



CONVERSATIONS ON CURRENT ISSUES IN THE PRACTICE OF EMPLOYMENT AND INDUSTRIAL LAW

HOSTED BY THE HON JUSTICE BROMBERG

AVAILABILITY OF JUDICIAL REVIEW ARISING FROM DISPUTE SETTLEMENT PROCEDURES IN
INDUSTRIAL INSTRUMENTS

JOINT PRESENTATION BY
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AND INGMAR TAYLOR SC, GREENWAY CHAMBERS

FEDERAL COURT OF AUSTRALIA, SYDNEY
THURSDAY, 25 OCTOBER 2018

THE ISSUE

- Modern Awards & EAs must have a dispute settlements procedure: s.146 & 186(6) FW Act. Employment contracts and public service determination *may* have such procedures
- The Fair Work Commission may exercise a power of arbitration conferred on it by a dispute settlement procedure: s.739 FW Act
- If the FWC exercises that power erroneously, is there a capacity to seek judicial review?

SECTION 739 OF THE FAIR WORK ACT

Disputes dealt with by the FWC

- (1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
- (2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under [subsection 65\(5\)](#) or 76(4), unless:
 - (a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or
 - (b) a determination under the [Public Service Act 1999](#) authorises the FWC to deal with the matter.

Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as [subsection 65\(5\)](#) or 76(4) (see also [subsection 55\(5\)](#)).

SECTION 739 OF THE FAIR WORK ACT (CONT.)

- (3) In dealing with a dispute, the FWC **must not exercise any powers limited by the term.**
- (4) If, in accordance with the term, the parties have agreed that **the FWC may arbitrate (however described) the dispute, the FWC may do so.**
Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see [subsection 595\(2\)](#)).
- (5) Despite [subsection \(4\)](#), the FWC **must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.**
- (6) The FWC may deal with a dispute only on application by a party to the dispute.

NOT OPEN TO JUDICIAL REVIEW

- Even if the decision of the FWC is wrong in law or based on erroneous findings of fact, the decision is not open to challenge:
 - *CFMEU v AIRC* (2001) 203 CLR 645 (the Private Arbitration Case)
 - *Linfox Australia Pty Ltd v TWU* [2013] FCA 659; (2013) 213 FCR 479
 - *AMWU v ALS Industrial Australia Pty Ltd* [2015] 235 FCAFC 123; (2015) 235 FCR 305
 - *Endeavour Energy v CEPU* [2016] FCAFC 82; (2016) 244 FCR 178



CAPACITY TO SEEK ALTERNATIVE RELIEF

- Before any dispute is notified
- After a dispute has been arbitrated:
 - *Energy Australia Yallourn Pty Ltd v AMWU* [2018] FCAFC 146

WHAT MAY BE CHALLENGED IN THE FEDERAL COURT?

- Where the basic and fundamental requirements for an arbitration are missing (i.e there is no power to arbitrate; there is no dispute notified)
- A failure to comply with the terms or procedure delineated in the dispute settlements clause: s. 739(3)
- A substantial failure of natural justice – a failure to conduct a hearing in a manner required by s.577 (“fair and just”)
- A decision that is inconsistent with the FW Act or a fair work instrument - s739(5)?

QUESTIONS

- Is the analogy to private arbitration appropriate given it is an 'agreement' that is binding on those who were not parties to it?
 - *CFMEU v AIRC* (2001) 203 CLR 645 (the Private Arbitration Case)
 - *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393
- Is it inconsistent with rights that exist in commercial arbitration:
 - ss.34 & 34A of the *Commercial Arbitration Act 2010* (NSW)
 - S. 8 of the *International Arbitration Act, 1974* (Cth)

SOLUTIONS?

- A Declaration from the Court as an alternative to activating a dispute?
- Don't include arbitration provisions for FWC in Awards or EAs?
- Alternatively, include them but limit their scope: eg restrict the subject matters over which the FWC may arbitrate?