

31/89

SUPREME COURT OF VICTORIA

FRASER v VITKUS and ANOR**Hampel J****15, 31 May 1989 — [1990] VicRp 12; [1990] VR 125**

PROCEDURE – CIVIL PROCEEDINGS – ARBITRATION – EFFECT OF ARBITRATION ORDER – WHETHER DIFFERENT FROM MAGISTRATES' COURT ORDER – WHETHER SUBJECT TO ORDER TO REVIEW PROCEDURE: MAGISTRATES' COURTS ACT 1971, SS3, 72A-F, 88.

The provisions of Part VIIIA of the *Magistrates' Courts Act 1971* ('Act') do not set up a separate system of arbitration of disputes by a separate tribunal, but provide for a speedier, less formal method of the determination of some disputes. Accordingly, an order made in an arbitration has the same effect as an order of the Magistrates' Court and is subject to the review procedure provided for in Part XI of the Act.

HAMPEL J: [1] The Magistrate sitting at Broadmeadows dismissed a complaint by Francis Thomas Fraser against Randell R Vitkus and TC Stanley with costs. The complainant wished to review this decision and applied to a Master for an Order Nisi. The Master refused to make the order on the basis that the Magistrate's decision was an "award" made under the provisions of Part VIIIA of the *Magistrates' Courts Act 1971* and the review procedure of summary convictions or orders under Part XI of the Act was not available because such an "award" was not an "order" of a Magistrates' Court. The Master was of the view that the only avenue of redress was under the *Administrative Law Act 1978*.

The new Part VIIIA was introduced by s4 of the *Courts (Further Amendment) Act 1986* and came into operation on 6th May 1987. It is as follows: [*His Honour then set out PART VIIIA and continued*] ... [4] Section 88(1) of the *Magistrates' Courts Act* establishes the review process and an "order" is defined in s3 as including an order, adjudication decision grant or refusal of any application and also a determination of whatsoever kind made by a Magistrates' Court.

The unsuccessful complainant now appeals from the Master's refusal to grant the Order Nisi. Mr Paul Collins of counsel who appeared for the appellant submitted that the Part VIIIA arbitration procedure did not exclude the operation of Part XI and that had Parliament intended to remove the right to review it would have said so. He argued that the amendment simply created a new less formal procedure for the determination of some disputes which nevertheless are determined within the civil jurisdiction of the Magistrates' Court and as such attract the review procedure created by s88.

Section 72A(1) prohibits a Magistrates' Court from hearing and determining complaints involving an amount less than \$3000 "unless the complaint has been referred to arbitration in accordance with this Part". Sub-sections (2) and (3) limit the effect of sub-s(1) in the prescribed circumstances and sub-s(4) enables the complaint to be heard in a court in the prescribed circumstances once an arbitration is commenced. Sub-section (5) enables the \$3000 limit to be increased by regulations. The conduct of an arbitration is controlled by s72B which by sub-s2(a) enables the magistrate to [5] exercise any powers which a magistrate may exercise in Court.

In my opinion, the effect of those provisions is not to set up a separate system of arbitration of disputes by a separate tribunal, but to provide for a speedier less formal and more efficient way Magistrates may determine some disputes under the umbrella of the civil jurisdiction of the Court. Once the dispute has been so determined it has the effect as if it were a judgment of the Court. That provision in s72E, when read together with the words of s72A(1), namely that the Court "must not hear" such a complaint "unless" it has been referred to arbitration, combine to emphasize that the arbitration system created under this part is but a method of dealing with such complaints which, when determined, have the same effect as an order of the Magistrates' Court. It is significant that Part VIIIA, by s72F, excludes the operation of the *Commercial Arbitration*

Act 1984 with the appeal and review procedures there provided by s38 but does not exclude the review procedure provided for in Part XI of the *Magistrates' Courts Act*.

Section 88 which provides for orders to review is wide and obviously intended to encompass every kind of determination within the jurisdiction of the Magistrates' Court. The introduction of the additional procedure in Part VIIIA is not, in my view, a basis for attributing to the legislature of an intention to oust the broad right of review which exists in the same Act in the absence of clear statement to that effect. **[6]** In my opinion the appeal should be allowed. To avoid further expense, I am prepared to grant the order nisi to review on the grounds which have been submitted.

APPEARANCES: For the appellant Fraser: Mr P Collins, counsel. Secomb McDonald Smith Jones & Kennedy, solicitors. No appearance by either defendant.
