CASE NOTE*

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION V AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION: THE AIRC AND THE EXERCISE OF PRIVATE ARBITRAL POWER

I INTRODUCTION

The joint judgment of the Full Bench of the High Court of Australia in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* ('*CFMEU*')[1] determines the powers and role of the Australian Industrial Relations Commission ('the Commission') in arbitrating and mediating certain industrial disputes. The case discusses the operation of a Certified Agreement under the *Industrial Relations Act 1988* (Cth) ('*IR Act*') and its successor, the *Workplace Relations Act 1996* ('*WR Act*'). In particular, the High Court clarifies the powers that the Commission exercises when acting as an arbitrator under a Certified Agreement created pursuant to the *IR Act*.

Although the decision re-establishes a broad role for the Commission in workplace dispute resolution, it simultaneously alters its significance in an increasingly de-centralised wage system.

II THE FACTS OF THE CASE

The case concerned a Certified Agreement ('the Agreement') made in 1996 (before the operation of the *WR Act*) between the Construction, Forestry, Mining and Energy Union ('the Union') and Gordonstone Coal Management Pty Ltd ('Gordonstone'). Importantly, cl 22 of the Agreement stated that the Commission could determine disputes between the Union and Gordonstone and that both would be bound by any decision or mediation of the Commission.[2]

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1 (2001) 75 ALJR 670.

2 Specifically, cl 22 stated that:

> (a) In the event of a dispute where resolution cannot be achieved without the assistance of the [Commission], the parties will exchange positions prior to any hearing taking place.

When the Union referred a wide-ranging industrial dispute at Gordonstone mine to the Commission in 1997, Gordonstone claimed that s 89A of the *WR Act* (which restricts the Commission's power to arbitrate to certain 'allowable award matters') limited the Commission's ability to mediate the dispute. Both parties agreed that the dispute included several matters beyond the Commission's powers as set out in s 89A. However, the Full Bench of the Commission decided, amongst other things, that s 89A of the *WR Act* did *not* restrict the Commission's powers under the Agreement.[3] Gordonstone appealed on constitutional grounds to the High Court of Australia, which remitted the case to the Full Bench of the Federal Court. The Federal Court found for Gordonstone in March 1999, and issued a prohibition order to the effect that the Commission could not act in the dispute except as allowed for by s 89A of the *WR Act*.[4] The Union then appealed to the High Court.

III THE DECISION OF THE HIGH COURT

All seven Justices of the High Court stated in a joint judgment that the Agreement was validly certified, that cl 22 was valid, and that s 89A of the *WR Act* did not restrict the power of the Commission to resolve the dispute. The critical finding made by the Court in relation to the role of the Commission was that, when exercising its powers under cl 22 of the Agreement, the Commission exercises a power of *private arbitration*, which is neither a judicial power nor an arbitral power under the *WR Act*.

The case turned on the interpretation of two key provisions: s 170MH of the *IR Act* and s 89A of the *WR Act*. Section 170MH of the *IR Act* allows '[p]rocedures in an agreement for settling and preventing disputes [to] ... empower the Commission to do either or both of the following: to settle disputes over the application of [a certified] agreement [and/or] to appoint a board of reference'. Significantly, dispute settlement procedures are required in an agreement before certification by the Commission, pursuant to s 170MA(1)(c) of the *IR Act*.[5] Section 170MH was repealed by the *Workplace Relations and Other*

(b) The parties to this Agreement agree to abide by any decision determined by the [Commission] which relates to a dispute at Gordonstone mine.

(c) Where it is agreed by the parties to resolve the matter with a mediator of the [Commission], both parties agree to abide by the recommendations of the chairman.

3 *Construction, Forestry, Mining and Energy Union v Gordonstone Coal Management Pty Ltd* (1997) 75 IR 249.

4 *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* (1999) 93 FCR 153; for the subsequent decision relating to the costs order see *Gordonstone Coal Management Pty Ltd v Australian Industrial Relations Commission* [1999] FCA 797 (Unreported, Black CJ, Heerey and Goldberg JJ, 18 June 1999).

5 This requirement for the inclusion in agreements of procedures for preventing and settling disputes is now in the *Workplace Relations Act 1996* (Cth) ss 170LT(1), (8).

Legislation Amendment Act 1996 (Cth), but was retained for the purposes of Certified Agreements made under the *IR Act*.[6]

Section 89A(2) of the *WR Act* purports to limit the Commission's jurisdiction to 'allowable award matters' when exercising its functions under the *WR Act*. Importantly, s 89A(1) states that these 'restricted' functions are arbitration, making awards and orders to settle or prevent disputes, and varying an award or order to maintain a settled industrial dispute.

Gordonstone argued that s 170MH (and hence its continuing application) was invalid on the grounds that it exceeded the constitutional power of the Federal Parliament (by potentially granting judicial powers to a non-Chapter III court) and that s 89A effectively limits the powers of the Commission to arbitrate any dispute.[7]

The High Court found, on the contrary, that s 170MH was in fact constitutional as it authorised the Commission in this case to exercise a power of private arbitration, not a judicial power. The separation of powers issue did not arise as the Court clearly stated that, although the section may be invalid to the extent that it authorises the Commission to exercise a judicial power, the section can validly authorise the Commission's exercise of private arbitral power.[8]

Furthermore, the Court held that s 89A had no application to the Commission's private arbitration power in the dispute in *CFMEU* since, by definition, there was no industrial dispute for the purposes of the *WR Act*, as the dispute at the Gordonstone mine was not an 'inter-State' dispute and there was no application by the parties for the varying of an award or order. These findings meant that none of the circumstances outlined in ss 89A(1)(a), (b) or (c) were present, and therefore the restrictions in s 89A(2) did not apply.

IV THE DISTINCTION BETWEEN ARBITRAL, PRIVATE ARBITRAL AND JUDICIAL POWER

The Court created an interesting taxonomy of powers that may be exercised by the Commission in the settlement of disputes. There is the traditional and

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6 The empowerment of the Commission to settle the application of agreements or appoint a board of reference is now effected in substantially the same terms by the *Workplace Relations Act 1996* (Cth) s 170LW.

7 Gordonstone also contended that the Agreement was invalidly certified in 1996 as there was no industrial dispute or industrial situation at the time. This argument was based on the requirement of s 170MA of the *IR Act* that there be an industrial dispute or an industrial situation existing in order to enliven the Commission's power. This legislative restriction on the Commission's power is a direct result of the constitutional limits on Commonwealth power in the area of industrial relations in s 51(xxxv) of the *Australian Constitution*: the Commonwealth's power only arises in cases of 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. The High Court found that it was open to the Full Bench of the Commission and the Full Bench of the Federal Court to declare the Agreement valid as an industrial situation did in fact exist at the time of certification. The Court relied on three pieces of evidence to support its conclusion: an affidavit by Gordonstone in 1996 in support of the certification of the Agreement, a dispute notification made by Gordonstone in 1995 and a further dispute notification made by the Union in 1996.

8 *CFMEU* (2001) 75 ALJR 670, 677.

(relatively) clear distinction drawn between arbitral and judicial power and then there is the novel distinction drawn by the Court between 'arbitral power' and 'private arbitral power'.

In the context of the case, the Court defined judicial power as 'making a binding determination as to legal rights and liabilities arising under an award or agreement'.[9] Judicial power is 'exercised independently of the consent of the person against whom the proceedings are brought',[10] and results in an order that 'is binding of its own force'.[11]

The Court did not expressly define arbitral power. However, the Court did define private arbitration as a determination that is 'not binding on its own force':[12] its enforcement 'depends on the law which operates with respect to it'.[13] So a private determination of rights is neither final nor determinative, perhaps because it can be 'appealed' and the jurisdiction of the arbitrator can be questioned. In some ways, this appears similar to forms of collateral attack on a judicial decision.

It is interesting that the Court in *CFMEU* states clearly its notion of judicial power but remains silent on the nature of arbitral power. In *R v Gough; Ex parte Meat and Allied Trades Federation of Australia* ('*Gough*'),[14] which dealt with the Conciliation and Arbitration Commission's exercise of arbitration powers in an unfair dismissal claim and which is referred to by the Court in *CFMEU*, the High Court considered closely the meaning of both powers. In *Gough*, Barwick CJ thought that an arbitral power settled a dispute by the making of an award, which may contain new rights other than those that existed before the dispute, while 'it is the ascertainment and enforcement of existing rights [that is] classically at the very heart of the exercise of judicial power'.[15] Similarly, Menzies J found that a 'non-arbitral decision' had been made in *Gough* because it related to the enforcement of existing rights, although he did not feel compelled to decide that the decision was judicial in nature.[16]

In some ways the arbitral-private arbitral split is similar to the distinction between private arbitration and industrial arbitration discussed by Heerey J in *National Union of Workers v Pacific Dunlop Tyres Pty Ltd* ('*NUW*').[17] In that case, which was concerned with the unfair dismissal of an employee, Heerey J explained that private arbitration means agreed decision-making by an independent party pursuant to an arbitration agreement, while industrial arbitration refers to a statutory procedure in which a creature of statute, the Commission, determines the dispute between the parties. Typically therefore, the Commission engages in industrial arbitration.

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9 Ibid 676.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 (1969) 122 CLR 237, 243.
15 Ibid 241.
16 Ibid 243.
17 (1992) 37 FCR 419, 424.

Interestingly, in both *NUW* and a later case that applied the decision, *Horsman v Commissioner of Main Roads*,[18] the Federal Court held that the Commissioner in each case was not acting as a private arbitrator but was in fact acting as a Commissioner. However, both cases turned on the fact that there were no express terms establishing a private arbitration.

V LIMITS ON THE ARBITRAL POWERS OF THE COMMISSION

It has long been recognised that the Commission balances precariously between the exercise of arbitral power, judicial power and 'award-making' power. This tension is created by the strict requirements of the separation of powers doctrine in the federal sphere which has meant that the Commission, like its predecessor the Conciliation and Arbitration Commission, has never been allowed to exercise a judicial function. Recent legislative reforms by the Federal Government, part of a fundamental change in the Australian labour market designed to achieve a more decentralised wage determination system, have further accentuated these tensions.

A Constitutional Limits

The federal separation of powers means that the Commission cannot exercise judicial power as such power is reserved for Chapter III courts alone. In practice then, the Commission cannot arbitrate, or 'create', an award that contains a dispute resolution procedure that allows the Commission to finally determine the rights of the parties. This would involve the Commission in using its arbitral power to grant itself a judicial power, which would clearly be unconstitutional.[19] The separation of powers is highlighted by the fact that the Commission creates awards while only the Federal Court can enforce awards and Certified Agreements.[20]

B Legislative Limits

In *CFMEU*, the Court stated that s 89A does not limit the arbitral power exercisable by the Commission.[21] Rather, the Court implicitly suggested that s 89A(1) only limits the circumstances in which the Commission's 'restricted' arbitral power can be exercised.

Typically, s 89A is viewed as the Federal Government's means of restricting the role of the Commission in workplace relations: by limiting the definition of 'industrial dispute' to the allowable award matters of s 89A(2), the *WR Act* limits the jurisdiction of the Commission. Creighton and Stewart contend that the most

18 (1999) 89 IR 343.

19 See *CFMEU* (2001) 75 ALJR 670, 676. The Court refers to *Gough* (1969) 122 CLR 237 and *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 625.

20 *Workplace Relations Act 1996* (Cth) ss 178-9.

21 *CFMEU* (2001) 75 ALJR 670, 677.

obvious omissions in the allowable award matters are provisions relating to consultation on workplace change and redundancy, unfair dismissal and workplace safety, omissions that the writers characterise as a 'reaffirmation of managerial prerogative'.[22] Section 89A(1) then clarifies these restrictions on the Commission by stating exactly when this definition of 'industrial dispute' is to apply. Yet it is interesting to observe that, while the form of ss 89A(1)(a)-(c) was intended to allow the Commission to continue to exercise an unrestricted *conciliation* role (as noted by Creighton and Stewart),[23] the effect of s 89A(1) in *CFMEU* has been to lift the legislature's significant restrictions on the Commission in the area of *private arbitration* of single disputes.[24]

VI COMMENTS AND ISSUES

It is important to understand the significance of the Court's discussion of a power of private arbitration in the context of workplace relations. While the notion of private arbitration has long been part of industrial negotiation and settlement, the suggestion that the Commission exercises its role under Certified Agreements in accordance with such a power, a characterisation which avoids otherwise significant restrictions on its operation, is novel.

The Court offers no judicial support for employing a power of private arbitration and the general law to justify the Commission's ongoing role in the dispute at issue in *CFMEU*.[25] The statements in the joint judgment to the effect that the general law provides a solution[26] do not seem to consider sufficiently the implications of the decision, although it appears this issue was not pressed by the parties.

Given the Court's orders in *CFMEU*, the matter now returns to Commissioner Hodder who originally heard the matter in March 1997 and who must exercise the powers of a private arbitrator in determining the dispute. Yet the general law is far from clear in determining how the matter would proceed. Fundamental questions of contract arise: Is the agreement valid? Was there an intention to create legal relations? Can the union bind its members apart from the operation of the *WR Act*? Are damages payable for a breach of the agreement's dispute resolution procedures? It is arguable that a private arbitration agreement could be enforceable under s 178 of the *WR Act*, however this still requires some form of agreement to be found and for the courts to require compliance with the arbitration clause. It also suggests the possible application of (albeit statutory) penalty provisions in the enforcement of a 'general law' agreement. The real

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22 Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (3rd ed, 2000) [6.32].

23 Ibid [6.33].

24 It is also interesting to add that this decision reduces the significance of the Commission's s 170MX powers. Section 170MX was designed as the sole repository of the Commission's unrestricted arbitration power, though its use is restricted to a carefully contrived procedure. A further significance of the Court's decision in *CFMEU* may therefore be to reduce the peculiarity of an arbitration under s 170MX.

25 See *CFMEU* (2001) 75 ALJR 670, 676-7.

26 Ibid.

question is whether such a private agreement, based in the general law, is properly characterised as a commercial arbitration agreement. This final question raises the possibility that the parties to such an agreement may be bound by the (State-based) commercial arbitration statutes, in this case the *Commercial Arbitration Act 1990* (Qld). This then raises the difficult conundrum of the application of State law to an agreement initially created in a federal statutory system and administered by a federal statutory body.

In addition to the interesting permutations of the general law, the deeper, more fundamental, issue in *CFMEU* is the very notion of private arbitral power. The Court emphasised the distinction between an *arbitrated* and an *agreed* dispute settlement procedure. Essentially, this is the difference between the parties deciding that the Commission will mediate any future dispute and the Commission requiring the parties to provide that the Commission will mediate any such dispute. The effect of the Court's use of the power of private arbitration is that the Commission is able to perform a function it might otherwise be denied. To describe the Commission's role as 'judicial' breaches the separation of powers doctrine; however, to describe that same role, albeit with less 'finality', as the Commission exercising a private arbitral power does not breach the doctrine and allows the matter in question to proceed. The parties' agreement allows the Commission to make a determination *because* it implies that any such determination is not final.

Even more important than the constitutional implications of the private arbitral power is the hint that it may also provide an escape from the strictures of s 89A. It could be suggested that the general agreement the Court points to as a basis for the Commission's role authorises the Commission to exercise a wide-ranging power to decide and settle disputes. The Court's reasoning suggests such an arrangement does not fall foul of constitutional restrictions, but it may also avoid s 89A as well. The real question, left unanswered by the Court, is whether the reinvigorated notion of a power of private arbitration is indeed caught by s 89A.

Ostensibly, the Court answered this question by distinguishing s 89A(1) on the grounds that the dispute in *CFMEU* was not an inter-State dispute and no order or award was to be varied. The difficulty with the Court's narrow focus on the lack of an inter-State dispute in order to deny the application of s 89A is that it is in direct contrast with the Court's earlier reliance on the industrial dispute to consider the Agreement as certified.[27] Implicitly, the Court has concluded that there is sufficient 'inter-Stateness' to ground the dispute that led to the original agreement in federal law, but that the particular and individual disputes that occur under that agreement, if presented for private arbitration to the Commission, are not inter-State in nature – unless perhaps the particular dispute occurs at a number of sites in several States.

Interestingly, the Court did not distinguish the relevance of s 89A(1)(a) on the ground that the matter is not an arbitration. It is arguable that s 89A(1)(a) is not applicable as the term 'arbitration' in that section may be different from the

27 See above n 7.

Court's concept of 'private arbitration', or even the notion of 'arbitration' referred to by Heerey J as industrial (workplace?) arbitration. Also, ss 89A(1)(b) and (c) would not be applicable either as the Commission, acting in its private arbitration capacity, would not 'make an order or award' for the purposes of the *WR Act*, nor would it vary an award or order. This suggests that s 89A, in addition to not applying to conciliation by the Commission, may also not apply to private arbitration conducted by the Commission.

Finally, if the Commission, in its private arbitral role, is bound by the general law, in particular by the State commercial arbitration statutes, the Commission may be characterised as no more than another provider of professional dispute settlement services in the steadily maturing market for the provision of such services. What, then, is the reason for choosing the Commission as a service provider? Cost and experience are two strong reasons, however there is no 'statutory' advantage. The Commission will simply be exercising its power under the arbitration agreement, as its empowerment under ss 170MH and 170LW is limited by the High Court in *CFMEU* to a private arbitral power. This may mean that the 'private arbitral' notion results in another reduction in the special role of the Commission in Australian workplace relations. Interestingly, this would be consistent with the Federal Government's continued efforts to create a more decentralised wage determination system.

VII CONCLUSIONS: THE SIGNIFICANCE OF THE DECISION FOR WORKPLACE RELATIONS GENERALLY

It is interesting to consider the wider implications of this decision beyond any remaining Certified Agreements created under the *IR Act*. The significance of the Court's decision in *CFMEU* is that the Commission is still empowered to create dispute resolution procedures by arbitration under s 89A(2)(p) of the *WR Act*. This means that in any arbitrated award or dispute settlement, the Commission remains bound not to create a right to arbitrate further disputes. However, if the parties create a Certified Agreement or even an Australian Workplace Agreement, then the Commission may be able to exercise a private arbitral power.

But from this situation flows two different courses. One would allow the Commission to again exercise wide 'arbitral powers', albeit in the context of private arbitration. This course would re-introduce the Commission to its strong position in workplace relations in Australia and relax to some extent the restrictive life it leads under s 89A and s 170MX. The other course would encourage parties to engage other organisations or bodies in dispute resolution procedures in the future, by suggesting that the Commission is equivalent to any other dispute resolution body or individual when dealing with industrial disputes under Agreements, and that it carries no particular statutory significance or power when it engages in such a role. One advantage the Commission does have over other private sector services is that it costs less than other options. In some ways, however, it is questionable whether the state, through the Commission, has

any legitimate role at all in providing tax-payer subsidised services to what is essentially a private sector market for the provision of dispute settlement services.

This decision by the High Court may encourage and intensify the trend already present in workplace relations in Australia to take more and more aspects of the wage determination process outside of the procedures created by regulation by fostering the notion that the Commission is one choice amongst many in the settlement of workplace disputes.