Industrial Relations Commission of Australia

1284/1992 (13th November, 1992)

Industrial Relations Commission Decision 1284/1992; [1992] 1284 IRCommA

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effect

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.113 applications for variation

CPH Sales and Contracting
(C No. 31904 of 1992)

FURNISHING TRADES AWARD, 1981(1)
(ODN C No. 01333 of 1977)

Leadlight Originals
(C No. 31225 of 1992)

GLASS MERCHANTS AND GLAZING CONTRACTORS (VICTORIA)
CONSOLIDATED AWARD 1988(2)
(ODN C No. 32180 of 1988)

Various employees — Furnishing industry
Glass industry

DEPUTY PRESIDENT WATSON — MELBOURNE, 13 NOVEMBER 1992

Industrial unions - right of entry - preference - conscientious objection - practical problems arising in respect of conscientious belief of employer does not justify removal of award rights - provision sought goes beyond rights of entry - variation sought inconsistent with objects of the Act - preference - found that variation sought may seek to permit employers to discriminate against union members - no evidence of any practical problem having arisen in respect of preference - termination - grant of application would allow dismissal for any reason including reasons expressly prohibited by the Act.

DECISION

These matters involve applications to vary the Furnishing Trades Award, 1981 and the Glass Merchants and Glazing Contractors (Victoria) Consolidated Award 1988 by CPH Sales and Contracting and Leadlight Originals of Melton, respondents to the respective awards. The applications were in very similar terms and relied on identical grounds. As a consequence the matters were joined with the consent of the parties on 6 October 1992.

The proprietors of both applicant companies are members of the Christian Fellowship known as **Brethren**. They were represented by Mr Hornsey, proprietor of CPH Sales and Contracting. Mr Hornsey also intervened on behalf of **the Brethren**, although given the nature of the Fellowship, the scope of and authority for such representation by intervention was not established. I am prepared to assume for the purpose of this decision that the views advanced by Mr Hornsey on behalf of the applicant companies reflect those **of Brethren** members generally.

The applicant sought to vary the Furnishing Trades Award, 1981 as follows:

"(1) Insert additional paragraph to Clause 40 (Right of Entry of Union Officials):

(1)Print G0770 [F029] (2)Print H4634 [G034]

'(C) Any employer who has a conscience before God and belongs to the Christian Fellowship known **as Brethren**, shall be exempt from any of the provisions of this Award which require such an employer to make contact with or give access (either in premises or on site) to representatives of Trade Unions or similar industrial organisations. This exemption shall not preclude an officer of the Industrial Relations Commission or the Department of Labour from making contact with or entering the premises of such an employer in the course of duty.'

(2) Insert additional paragraph to Clause 33 (Preference for Union Members):

'(C) Any employer who has a conscience before God and belongs to the Christian Fellowship known **as Brethren**, shall not be forced to employ or give preference in employment to a member of a Trade Union or similar industrial association.'

(3) Insert additional paragraph to Clause 6(e) (Contract of Employment - Termination):

'(iv) Any employer who has a conscience before God and belongs to the Christian Fellowship known **as Brethren**, shall have the right to terminate the employment of an employee at any time by reason of matters arising which affect the employer's conscience, provided that final payment be made to the

employee at least equal to or better than that prescribed by the Award on termination.'"

The application to vary the Glass Merchants and Glazing Contractors (Victoria) Consolidated Award 1988 was in identical terms, save for the relevant clause numbers and an additional variation sought to the superannuation provision to insert as an additional paragraph:

"Any employer or employee who has a conscience before God and belongs to the Christian Fellowship known as Brethren shall be entitled to contribute to any Superannuation Fund which complies with the Occupational Superannuation Guidelines."

In fact, there exists no superannuation clause in that award. An application for a superannuation provision is currently subject of proceedings in C No. 30932 of 1992. In the current proceedings the respondent union, The Federated Furnishing Trade Society of Australasia (FFTS) agreed to accept the insertion of a clause in respect of Brethren members in terms similar to that inserted by Turbet C(3) in the event that a superannuation clause were inserted as a result of proceedings in C No. 30932 of 1992.

This proved acceptable to the applicant company and that element of the variation was not pursued. That agreed position will be given effect in relation to any relevant orders arising out of C No. 30932 of 1992.

(3)Print K1037

In the proceedings on 6 October 1992, I brought to the attention of Mr Hornsey the fact that point (3) of Schedule B of his application to vary the Furnishing Trades Award, 1981 needed amendment in light of variation(4) to the relevant clause between the lodging of the application by CPH Sales and Contracting and 6 October 1992. On 6 October 1992, I directed CPH Sales and Contracting to amend its claim in light of that subsequent variation. The amended variation sought is as follows:

"Insert additional paragraph to Clause 6(d)(vi) (Contract of Employment - Termination - Unfair Dismissals):

Notwithstanding the forgoing, any employer who has a conscience before God and belongs to the Christian Fellowship known as Brethren, shall have the right to terminate the employment of an employee at any time by reason of matters arising which affect the employer's conscience, provided that final payment be made to the employee at least equal to or better than that prescribed by the Award on termination."

The applicants advanced several grounds in support of the variations sought.

The first, and central ground raised, was that the requirements imposed upon members of the Brethren as respondents to the awards created fundamental conflict with their religious beliefs. Members of the Brethren are bound by

conscience by the authority of God's word with the Holy Scriptures, or their interpretation thereof, binding their lives to the exclusion of all other claims. The central matter motivating the applications on the grounds of conscience is the belief of **the Brethren** that God intended that no third party
should come between "masters" and "servants", with trade unionism being seen as "organised rebellion against divinely instituted authority" and essentially anti-christian in character. The religious beliefs of **the Brethren** do not allow
them to recognise or have dealings with trade unions (or employer organisations). The intention of the applications were to remove from employer respondents who are members of **the Brethren**, the obligation to have dealings with the respondent union.

It was submitted that the applications were motivated by this view of trade unions and not by any desire to otherwise avoid award regulations or conditions. In this context it was submitted **that Brethren** members otherwise fulfil the spirit and letter of industrial law and have no objection to regulation and inspection by authorities, such as the Industrial Relations Inspectorate and the Industry Registry, with Government (and its agencies) being recognised by **the Brethren** as "ordained of God".

Second, the applicants submitted that recognition of conscience as sought in the variations proposed was contrary to the rights guaranteed by s.116 of the Constitution which reads:

> "The Commonwealth should not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

(4)Print K4699 [F029 V038]

Reliance was placed on a decision by Turbet C(5) in relation to an application seeking exemption **of Brethren** from some superannuation clause requirements of an award.

Third, the applicants submitted that recognition of conscience was reflected in the Industrial Relations Act 1988 (the Act) (s.267) and recent award provisions for superannuation exemption.

Fourth, reliance was placed on a recommendation of Hodder C(6) in respect to right of entry as it **affected Brethren** members respondent to the Graphic Arts Award, 1977.(7)

Fifth, it was submitted that there is a current need for the relief sought by the applications. This need was said to arise from attempts on one occasion by an organiser of the FFTS to seek entry at the premises of **a Brethren** member in Melbourne who employs staff under the Furnishing Trades Award, 1981. The applicants submitted that the need for the variation was

further supported by "considerable trouble in the Furnishing Trade in N.S.W. over the last two years", which was said to have involved a problem 18 to 24 months ago which has not subsequently occurred upon resolution at that time.

Sixth, it was submitted that a general exemption **of Brethren** members was required rather than exemption of named respondents to avoid continued applications in respect of new employer respondents. The applicants submitted that abuse would be avoided by a requirement **of Brethren** members, respondent to the awards, to establish their genuine conscience before the Industrial Registrar (arising out of s.267 of the Act). Such a mechanism was not included in the variations sought and the mechanism proposed appears to go beyond the scope of s.267.

Shortly after the adjournment of proceedings on 26 October 1992, the applicants provided me with three documents, although no request was made then or at any later stage to allow further submissions in relation to them. Nonetheless, on my own motion, I invited further submissions in relation to one document; a without prejudice document produced on 26 October 1992 by the National Union of Workers (NUW) in relation to objections **by Brethren** members to a roping-in exercise in respect of the Rubber, Plastic and Cable Making Industry (Consolidated) Award 1983.(8) If given effect to as an award or award variation it would have the effect of removing specific named respondent companies from the effect of some award provisions requiring contact with trade unions. In response to the invitation for further submissions, the applicants submitted they would have no objection to similar provisions being adopted in the current matter.

Mr Mason, for The Australian Chamber of Manufactures and Mr Blanksby for the Victorian Glass Merchants Association, raised a number of concerns on behalf of members of their organisations:

. the variations would result in some discrimination in favour **of Brethren** members, relative to other employers respondent to the awards.

(5)Print K1037 (6)Print K1988
(7)Print D3156 [G014]; (1977) 194 CAR 5 (8)Print F5566 [R007]

. the variations would remove in respect **of Brethren** employers the union role in award enforcement which could lead inadvertently to award breaches **by Brethren** members, giving them an advantage over other employers.

. it would be unfair to have differential award provisions operating within a large and diverse industry.

. the variations sought and the grounds relied upon were inconsistent with certain objects of the Industrial Relations Act 1988.

- doubts existed as to the capacity of the applicants to seek the variations on behalf of all members of **the Brethren**.

- the applications, if granted, would diminish the access to trade unions of individuals employed **by Brethren** members.

Mr Ross, for the FFTS and intervening for the Australian Council of Trade Unions put detailed submissions opposing the applications for the following reasons:

- they are inconsistent with previous decisions of the Commission.(9)

- they are inconsistent with the objects of the Act, particularly s.3(f) and (k).

- they are inconsistent with the provisions of the Act - particularly s.334.

- the applications constitute an unwarranted interference in trade union rights which are protected by law.

- the applications insofar as they related to right of entry would have no practical effect as s.286 of the Act would continue to operate.

- the applications are too broad in scope and beyond the competence of the applicants as single named respondents.

- there are real questions about the extent to which a corporation can hold a "conscientious belief" as opposed to individuals which manage the affairs of the corporation.

Decision

These applications essentially raise a conflict between the particular religious beliefs of employers, members of the Christian Fellowship known as **the Brethren**, and provisions of awards of this Commission which are common and
generally accepted as appropriate provisions within the context of the Commission's award making powers arising out of the Act.

(9)In particular, but not exclusively, Thomas Heaney and Co. and others v. The Clothing and Allied Trades Union of Australia (1962) 100 CAR 424. Reference was also made to a decision of Beech C in the Western Australian Industrial Relations Commission in Concept Products v. The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, (W.A.) (1992) 72 WAIG 1137, a decision subject to appeal.

I have no reason to doubt the sincerity of the beliefs held by the applicants. Whilst some care should be taken not to intrude unnecessarily on

the genuine beliefs of the applicants and members of **the Brethren** generally, the accommodation of those views in the manner sought through the applications would significantly affect the rights of others; a trade union and its members and potential members. Ultimately, my task is to balance those considerations within the framework of the Act, having regard to the submissions before me.

I deal first with the general issues raised and then consider the specific applications made.

s.116 of the Constitution

I do not accept the submission of the applicants that it would be unconstitutional, by reference to s.116 of the Constitution, not to release **the Brethren** from award obligations inconsistent with their religious beliefs. In my view, that submission rests on the section of the constitution that "the free exercise of any religion" is not to be prohibited. That constitutional right, like other "freedoms" provided for by the Constitution, is not absolute but should be seen in the context of the laws of an orderly society. In a High Court judgement dealing with "freedom of religion" Lathan CJ, having noted the word "free" has many meanings, observed:

> "But in all these cases an obligation to obey the laws which apply generally to the community is not regarded as inconsistent with freedom."(10)

In the same case Williams J observed:

> ". . . the meaning and scope of s.116 must be determined, not as an isolated enactment, but as one of a number of sections intended to provide in their inter-relation a practical instrument of government, within the framework of which laws can be passed for organising the citizens of the Commonwealth in national affairs into a civilised community, not only enjoying religious tolerance, but also possessing adequate laws relating to those subjects upon which the Constitution recognizes that the Commonwealth Parliament should be empowered to legislate in order to regulate its internal and external affairs."(11)

The applicants are motivated by a concern about the effect on them of the exercising by unions of legitimate rights which exist as a result either by way of legislation of or by way of awards made pursuant to legislation of the Commonwealth Parliament, consistent with its powers in relation to the prevention and settlement of interstate industrial disputes.

Past superannuation exemptions for members of **the Brethren**

The superannuation decisions of the Commission relied upon by the applicants provide little support for the current applications, except in relation to the variation of the superannuation clause in the Glass Merchants and Glazing Contractors (Victoria) Consolidated Award 1988 which is not pursued in the current proceedings for reasons explained above. Most of those decisions

were by consent. In any case none effected in a substantive way the award

(10)Adelaide Company of Jehovah Witnesses Incorporated v. The Commonwealth (1943) 67 CLR 116 at 126

(11)ibid. p.159

rights of employees to superannuation contributions by their employers, being restricted, as they were to an additional provision permitting contributions to be made to any approved occupational superannuation fund to which an employer or eligible employee who is a member of **the Brethren** elects to contribute. There exists a fundamental difference between the effect of those award provisions and those sought by way of the current applications which seeks to significantly restrict the rights of a union - an organisation under the Act - and its members or potential members.

The recommendation of Commissioner Hodder

The reliance by the applicants upon the recommendation of Hodder C does not support the applications to vary sought by the applicants. That recommendation does not remove award rights. Rather, the recommendation settled a particular dispute on the basis of the acceptance by the parties of the recommendation and in particular an acceptance by the union in that case that it would not, as a matter of choice, exercise certain award rights in relation to certain employers. Such an outcome does not support a variation removing such award rights.

The proposal submitted by the NUW in relation to the roping-in exercise in the Rubber, Plastic and Cable Making (Consolidated) Award 1983 was advanced as a without prejudice position. If given effect by the Commission by way of an award variation it would represent a consent variation to the award and does not support an arbitrated variation as sought in the current matters, either in the form of the applications made or in terms similar to those reflected in the NUW document.

Consistency with recognition of conscientious objection in s.267 and s.122(3) of the Industrial Relations Act 1988

The effect of the applications now before me would extend well beyond the recognition of conscientious objection currently within the Act. The current conscientious objection provisions are significantly more restricted and when applied generally have little effect on the rights of others. In contrast the current applications would significantly affect the rights of a trade union as a registered organisation under the Act and the rights of the applicants' employees, not all of whom are members of **the Brethren**, to join trade unions and enjoy the full benefits of trade union membership. As was noted by Findlay C in refusing a more limited application by members of **the Brethren** in respect of the Clothing Trades Award 1982,(12) following acknowledgement of the sincerity of their religious beliefs:

"However, should the application be granted it would not only satisfy the

conscience of the handful of applicants concerned in this matter but would also have the effect of restricting the freedom and will and conscience of each and every employee in their employ. It would also have the effect of restricting the freedom of union officials in carrying out functions authorised by the legislature. Functions accepted within our social and legal structures as being in the interests of society and as being well within the bounds of christianity."(13)

(12)Print G0207 [C037CRA] (13)(1962) 100 CAR 424 at 430

The extension of the concept of conscientious objection sought by the applicants would diminish the existing rights of the FFTS and the rights of persons employed **by Brethren** members by restricting, if not removing, their right to join a union and by curtailing the rights and functions of their union, diminishing the range of benefits to be derived from trade union membership. In my view, it would be inappropriate to allow a recognition of conscientious objection beyond that currently recognised in the Act which would have such an effect. The Full Bench of the Clothing Trades Award 1982 appeal in rejecting an appeal by members of **the Brethren** against a decision to refuse exemption from some award provisions requiring contact with and recognition of unions, stated:

"In our view we should not allow the conscientious beliefs of the appellants to diminish the rights of the individual employees and the Union particularly as the main provision in issue, right of entry, has existed for some 40 years. It follows that the Commissioner was right in his decision and the appeal should be dismissed."(14)

The current applications would significantly extend the concept of conscientious objection now in the Act and if accepted would open the way for employers seeking relief from a range of award provisions in a manner which would extend to employers beyond the membership of **the Brethren** and in a manner
which would conflict with the objects of the Act.

Effect of the continuation of right of entry on the applicants' businesses

As will be discussed later in this decision, the granting of the variations sought in respect of right of entry cannot remove from the applicants the effect of s.286 of the Act, so that the FFTS would retain a right of entry. Accordingly, this decision will not alter the continuation or otherwise of a right of entry and would not therefore be determinative of any business decisions made by members of **the Brethren** in the context of a continuing right of entry. In making their applications the applicants have taken steps to satisfy their conscience, particularly in the context of their acceptance of the authority of Government and its agencies and their request of the Commission "as a representative of the authority given to govern by God to make a ruling".(15)

Practical problems arising in relation to the beliefs of **the Brethren** members

In my view, the submissions as to practical problems arising in respect of the conscientious beliefs **of Brethren** employers does not justify the removal of award rights sought by the applicants. On the submissions of the applicant the problem in Melbourne was restricted to the attempted exercise on one occasion by an FFTS official of the right of entry which, when refused, has not been further pursued by the union. On the submissions of the applicants, the problem in New South Wales appeared to extend to the behaviour of one FFTS official which created problems for employers including, but not limited to, members of **the Brethren**. That problem was addressed with the assistance of the Registrar of the relevant tribunal and has not subsequently occurred. No problems were raised at all in respect of the Glass Merchants and Glazing Contractors (Victoria) Consolidated Award 1988 or in respect of the preference or termination of employment clauses of the Furnishing Trades Award, 1981. It appears on this past experience that with commonsense, the limited practical

(14)(1962) 100 CAR 424 at 438 (15)transcript, p.5

problems which have arisen out of the conscientious belief **of Brethren** employers were capable of resolution, with or without the assistance of the relevant industrial tribunal, without resort to the broad ranging award variations currently sought by the applicants.

The scope of the applications

A further general consideration arises in the form of the difficulty in establishing the effect of the variations sought, both in relation to which respondent employers it would directly effect and the specific impact on the award provisions in relation to those employers. These issues were not addressed to my satisfaction by the applicants, raising in my mind doubts as to whether such applications applying in a general way to award respondents beyond the immediate applicants should be entertained, although Mr Hornsey did indicate he was prepared to make available a list of relevant employer respondents to the Commission which would, subject to appropriate authority, allow a variation in respect of specific respondents. Given my ultimate conclusions it is not necessary to explore these issues further.

I turn now to consider the specific variations sought.

Right of entry

The first variation sought, ostensibly directed to right of entry, in fact extends far beyond right of entry in its terms and effect, seeking exemption **of Brethren** members "from any of the provisions of this award which require such an employer to make contact with or give access to representatives of trade unions", an effect which was intended by the applicants.(16) Whilst the total effect of the variation of award provisions was not canvassed by the applicants it is clear that it would effect many award provisions beyond right of entry. For example, in relation to the Furnishing Trades Award, 1981 it

would significantly erode the operation and effect on paragraph 6(d)(vii) - Disputes settlement procedures - unfair dismissals and as such significantly diminish the effect of an award clause inserted in the award consistent with a primary purpose of the Act to prevent and settle industrial disputes (as reflected in the objects in s.3(a) and (b)). Effects of the variation sought such as this, together with the failure of the applicants to identify the full effect of the variation lead me to refuse the variation sought in its broadest form.

If the variation were restricted to removing from the FFTS its right of entry it would, if implemented, be inconsistent with the right of entry provided by s.286 of the Act, raising doubts as to the merit of the claim in the context of the Act. More significantly, however, the existence of s.286 creates a situation whereby even if the variation sought was granted in respect to right of entry, the FFTS would retain such a right by virtue of s.286. Hence, the granting of such a variation to the awards would not achieve the objective of the applicants in seeking the variation, even if such an application was justified on merit. In the context of s.286, such a variation would serve no effective purpose.

Further, I am not satisfied that the variation sought, even limited to right of entry, has merit for several reasons:

(16)transcript p.19

. the variation seeks to remove, in respect of some employers, a fundamental right of unions as organisations under the Act and would be inconsistent with those objects of the Act directed at encouraging organisations.

. The importance of the right of entry has long been recognised by the Courts and the Commission and its predecessors. Keely J, in determining the penalty for a breach of the right of entry provision in the Clothing Trades Award 1982 noted:

> "Such a breach of an award of the Conciliation and Arbitration Commission can not be tolerated by this Court, having regard to the public interest in deterring employers from refusing to comply with the clause."(17)

The Clothing Trades Award 1982 appeal Full Bench noted:

> "Then there are the rights of the Union and its officers, including the important right of entry which they have enjoyed for many years and which they justifiably regard as of fundamental importance to the proper performance of their functions."(18)

. Given the central role played by unions, supported by right of entry, in award enforcement, the objective of the variation is inconsistent with object 3(e) of the Act; "to provide for the

observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes".

My experience suggests that unions continue to play a primary role in award enforcement. The important role of unions in award enforcement was recognised by Keely J, in a matter involving a prosecution for the breach of clause 31 of the Clothing Trades Award 1982 - the Right of Entry clause. Keely J stated:

> ". . . cl. 31 is an important provision in the award and the union has an important role to play in ensuring that employers bound by the award comply with its provisions. Clause 31 is intended to assist the union to carry out its role of enforcing compliance with the award."(19)

. In my view the submissions of **the Brethren** misconstrue the role of unions in exercising the right of entry. In performing that role they are acting with legislative authority and in that sense are no differently placed than the Inspectorate or a member of the Commission in exercising the power of inspection, with the applicants willingly accepting such regulation and inspection. There exists an inconsistency in the views of the applicants in

(17)Philopoulos v. Farabram Nominees Pty Ltd (1980) IAS Current Review 275 at 277
(18)(1962) 100 CAR 424 at 438
(19)Philopoulos v. Farabram Nominees Pty Ltd (1980) IAS Current Review 275 at 277

that they accept the authority of the Commission but reject the exercise of rights of organisations when the same Act which establishes the Commission creates and regulates organisations and affords them rights such as the right of entry.

This role of unions, in acting with legislative authority when exercising their right of entry, seems to have been recognised in the past by members of **the Brethren**. In the Clothing Trades Award 1982 appeal the Full Bench noted that the applicants, members of **the Brethren**, did not object to all parts of the right of entry clause, stating:

> "Sub-clause (a) of clause 31 deals with the entry of authorized persons for the purpose of inspecting and gaining access to records. This is not contested by the appellants because, they say, the person authorized under this sub-clause, even if he be a union official, becomes cloaked with governmental power and is translated from a union official to a government official by virtue of the provisions of the sub-clause. He is acting for the government which is an authority recognized by the scriptures."(20)

For those reasons I refuse the application for the first variation, both in its broader form or restricted in its effect to right of entry.

Preference

The variation proposed extends beyond preference seeking that an employer, who is a member of **the Brethren** "shall not be forced to employ or give preference in employment to a member of a trade union". The term "shall not be forced to employ" can be read at two levels. If, at the first level, it seeks to provide employers with a right to discriminate against trade unionists, it is contrary to the object of the Act to encourage organisations and is inconsistent with s.334 of the Act. The Commission cannot negate the protection to unionists provided by s.334 and should not as a matter of merit award such a provision. If, at the second level, the term is read entirely in the context of seeking the non-application of preference the term "shall not be forced to employ" is superfluous. In either case, the variation in the terms sought is refused.

It is then necessary to consider a more limited provision which would exempt employer members of **the Brethren** from the preference clause in the awards. Such an exemption is not necessary to allow those employers to employ members of their own faith in light of the terms of s.122(3) of the Act and the availability to those employees of certificates subject to the requirements of s.267. In practical terms the question then comes down to whether employers of **the Brethren** faith should be exempted from an award provision applying generally to employers respondent to award in respect of the choice in employment between a unionist and a non-unionist, neither of whom are members of **the Brethren** who have obtained a certificate pursuant to s.267 of the Act.

I am not inclined to restrict the operation of a clause which operates generally in the award, consistent with the object of encouraging organisations, on the basis of the applicants submissions in these proceedings for the following reasons:

(20)(1962)100 CAR 424 at 433 and 434

- the evidence and submissions raised no incident where the question of preference has arisen in a practical sense in respect of either the applicant companies or more generally.

- the awarding of an exemption in this case could flow more generally to other employers with a genuine conscientious objection to trade unions - whether religiously based or otherwise. To grant such an exemption on the grounds advanced would extend the concept of conscientious objection beyond that reflected by the Parliament in the current Act to the detriment of the role of unions as organisations under the Act.

Contract of employment - termination

This variation seeks to provide employers belonging to **the Brethren** with "the right to terminate the employment of an employee at any time by reason of matters arising which affect the employer's conscience" subject to payment of at least award entitlements. The applicants seek the insertion of the variation as an additional subclause within the unfair dismissals clause of the Furnishing Trades Award 1981 and as an additional subclause within the contract of employment clause dealing with the notice requirements in the Glass Merchants and Glazing Contractors (Victoria) Consolidated Award 1988. This variation does not appear to bear any relation to **the Brethren**'s objection to contact with trade unions. In neither case does the variation sought go simply to the issue of contact made with trade unions, but rather would have the effect of removing generally available and accepted award rights of employees, both unionists and non-unionists. It would remove from employees of members of **the Brethren** the award right of notice in the case of the Glass Merchants and Glazing Contractors (Victoria) Consolidated Award 1988 and the award right to protection from unfair dismissal in the case of the Furnishing Trades Award, 1981. Such a variation is not supported by the advanced grounds of religious belief advanced by the applicants nor on any other basis in the current proceedings.

In seeking to negate the application of the unfair dismissal provision **to Brethren** employers it would purport to allow dismissal for any reason, including reasons expressly prohibited by s.334 of the Act. Indeed to the extent that the proposed variation bears any relationship to the grounds of religious belief advanced by the applicants it would, as was reflected in the submissions of Mr Hornsey at p.22 of transcript, be directed to **allowing Brethren** employers to dismiss on the grounds of trade union membership, contrary to the provisions of s.334 of the Act. A federal award provision will not be valid if it is inconsistent with a Commonwealth Statute, unless allowed by an express statutory provision to the contrary. Further, the granting of the application on this basis would remove from employees **of Brethren** members their right to join trade unions and their right to enjoy the full benefits of trade union membership including the right to representation by their union.

I refuse the final variation sought.

For the general and specific reasons stated above the applications are dismissed.

Appearances:

D. Hornsey on behalf of CPH Sales and Contracting and Leadlight Originals and intervening on behalf of the Christian Fellowship known as **the Brethren**.

D. Blanksby for the Victorian Glass Merchants Association.

M.J. Mason and S.P. Day for The Australian Chamber of Manufactures and on behalf of the respondent members of the South Australian Employers Federation,

Tasmanian Confederation of Industries and Chamber of Commerce and Industry, South Australia.

R.A. Lowe and I. Ross for The Federated Furnishing Trade Society of Australasia and intervening for the Australian Council of Trade Unions.

Dates and place of hearing:

1992.
Melbourne:
October 6, 26.

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