evidence as to whether Mr Fisher was unduly interfering with the technical side of Mr Harman's work. On the issue of retention of documents, there was substantial cross-examination in particular.

31 In the witness statement of Mr Fisher a section was headed "Relationship with Harman". It was there claimed that the bulk of the developing company's problems flowed

from the deterioration of its relationship with Mr Harman. He said he became disillusioned with Mr Harman and considered he needed closer management. This had resulted in a difficult time with him. There had been an altercation and resulted in Mr Harman unsuccessfully seeking a restraining order against him. He had ceased to deal with Mr Harman after that. However, Mr Harman had kept significant records regarding the research and development activities. He was of the opinion that Mr Harman either retained or has destroyed the bulk of the records produced by him. These matters were also the subject of cross-examination.

32 It is apparent from this review of the issues (scantily referred to by the Tribunal in par 26 of its reasons) that there was a quite profound and antagonistic gulf between Mr Fisher and Mr Harman so that there was indeed a major issue of credibility between them. Only if the evidence of Mr Harman had been disbelieved could the Tribunal have arrived at its conclusion in par 97 of its reasons that the activities on the three projects there mentioned were actually carried on and carried on for the requisite purposes. I therefore accept the submission for the applicant that although the Tribunal failed to make any express findings of credibility it could not have arrived at the decision which it reached without having in its mind resolved those issues and done so adversely to the evidence of Mr Harman. That resolution determined the factual issues at the heart of the case.

33 There is a further reason it is submitted for the applicant that the matter should not be remitted to the same Tribunal. It is that the Tribunal not only failed to make express findings of credibility and in relation to the requirements of innovation and technical risk but also failed to make a finding concerning core technology. It is submitted the Tribunal should therefore be seen as having failed at every step so that the matter should not be remitted to it.

34 For the both the respondent and applicant reliance is placed on the decision of the Court in *Northern NSW FM Pty Limited v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 42 where it was said by Davies and Foster JJ:

“If a decision has been set aside for error and remitted for rehearing, it will generally seem fairer to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member constituting the Tribunal in the original inquiry or hearing will already have expressed a view upon facts which will have to be determined in the

rehearing. The aggrieved party may think that a rehearing before the Tribunal as originally constituted could be worthless, for the member's views have been stated. Thus, if a decision of the Administrative Appeals Tribunal has been set aside and the matter remitted for rehearing, the President of that Tribunal ordinarily allocates to the rehearing a different member of the Tribunal. There are, of course, cases where it is convenient for the Tribunal as previously constituted to deal with the matter. And occasionally the Court itself expresses such a view, so as to make it clear that it would not be improper for the Tribunal as previously constituted to consider the matter again. See for example: Versatile Carpets Pty Ltd v Collector of Customs (unreported, Federal Court of Australia, Sweeney, Woodward and Davies JJ, 21 February 1985) in which the Court remarked "...subject to questions to availability of members, it would be helpful if the matter were heard by the Tribunal as it has so far been constituted."

35 *Versatile Carpets Pty Ltd v Collector of Customs* (unreported, Federal Court of Australia, Sweeney, Woodward and Davies JJ, 21 February 1985) concerned the appropriate classification of goods under Pt II of the First Schedule of the *Customs Tariff Act 1966* (Cth) where a particular item in the Schedule was not considered by the Tribunal. It did not involve issues akin to those raised by the present proceeding.

36 In *Northern NSW* the member constituting the Australian Broadcasting Tribunal for the purpose of the report had expressed views with respect to the merits of the case put on behalf of Northern Rivers FM Limited and had fully and firmly expressed them adversely to that company. The Court said as the matter was to be heard and decided again it would be fairer to that company that the matter be heard by a differently constituted tribunal. The tribunal had not expressed a view that a rehearing by a differently constituted tribunal would be inconvenient or unsuitable. Accordingly there was nothing before the primary judge in the matter of *Northern NSW* to show that the ordinary practice should not apply. The general position is, said Davies and Foster JJ, that when decisions in judicial and administrative proceedings are set aside *in toto* and the matter remitted to be heard and decided again, justice is in general better seen to be done if the court or the tribunal is reconstituted for the purposes of the rehearing.

37 In *Australian Railways Union & Ors; Ex parte Public Transport Corporation* (1993) 117 ALR 17 at 25 the High Court accepted that, there being no issue of assessment of the credibility of witnesses arising, it was not appropriate for a direction to be given that the matter be sent back before a difference Full Bench of the Industrial Relations Commission.

38 In *Steedman v Baulkham Hills Shire Council (No. 2)* (Court of Appeal NSW, 13 August 1993), Kirby P said that normally the Court of Appeal, when remitting a matter to a division of the Supreme Court or another court or tribunal subject to its authority, would not interfere with the assignment of the hearing to a particular person, although in special circumstances an appellate court may direct that the court or tribunal below be differently constituted: see 68 ALJ 79 where, after citation of *Steedman* in that respect, the author says that a rehearing would be ordered where the original tribunal has stated its findings in strong language or where there has been a finding of the credibility of a party or a major witness. Here it is submitted for the respondent that none of these categories apply on a true reading of the reasons of the Tribunal.

39 In accepting the general position as articulated in *Northern NSW*, Mansfield J in *Australian Trade Commission v Underwood Exports Pty Ltd* (1997) 49 ALD 426 also referred to the acceptance of that approach by Sheppard J in *Brackenreg v Comcare Australia* (1995) 56 FCR 335 at 343-52 and by Heerey J in *Mabru Nominees Pty Ltd as Trustee of the Urban Family Trust No. 2 Trust v Commissioner of Taxation* (1997) ATC 4902 at 4911; 37 ATR 97. In remitting the matter before him to a tribunal differently constituted, Mansfield J had regard to the fact that it was not a case where no question as to the credibility of several witnesses before it was unimportant. The point of the reference was not simply to be resolved with the proposition that the case was one where the tribunal as originally constituted simply failed to express its findings on certain questions of fact and could now do so.

40 Approaching the matter in terms of these authorities I start from the usual position that remission to a differently constituted tribunal is the ordinary way to proceed. There are factors which make that inconvenient and those factors relate to the volume of evidence previously heard. To set against that is the consideration that it is open to either of the parties upon remission to a differently constituted tribunal to make submissions to that tribunal on the degree to which evidence given to the former tribunal may be utilised without recall by the differently constituted tribunal. Critically, however, this is a case involving credibility findings particularly in relation to the profound conflict in the evidence between Mr Fisher and Mr Harman. While it is the case here that there was no express finding of the credibility of a party or a major witness, it is clear that the Tribunal has in fact formed views in relation to that credibility or else it could not have arrived at the determination which it

made. Additionally, this is a case where the existence of credibility issues was expressly recorded by the Tribunal. Those considerations make it apparent that the ordinary practice should apply.

Conclusion

41 For these reasons I consider that the respondent's motion should be granted but on the basis that remission is to a tribunal differently constituted.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice R D Nicholson.

Associate:

Dated: 16 February 2001

Counsel for the Applicant: Mr M Corboy

Counsel for the Respondent: Mr W S Martin QC and Mr S A Leslie

Date of Hearing: 9 February 2001

Date of Judgment: 16 February 2001