

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.170LW application for settlement of dispute

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

and

Telstra Corporation
(C2003/2130)

Telecommunications services

VICE PRESIDENT LAWLER

SYDNEY, 2 JULY 2003

Source and nature of procedural and interlocutory powers exercised by the Commission when arbitrating disputes under dispute settlement procedure in a certified agreement - distinction between "jurisdiction" and "power" - nature of powers arising from the agreement of the parties - availability of powers in s.111(1) - power to order production of documents - power to make order in the nature of an interlocutory injunction - exercise of powers limited by jurisdictional constraints - jurisdictional constraints include whether dispute is a "dispute over application of agreement", other constraints in the Act and express or implied constraints in the agreement of the parties.

INTERLOCUTORY DECISION

[1] This matter raises important questions about the source and nature of the procedural and interlocutory powers exercised by the Commission when dealing with a dispute referred under a dispute settlement procedure in a certified agreement where the Commission has approved that procedure empowering the Commission to settle the disputes over the application of the agreement, such approval having been given at the time of certification pursuant to s.170LW of the *Workplace Relations Act 1996* ("**the Act**") or one of its predecessors including, relevantly for the present purposes, s.134H of the *Industrial Relations Act 1988* ("**the 1988 Act**").

[2] On 28 April 2003 the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("**the CEPU**") notified a dispute between it and Telstra Corporation ("**Telstra**"). The notification was made under "clause 17 and 17.2 of the Telstra Redundancy Agreement 2002, a certified agreement." At the outset Telstra indicated that it challenged the jurisdiction of the Commission to deal with the dispute but consented to a conciliation proceeding on a 'without prejudice' basis. Conciliation occurred but did not resolve the dispute.

[3] The substance of the dispute notified by the CEPU was described in the dispute notification as follows:

“the matter in dispute relates to Telstra Corporation making six Customer Field Workforce positions redundant in the Newcastle Field Service Area. The union objects as:

- *it does not agree that the redundancies are bona-fide.*
- *Telstra has failed to provide the union with information that it has requested to be able to determine whether the six redundant positions are bona-fide redundancies.*

...”

The notice goes on to assert the CEPU’s belief that Telstra was in the process of notifying staff selected for termination and outlined the steps under the dispute settling procedure in the Telstra Redundancy Agreement 2002 that had been taken.

[4] The CEPU, pursuant to directions, submitted draft orders which it proposed to seek. Those draft orders were as follows:

DRAFT INTERIM ORDERS

1. *That the Commission has jurisdiction pursuant to s170LW of the Act and clause 17.2(a) of the Telstra Redundancy Agreement 2002 (the Agreement) to make a final and binding determination of any dispute between the parties concerning the application of the those clauses of the Agreement set out in clause 17(2)(a) thereto.*
2. *That Telstra take no further steps pursuant to the Agreement or otherwise to terminate the employment of those employees named in schedule A to this order until the hearing and determination of the matters in dispute under 17.2(a) of the Agreement or until further order of the Commission.*
3. *That Telstra provide to the CEPU by (date) all information and all documents:*
 - i. *on which it relied in determining that any of the employees in schedule A to this order were redundant;*
 - ii. *disclosing any steps taken by Telstra to seek to avoid the proposed retrenchment of the employees named in schedule A to this order;*
4. *That the dispute between the parties as to the application of the Agreement be set down for hearing pursuant to clause 17(2)(a) of the Agreement on (date).*

DRAFT FINAL ORDERS

1. *That the employees named in schedule A to this order are not redundant for the purposes of clause 3 of the Agreement;*
2. *That Telstra take no steps, pursuant to the Agreement or otherwise, to terminate the employment of the employees named in schedule A to this order.*

[5] The CEPU did not press for the making of interim orders at the time the matters covered by this decision were argued. Instead, this decision is concerned only with whether there is jurisdiction to entertain the application and whether there is power in the Commission to make interim orders of the type sought by the CEPU. Specifically, there are four distinct issues raised for determination in this decision:

- (1) Whether the dispute notified by the CEPU is a “dispute over the application of the [Telstra Redundancy Agreement 2002]” within the meaning of s.134H of the 1988 Act (a predecessor of s.170LW of the Act) and thus whether the Commission has jurisdiction to deal with the dispute.

Then, assuming that the Commission does have jurisdiction to deal with the dispute:

- (2) Whether clause 17.2 of the Telstra Redundancy Agreement 2002 confers a power of arbitration on the Commission in relation to the present dispute.
- (3) Whether the Commission, in dealing with the dispute, has power to make an interim or interlocutory direction or order requiring Telstra to produce documents relating to the issues raised by the dispute.
- (4) Whether the Commission, in dealing with the dispute, has power to make an interim or interlocutory direction or order restraining Telstra from proceeding with the proposed terminations pending the resolution of the dispute.

[6] It was common ground between the parties that the dispute settlement procedure in the AOTC Redundancy Agreement has been approved pursuant to s.134H of the 1988 Act. Section 134H, a predecessor of s.170LW of the Act, is in the following terms:

s.134H Procedures in an agreement for preventing and settling further disputes between employers and employees covered by the agreement may, if the Commission so approves, empower the Commission to do either or both of the following:

- (a) to settle disputes over the application of the agreement;*
- (b) to appoint a board of reference as described in section 131 for the purpose of settling such disputes.*

Section 170LW of the Act is in substantially identical terms to s.134H of the 1988 Act and the previous s.170MH of the Act.

[7] The Telstra Redundancy Agreement 2002 came into existence as a consent consolidation and variation by Commissioner Smith on 29 August 2002¹ of an agreement known as the AOTC Redundancy Agreement 1993. The AOTC Redundancy Agreement 1993 has a long and complicated history which is usefully recounted by Marshall J in *Telstra Corporation Limited v MacBean*². The AOTC Redundancy Agreement was certified by the Commission on 27 April 1993 pursuant to the provisions of Division 3A of the Industrial Relations Act 1988 (**the 1988 Act**). The *Industrial Relations Reform Act 1993* (“**the Reform Act**”), which came into effect on 30 March 1994, replaced Division 3A of Part VI with new provisions governing the certification of agreements in Divisions 2 and 3 of Part VIB of the 1988 Act. Section 35(2)(b) of the Reform Act provides as follows:

(2) *Despite the repeal of Division 3A of Part VI of the principle Act:*

...

(b) *An agreement certified under that division and in force immediately before the commencement day has effect as if the Principle Act had not been amended by this Act but may be extended under section 170MI of the Amended Act;*

[8] The Full Court in *Telstra v MacBean* held that the effect of s.35(2)(b) of the Reform Act preserves the application to agreements coming into force before 30 March 1994 of the whole statutory regime embodied in the IR Act as in force immediately before 30 March 1994 as far as that regime was applicable to those certified agreements³. With the exception of recent amendments to s.111, there are no material differences between provisions in the 1998 relevant to the determination of the issues in this matter and the equivalent provisions as they appear in the Act currently. Accordingly, the analysis in this decision will generally refer to the relevant provisions as they appear in the Act currently.

[9] Before proceeding to consider the issues identified in paragraph [5] above, it is useful to set out several clauses of the Telstra Redundancy Agreement 2002:

A. *Arising out of a decision in PR921659 and order in PR921685 issued on 29 August 2002 this agreement consolidates the AOTC Redundancy Agreement 1993 [AG765839] as varied by deleting all clauses therein and inserting the following.*

...

2. *AGREED PRINCIPLES*

2.1. *The parties agree that the following principles reflect their shared objectives in entering into this Agreement:*

- (a) *where redundancies occur, processes for separation are fair, and based on respect for the individual;*
- (b) *whilst recognising that long term job security cannot be guaranteed, providing access to job opportunities for redundant employees both within Telstra and in the industry generally is the objective;*
- (c) *Telstra retains the discretion in the selection of employees for redundancy and retrenchment.*

3. *DEFINITION OF REDUNDANCY*

3.1. *Where the job of an employee covered by this Agreement is redundant and Telstra has decided to retrench the employee, this Agreement will operate and the processes under this Agreement must be followed. The applicable process will be based on the facts of the situation.*

3.2. *Redundancies may arise where:*

- (a) *for operational, economic, technological, or structural reasons, the requirement for employees of Telstra to carry out work of a particular kind*

has ceased or has been significantly reduced and no other commensurate role is available; or

(b) Telstra has determined that the function being undertaken by the employee will no longer be undertaken within Telstra or at that location within Telstra and reasonable relocation opportunities are not available.

3.3. An entitlement to the retrenchment entitlements set out in clause 9 of this Agreement will only arise where and when an employee whose job is redundant is retrenched by Telstra.

...

5. INDIVIDUAL RETRENCHMENT

...

Consultation

5.2. Subject to clause 5.1 (b), the union notified about the proposed retrenchment in accordance with clause 5.1 (a) will be given an opportunity to consult with Telstra on:

(a) measures to avert the proposed retrenchment; and

(b) measures to mitigate the adverse effects of the proposed retrenchment.

5.3. Any consultation around these issues will conclude 2 weeks after the notification under clause 5.1 (a) has been given.

...

6. REDUCTION OF STAFF NUMBERS IN A GROUP

...

Consultation

6.2. The union notified about the proposed retrenchments in accordance with clause 6.1 will be given an opportunity to consult with Telstra on:

(a) measures to avert the proposed retrenchment/s; and

(b) measures to mitigate the adverse effects of the proposed retrenchment/s.

6.3. Any consultation around these issues will conclude 2 weeks after the notification under clause 6.1 has been given.

...

17. DISPUTE SETTLEMENT PROCEDURE

17.1. *If any matter arising as to the application of this Agreement is in dispute it will be dealt with as follows:*

...

- (e) *If the matter is still not resolved, referral, by the General Manager Human Resources of the Business Unit (or nominated representative), the employee/employees affected or a senior national representative of the relevant union, to the Australian Industrial Relations Commission in accordance with clause 17.2. Any dispute not within the scope of clause 17.2 can not be referred to the Australian Industrial Relations Commission.*

17.2. *A dispute referred to the Australian Industrial Relations Commission will be referred for:*

- (a) *in the case of a dispute over the application of any of the following clauses, conciliation/determination:*

Scope and Application - Clause 1

Definition of Redundancy - Clause 3

Requirement to Work - Clause 4

Individual Retrenchment - Clause 5

Reduction of Staff from a Group - Clauses 6.1, 6.2, 6.3, 6.6, 6.7, 6.8, 6.9

Site Function Closures - Clauses 7.3, 7.4 and 7.5

Retrenchment Entitlements - Clause 9

Long Service Leave - Clause 10

Superannuation - Clause 11

Continuous Service - Clauses 12 and 13; and

- (b) *in the case of a dispute over the application of any of the following clauses, conciliation:*

Agreed Principles - Clause 2

Telstra Jobs Program - Clause 8

Assessment, Ranking and Selection - Clauses 6.4, 6.5

Voluntary Retrenchment Option - Clauses 6.10, 6.11, 6.12, 6.13

Site Function Closures - Clauses 7.1 and 7.2

Leave - Clause 14

Redeployment and Salary Maintenance - Clause 15 Appeal Process - Clause 16.

17.3. *While any dispute is in the process of being resolved, work will continue without interruption in any manner whatsoever and any process under this Agreement shall continue without interruption.*

17.4. *Should any case of retrenchment become the subject of dispute, subject to it having been processed in accordance with the Agreement, there is no obligation on management to stay the retrenchment.*

(emphasis added)

CHARACTERISATION OF THE DISPUTE: IS THERE IS A “DISPUTE OVER THE APPLICATION OF THE AGREEMENT”

[10] It is well established within the Commission that a dispute settling clause in a certified agreement can only empower the Commission to deal with “disputes over the application of the agreement”.⁴ That is, the Commission has no *jurisdiction* arising from a dispute settlement procedure in a certified agreement to conciliate or arbitrate a dispute pursuant to such a clause unless the dispute can properly be characterised as a “dispute over the application of the agreement”.

[11] A number of full bench decisions have canvassed or adverted to the scope of the expression “disputes over the application of the agreement” in s.170LW and its predecessors. The meaning of that expression was first considered by a full bench of the Commission in *Re Automated Meter Reading Services (AMRS)*⁵. The majority concluded:⁶

“It is not necessary in this case to express a concluded view about the construction of the expression as it appears in section 170LW. For present purposes, it is sufficient to accept that the expression can be construed by analogy to cover a similar, albeit perhaps narrower, range of matters to those that were accepted as coming within the expression ‘dispute or claim arising out of the operation of the Award’. That and similar expressions in industrial instruments have been judicially construed to require a relationship between the dispute and the provisions of the award itself.”

Adopting this approach the majority referred to the classic statement of principle for determining whether a dispute or claim is one ‘rising out of the operation of the Award’ and concluded:⁷

“A relationship between the provisions of the relevant agreement and the subject matters in dispute would appear to be an essential element in the identification of any dispute over the application of the agreement”

[12] In *Shop, Distributive and Allied Employees Association v Big W Discount Department Stores*⁸ (“**Big W**”), in considering the scope of the “matter” subject to a referral under s.170LW stated:⁹

“Although the referral of a dispute over the application of the agreement is narrower than the referral considered in Heyman v Darwins, what comprises a dispute over the application of the agreement should not be narrowly construed; to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement.”

[13] Whatever else the expression “disputes over the application of the agreement” in s.170LW of the Act and its predecessors may denote, in my opinion it must certainly include:

- (i) disputes over *whether* the agreement applies in particular circumstances; and
- (ii) disputes over *how* the agreement applies in particular circumstances.

Disputes in each of those classes are within the ordinary meaning of the words in the expression “disputes over the application of the agreement”.

[14] Telstra submitted that in the present case there could be no “dispute over the application of the Agreement” within the meaning of s.134H in relation to the question of whether an employee was in truth redundant. It submitted that by virtue of cl. 3.1 the Telstra Redundancy Agreement 2002 “operates” only after an “employee ... is redundant” and “Telstra has decided to retrench the employee.” It argued that the redundancy occurred prior to the operation of the Agreement and therefore a dispute as to whether or not there was in truth a redundancy could not be a dispute over the “application of the Agreement”. Telstra also relied upon the history of the agreement including, in particular, the form of the AOTC Redundancy Agreement 1993 following variations by order of MacBean SDP of 22 October 1997. Exhibit Telstra 3 contains a copy of the AOTC Redundancy Agreement 1993 in its form following those variations. Telstra placed particular reliance upon cl. 1.5 of that agreement which provides:

“Nothing in this Agreement shall be taken to infer that the unions have given up any rights in respect of consultation/negotiation concerning staffing and structures. Accordingly, it is agreed between the parties that all existing staffing arrangements shall continue to be adhered to.”

Telstra relied upon the non-reproduction of cl. 1.5, or any analogue of that clause, when the Telstra Redundancy Agreement 2002 was made in substitution for the AOTC Redundancy Agreement 1993. Telstra argued that the omission of cl. 1.5 or an analogue must be taken to be intentional and indicated that the union was to have no role in relation to decisions that particular employees were redundant.

[15] Whether the dispute as notified is a “dispute over the application of the agreement” within the meaning of s.134H of the 1998 Act is a matter that turns on the proper construction of cl. 17.2 and cl. 3.1 of the Telstra Redundancy Agreement 2002. The task of construing an agreement involves a search for the intention of the parties objectively determined. In the first instance that intention is to be discerned from the words of the agreement given their ordinary meaning. Where the words of the agreement are ambiguous resort may be had to extrinsic evidence to resolve such ambiguity. Evidence of the subjective intentions of the parties is not admissible (or disregarded) for the purposes of construction.¹⁰

[16] Pursuant to cl. 17.2(a) the Commission has jurisdiction for “conciliation/determination” in respect of “a dispute over the application of any of the following clauses: ... Definition of Redundancy - Clause 3.1”. This is a clear and unambiguous conferral of power to settle disputes “over the application” of cl. 3.1.

[17] Clause 3.1 provides that the Agreement “will operate and the processes under this Agreement must be followed” where “the job of an employee covered by this Agreement is redundant **and** Telstra has decided to retrench the employee.” In my opinion it is unambiguously clear on the plain words of cl. 3.1 that the Agreement will operate, that is, apply, in a given situation only where both:

- (i) a job of an employee covered by (the) Agreement **is redundant**; and
- (ii) Telstra has decided to retrench the employee.

[18] In other words, a decision by Telstra to retrench an employee is not a sufficient condition for the operation (i.e. application) of the Agreement in a given situation. It is also a necessary condition to the operation (i.e. application) of the Agreement in a given situation that the “job of an employee is redundant”. Where the job of an employee identified for

retrenchment purportedly under the Agreement is not in truth redundant a necessary condition for the operation (i.e. application) of the Agreement is absent. It follows that a dispute over whether the job of an employee is in truth redundant is a dispute over *whether* the agreement applies in relation to the decision to retrench a particular employee or group of employees and is thus “a dispute over the application of ... definition of redundancy - cl. 3” within the meaning of cl. 17.2(a). In my opinion it matters not that the dispute is not a dispute over the application of particular processes provided for in the Agreement. It is sufficient where, as here, the dispute is a dispute over whether the agreement as a whole has any operation in the particular circumstances.

[19] In my opinion, the meaning of clause 17.2(a) in conjunction with clause 3.1 is clear and unambiguous on the plain words of those clauses and there is no warrant to resort to the history of the Agreement or other devices to determine the proper construction of these clauses.

[20] For these reasons, the dispute referred to the Commission by the CEPU is a dispute over *whether* the Telstra Redundancy Agreement 2002 applies in the particular circumstances and is therefore a “dispute over the application of the agreement” within the meaning of s.134H of the 1998 Act.

DOES CLAUSE 17.2(a) CONFER A POWER OF ARBITRATION ON THE COMMISSION?

[21] A dispute referred to the Commission under cl. 17.2(a) of the Agreement is “referred for ... conciliation/determination”. The CEPU submitted that these words ought be interpreted as conferring a power of arbitration on the Commission. The CEPU relied upon the decision of the Full Commission in *Big W*¹¹ which concerned a dispute settlement procedure that relevantly provided:

*“If the matter remains unresolved either party may refer it, to the Australian Industrial Relations Commission for determination.”*¹²

The Full Bench held that:

*“...in our view the terms of cl. 2.9(j) by which either party may refer a dispute to the Commission ‘for determination’ empowers the Commission to arbitrate.”*¹³

[22] The CEPU also relied upon the distinction between paragraphs (a) and (b) in clause 17.2 of the Agreement. In cl. 17.2(a) the dispute is referred to the Commission for “conciliation/determination” whereas under cl. 17.2(b) the disputes over the clauses nominated in that paragraph are referred to the Commission for “conciliation”. The CEPU also relied upon the following portion of transcript of proceedings before Smith C on Thursday, 22 August 2002 at the time the Telstra Redundancy Agreement 2002 was varied by deleting and substituting clauses 1 - 17 of the *AOTC Redundancy Agreement 1993*:

“Clause 14 is a significant change from the current arrangements and provides the retrenchment processes will not be stayed or extended because of absence from the workplace. Lastly, clause 17 is the dispute settlement procedure which maintains the present involvement of this honourable Commission in some disputes, that is conciliation and determination, and other levels of involvement for the Commission in other disputes, that is conciliation only.”

[23] Telstra submitted that the decision of the Full Bench in *Telstra Corporation Limited v CPSU*¹⁴ as having determined in relation to the predecessor dispute resolution clause in the Agreement that the reference to “conciliation/determination” did not confer a power of arbitration on the Commission with the consequence that the Commission’s role in relation to the present dispute is limited to conciliation or, at any rate, some role less than a role that involves making determinations binding upon Telstra. Telstra further submits that the fact that the Agreement was subsequently varied with no change to the role of the Commission being that of “conciliation/determination” means that the parties to the present Agreement are presumed to have intended that this prior construction is to continue to operate. The CEPU disputed the premise upon which Telstra’s submissions were based, namely that the Full Bench in *Telstra v CPSU* had held that the reference to “conciliation/determination” meant that the Commission had no power to arbitrate disputes under the dispute settlement procedure in the AOTC Agreement.

[24] The Full Bench in *Telstra v CPSU* dealt with the issue in the following manner¹⁵:

“... the AOTC Agreement ... at clause 17 sets out a dispute settlement procedure. Under clause 17.3 any matter unable to be settled between the parties may be submitted to the Commission for “conciliation/determination.”

The clause does not require that any dispute must be referred to the Commission, it is discretionary as to whether the matter is referred to the Commission. Where one party elects to refer the matter in dispute to the Commission for “conciliation/determination”, the clause makes no mention or provision that if conciliation fails, the “determination” referred to, imposes an obligation by the parties to accept any decision under the clause by the Commission. If it was intended by the parties that the clause imposed an obligation on the parties to accept in advance the outcome of any arbitration, one would have expected a specific reference to be included in the clause.

There was no evidence or material placed before the Commission to establish that the previous conduct of the parties supported the interpretation put by Mr Ramsey. In the absence of such a reference the use of the word “determination” referred to in the agreement leads to a construction that it is arbitration by the Commission conducted within the jurisdictional limits established by the Act. This conclusion is supported by the discretionary nature of 17.3 which provides that a dispute “may” be referred by a party to the Commission. The clause does not preclude any party from making an application under the Act.

*We are satisfied that the dispute settlement procedures in the AOTC Agreement did not provide the Commission with the power to arbitrate on a matter **that was otherwise outside** the jurisdiction of the Commission to determine.”*

(emphasis added)

[25] In considering this passage it is important to appreciate that at the time *Telstra v CPSU* was decided it was thought that any powers exercised by the Commission under dispute resolution procedures authorised by s.170LW and its predecessors were confined by the statutory limitation in s.89A of the Act. Thus, in *Telstra v CPSU* the Full Bench overturned orders made by Blair C at first instance in connection with a dispute referred to the Commission pursuant to cl. 17.3 (the dispute settling provision) in the AOTC Redundancy Agreement 1993. In this regard, the Full Bench concluded¹⁶:

“As we have said earlier the powers under s.111(1)(t) can only be exercised subject to the Act. The orders made by the Commissioner, we have concluded, were an exercise of arbitral power. The orders therefore, are subject to the application of s.89A which sets out that for the purpose of dealing with an industrial dispute by arbitration or by preventing or settling an industrial dispute by making an award or order, an industrial dispute is taken to include only matters covered by s.89A(2) and (3). Accordingly, the exercise of arbitral power under s.111(1)(g) is limited by the provisions of s.89A.”

[26] The decision of the High Court in *CFMEU v AIRC*¹⁷ (“**the Private Arbitration Case**”) has established authoritatively that the power exercised by the Commission under a dispute settlement procedure authorised by s.170LW and its predecessors (that case was concerned with s.170MH of the 1988 Act) in connection with a local dispute¹⁸ is not limited by s.89A and is in the nature of a power of private arbitration.

[27] In my opinion the decision in *Telstra v CPSU* does not stand for the proposition for which Telstra contends and the submissions of Telstra on this aspect of the case must be rejected. It is true that the paragraph commencing “The clause does not require ...”, if read in isolation, appears to support Telstra’s contention. However, the paragraphs that follow suggest the contrary. In my opinion the emphasised portions of the extract of the Full Bench’s decision set out above clearly convey that the Full Bench regarded cl. 17.3 as conferring a power of arbitration (that is a power to make determinations binding upon the parties) but only within the jurisdictional limits set by s.89A (as that provision was then understood to operate). Given that it is now established that those jurisdictional limits do not apply to powers being exercised under a dispute settling provision authorised by s.170LW and its predecessors in connection with a local dispute in New South Wales, the use of the word “determination” cl. 17.2(a) of the Telstra Redundancy Agreement 2002 empowers arbitration by the Commission confined only by the terms of that agreement. This conclusion is consistent with the approach of the Full Bench in *Big W* and is also supported by the distinction in powers conferred by cl. 17.2(a) (“conciliation/determination”) and cl. 17.2(b) (“conciliation”).

[28] It follows that the power conferred on the Commission by cl. 17.2(a) of the Telstra Redundancy Agreement 2002 in relation to the present dispute is a power to settle the disputes under cl. 17.2(a) by arbitration.

SOURCES OF POWER EXERCISED BY THE COMMISSION WHEN DEALING WITH DISPUTES NOTIFIED UNDER DISPUTE SETTLEMENT PROCEDURES APPROVED PURSUANT TO S.170LW AND ITS PREDECESSORS

[29] This matter raises issues relating to the nature and extent of powers exercised by the Commission when dealing with disputes notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors. Before embarking upon a consideration of those issues it is desirable to make some observations about the confusion that can arise from the language used in this area of discourse.

[30] First, in this area the terms “arbitration”, “award” and “arbitrated award” are apt to confuse. When the Commission arbitrates a dispute notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors the Commission is exercising a power of private arbitration.¹⁹ When a private arbitrator makes a final determination this is referred to as the arbitrator’s “award”. When the Commission deals with an industrial dispute under s.104(1) of the Act it typically does so by making an “award” pursuant to the powers in s.111(1)(b) or s.111(1)(e). In each case the Commission is

conducting an “arbitration” which results in an “award”. In the former case the “award” depends upon the consent of the parties embodied in their agreement to submit to arbitration. In the later case the Commission typically undertakes arbitration and makes an award independently of the consent of the parties.

“Jurisdiction” and “Power”

[31] Secondly, and more importantly, is the confusion arising from the concepts of “jurisdiction” and “power” that are sometimes used as if they are interchangeable. There is a distinction between those concepts which is important in the present case. The Commission may only exercise its *powers* when the exercise of those powers is within its *jurisdiction*. Put another way, the Commission’s powers are subject, *inter alia*, to its jurisdictional constraints²⁰. Those constraints may be constitutional²¹ or they may arise from the very statutory provisions which confer the particular power (or, as in this area, facilitate the conferral of power) or from other statutory provisions.

[32] As the High Court in the *Private Arbitration Case* has reminded us, s.89(b) of the Act is a source of *jurisdiction* and authorises the Commission to discharge “such... functions as are conferred on the Commission by this or any other Act.” One of the functions conferred on the Commission by the Act is the consideration, in connection with an application for the certification of an agreement made under Part VIB of the Act, of whether or not to approve (pursuant to the power in s.170LW or one of its predecessors) the dispute settlement procedures in the agreement empowering the Commission to “settle disputes over the application of the agreement”.

[33] It follows that the source of the Commission’s *jurisdiction* when it deals with a dispute notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors is:

(i) Section 89(b) of the Act in combination with an approval pursuant to s.170LW (or its relevant predecessor)

“in conjunction with”²²

(ii) the agreement of the parties that empowers the Commission to settle disputes.

[34] Each of these sources give rise to limitations on the Commission’s *jurisdiction* to exercise *powers* when dealing with a dispute notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors. Respectively, those limitations are:

(i) the limitation in s.170LW that the Commission can only approve dispute settlement procedures in a certified agreement empowering the Commission to settle “disputes over the application of the agreement”; and

(ii) any express or implied limitation arising from the terms of the agreement of the parties.

Other constraints on the Commission’s jurisdiction to exercise power may arise from other provisions of the Act that apply according to their terms (for example, s.89A where the dispute notified under a dispute settlement procedure in a certified agreement is an interstate dispute or a local dispute in Victoria or the Territories: see para [48]ff below).

Possible sources of power

[35] Following the *Private Arbitration Case* it is now well settled that the power exercised by the Commission when it arbitrates a dispute notified under a dispute settling procedure in a certified agreement (previously approved under s.170LW or one of its predecessors) is a power of private arbitration²³ conferred on the Commission by the agreement of the parties in circumstances where s.89(b) of the Act “authorises the Commission to exercise those functions that it derives from [s.170LW and its predecessors]”,²⁴.

[36] In the *Private Arbitration Case* the High Court noted that²⁵:

“In the case of private arbitration ... the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract”

That, of course, was a statement about private arbitration generally and ought not necessarily be seen as determining that the powers of the Commission when dealing with a dispute notified in relation to a dispute settlement procedure in a certified agreement are limited to the powers conferred expressly or by implication in the agreement.

[37] Obviously, the agreement of the parties (including such terms as may be supplied by the general law) is the primary source of power that may be exercised by the Commission (subject to jurisdictional constraints) when it is dealing with a dispute notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors. However, it seems to me that there are other possible sources of power, namely:

- (i) Section 170LW of the Act (or its relevant predecessor);
- (ii) The *Commercial Arbitration Act* of the relevant State and Territory; and/or
- (iii) Section s.111 of the Act.

It is convenient to first deal with these additional possible sources of power.

Are s.170LW and its predecessors an independent source of power?

[38] Whether s.170LW and its predecessors are an independent source of power in the Commission when it deals with a dispute notified under a dispute settlement procedure in a certified agreement where those procedures were approved pursuant to s.170LW or one of its predecessors is a question on which there are conflicting authorities.

[39] In *Re Qantas Airways Limited Enterprise Agreement III*²⁶ a full bench of the Commission was concerned with an appeal against a “determination” by Bacon C under a dispute settlement clause in an enterprise agreement. The dispute related to whether, under the terms of the relevant agreement, a particular individual was entitled to preference in relation to particular vacancy. The “determination” by the Commissioner, expressed to be pursuant to the dispute settlement clause in the agreement, required Qantas to give preference to the employee in relation to the vacancy. It also declared that “for each day that Qantas does not employ Mr Humphreys, it is in breach of this determination...”. The Full Bench upheld an argument that the Commissioner’s determination was invalid on the basis that it involved a purported exercise of judicial power in that the Commissioner’s “determination was an adjudication of a dispute about rights and obligations arising solely from the operation of the

agreement on past events”²⁷. This conclusion, and the reasoning that supports it, are open to doubt in light of the subsequent decision of the High Court in the *Private Arbitration Case* (see para [48]ff below).

[40] However, arguments were also advanced over the nature of the Commissions power under s.170MH (now s.170LW). As is apparent in the following extract, the Full Bench noted the existence of conflicting streams of full bench authority on the issue but determined that it was unnecessary to determine the relevant grounds of appeal or resolve the conflict in the authorities²⁸:

“THE NATURE OF THE COMMISSION'S POWER UNDER S.170MH

We were taken to a number of decisions in which the nature of the Commission's power under s.170MH has been the subject of examination and comment. There is significant support in those decisions for the view that when the Commission acts to resolve a dispute about the operation of an agreement pursuant to s.170MH (now s.170LW) it is exercising a power conferred by s.170MH and the dispute settlement provision made under it: Construction, Forestry, Mining and Energy Union v Gordonstone Coal Management Pty Ltd (1977) 75 IR 249 at 260; Re British Aerospace Australia Ltd (Australian Centre for Remote Sensing) Certified Agreement 1995 [Print Q1215] and Re Sunshine Sugar Certified Agreement 1997 [Print P9636] and see also Re Higher Education General and Salary Staff (Interim) Award 1989 [Print Q0702 at p. 49]. This view is well summarized in the following passage from the judgement of Justice Munro in British Aerospace :

"[I]f the Commission has any power or jurisdiction to exercise in relation to such matters, jurisdiction derives from the power quite expressly conferred on the Commission under section 170LW" [para. 8]

A contrary view was expressed by Full Benches of the Commission in Re Australian Broadcasting Corporation Journalists and Reporters (Salaries) Award 1990 (the ABC Journalists Case) (Print M3463 at p.6) and Re NationalPak Australia Limited Padstow Enterprise Agreement 1994 [Print N2211 at p. 3]. The Full Bench in the ABC Journalists Case put it this way:

"It is apparent from the excerpts from the Commissioner's decision referred to above that he considered that he was conducting the proceeding on the basis of the dispute having been referred to the Commission pursuant to clause 8.9 of the Agreement. The order, however, purports to be made `pursuant to [s.170MH]' of the Act.

S.170MH does not confer any power upon the Commission other than the power to approve or refuse to approve the content of certain types of clauses in certified agreements. Such agreements must contain provisions setting out procedures for preventing and settling disputes between the parties to the agreements. That, as stated earlier, is a precondition for certification.

There is, however, no provision in the Act which requires, either generally or as a precondition to certification, that the dispute settling procedures must provide for any, or any specific, role to be played by the Commission at any stage during the conduct of such procedures. All that s.170MH provides is that such dispute settling procedures may include a role for the Commission and, if they do so , the

Commission, when considering certification or approval, is empowered to consider the appropriateness of the role allocated to it by the agreement.

Of itself, therefore, s.170MH does not empower the Commission to make any orders in relation to the resolution of any disputes and in so far as the Commissioner purported to make an order `pursuant to section [170MH]', he was not empowered to do so." [3463 at p. 6]

The resolution of the conflict between these approaches is important. If s. 170MH is not an independent repository of power, then it may be necessary to look elsewhere for a source of power to make decisions or determinations pursuant to dispute settlement procedures.

The next issue concerns the nature of the power which the Commission exercises in determining a dispute brought to it for resolution under a dispute settlement procedure approved pursuant to s.170MH. It has been accepted in a number of cases that a determination made pursuant to a dispute settlement procedure has no independent statutory force and failure to comply with it is actionable, if at all, only as a breach of the award or agreement and not as a breach of the determination as such: see NationalPak at p.4, Higher Education at p.51. We were urged by Mr Buchanan to reject this approach on the basis that the Commission can only act by exercising statutory powers. These powers are, relevantly, to be found in s.111(1)(e). Because the Commissioner purported to act pursuant to s.170MH his determination is a nullity.

Given our earlier conclusion that the Commissioner's determination is invalid because it involves the purported use of judicial power, there is no need to rule on Mr Buchanan's submissions. As was acknowledged in argument, there are three Full Bench decisions which adopt a view of the operation of s.170MH which Qantas submits we should not follow. We do not think it is desirable to embark on a review of those decisions when the case has already been disposed of on another ground. "

Thus, the Full Bench identified conflicting strands of authority in relation the power conferred by s.170MH (now s.170LW); observed that the resolution of that conflict was an important matter and determined that it was unnecessary to resolve that conflict because of its conclusions in relation to judicial power. It would appear that the conflict of approach flagged by the Full Bench in *Re Qantas Airways Limited Enterprise Agreement III* has not been addressed and resolved at an appellate level. The present case raises this issue left unresolved by the Full Bench in *Re Qantas Airways Limited Enterprise Agreement III*.

[41] For myself, I am inclined to prefer the reasoning of the Full Bench in the *ABC Journalists Case*. On the plain meaning of the words of s.170LW (and its predecessors) the power conferred by that section is nothing more nor less than a power of approval: "if the Commission so approves", "procedures in a certified agreement for preventing and settling disputes ... may empower the commission to ... settle disputes over the application of the agreement." : it is the dispute settlement procedures in the agreement that "empower" the Commission to settle that class of disputes. Thus, in the *Private Arbitration Case* the High Court said²⁹:

"To the extent that s 170MH of the IR Act operates in conjunction with an agreed dispute resolution procedure to authorise the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement, it merely authorises the Commission to exercise a power of private arbitration."

The view I prefer has also been adopted by a subsequent Full Bench in *ASU v Australian Taxation Office*³⁰, albeit without reference to *Re Qantas Airways Limited Enterprise Agreement III* and the fact of the conflicting authorities referred to in that decision.

[42] Having said this, in my opinion the two approaches do not lead to different results in terms of the extent of power exercised by the Commission when it is dealing with “disputes over the application of the agreement” pursuant to procedures in a certified agreement for preventing and settling disputes. This is because to the extent that s.170LW or its predecessors may be an independent source power, there is nothing in the words of s.170LW to suggest that such power could, in content, extend beyond the power conferred by the agreement of the parties. In either case the Commission lacks power to enforce its own orders or determinations in connection with such a dispute.

[43] This view is consistent with the statement by Munro J in *British Aerospace* that, in relation to such matters, “jurisdiction derives from the power quite expressly conferred on the Commission under section 170LW”.³¹ That statement in relation to *jurisdiction* is also accurate and is a pre-echo of the language of the High Court in the *Private Arbitration Case* at para [8].

Power under the Commercial Arbitration Acts

[44] The Commercial Arbitration Acts of each of the States and Territories contain equivalent provisions and constitute a uniform national code. They confirm and supplement the powers of private arbitrators under the general law and also deal with matters that were beyond the power of a private arbitrator³² and thereby enhance the practicability and efficacy of private arbitrations. The Commercial Arbitration Acts apply to “arbitration agreements” which are defined broadly in s.4(1):

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

"arbitration agreement" means an agreement in writing to refer present or future disputes to arbitration.

...

Subject to an issue as to whether the industrial context and purpose of dispute settlement procedures in a certified agreement constitute “subject matter” that “otherwise indicates or requires”, a dispute settlement procedure in a certified agreement which confers a power of arbitration on the Commission falls within this definition. After all, the High Court has held that such procedures confer a power of private arbitration³³.

[45] Given my conclusion as to the availability of powers in s.111(1) of the Act it is unnecessary to consider that matter further. That conclusion, if correct, raises issues of the possible application of s.109 of the Constitution in relation to provisions in the Commercial Arbitration Acts in so far as it may otherwise be applicable. If my conclusion as to the availability of powers in s.111(1) is not correct then the provisions of the Commercial Arbitration Acts may well apply to disputes arbitrated by the Commission under dispute settlement procedures in a certified agreement.

Powers under Section 111(1)

[46] While the power exercised by the Commission under a dispute settlement procedure in a certified agreement is a power of private arbitration it is not necessarily a power of private arbitration pure and simple. The Commission is a creature of statute and invested with statutory powers. Again, it is important to note that s.89(b) of the Act “authorises the Commission to exercise those functions that it derives from [s.170LW and its predecessors]”³⁴

[47] The present case raises the issue of whether in dealing with a dispute notified under a dispute settlement procedure in a certified agreement and approved under s.170LW or one of its predecessors, the Commission may exercise the powers in s.111(1) - at least the procedural or interlocutory directions or orders.

[48] It should not be thought that, putting aside s.170LW and its predecessors, the decision in the *Private Arbitration Case* stands for the proposition that none of the provisions of the Act relating to the powers of the Commission can have any operation in relation to an arbitration under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors. The *Private Arbitration Case* was concerned with whether the restriction on power in s.89A was applicable to the powers exercised by the Commission under a dispute settlement procedure in a certified agreement (being powers derived from an approval under the then s.170MH - a predecessor of s.170LW) in connection with a local dispute as distinct from an “industrial dispute” as defined in s.4 of the Act which relevantly incorporates the requirement of an interstate element. The High Court dealt with the issue as follows³⁵:

“It was held by the Full Court of the Federal Court that the Commission's powers which derive from s 170MH of the IR Act are confined by s 89A of the WR Act because of the “arbitral character” of those powers (Gordonstone Coal Management (1999) 93 FCR 153 at 164 [43]). For present purposes, it may be accepted that those powers are arbitral in character. Even so, s 89A is not concerned to limit powers which are arbitral in character. Rather, it is concerned to limit the matters which, although the subject of an industrial dispute, may be the subject of arbitration or of an award or order, including the variation of an award or order. It does so by providing that, for specific purposes, an industrial dispute is taken to include only allowable award matters.

As earlier noted, the purposes specified in s 89A(1) are:

- “(a) dealing with an industrial dispute by arbitration;*
- (b) preventing or settling an industrial dispute by making an award or order;*
- (c) maintaining the settlement of an industrial dispute by varying an award or order.”*

*And as also earlier noted, “industrial dispute” is a defined term which incorporates the need for an **interstate** element.*

*The disputes with which the Commission is now asked to concern itself are disputes over the application of the Agreement. Because the Agreement applies only at the Gordonstone mine, they are, necessarily, **local disputes** to which pars (a) and (b) of s 89A(1) can have no application. Similarly par (c) has no application because the Commission is not being asked to vary an award or order.*

Section 89(b) of the WR Act authorises the Commission to exercise those functions under cl 22 of the Agreement which the Commission derives from s 170MH of the IR Act. Section 89A does not limit the powers which may be exercised by the Commission

in discharging those functions. Accordingly, the Full Court of the Federal Court erred in issuing prohibition.”

(emphasis added)

[49] It is apparent from the emphasised passages that the non-application of s.89A on the facts in the *Private Arbitration Case* was a consequence of the *local disputes* arising under the certified agreement in that case not falling within paragraphs (a), (b) or (c) of s.89A because those paragraphs only apply to “industrial disputes” - a defined term which incorporates the need for an interstate element. It is implicit in the analysis of the High Court that a different conclusion would have been reached if the dispute in that case had come within paragraphs (a), (b) or (c) of s.89A.³⁶ Support for this approach may be gleaned from paragraphs [59]ff of *Maritime Union of Australia v Australian Plant Services Pty Ltd.*³⁷ It follows that the *Private Arbitration Case* in fact supports the proposition that the provisions of the Act relating to the powers of the Commission are, subject to their terms and to questions of jurisdiction, applicable to an arbitration under a dispute settlement procedure in a certified agreement authorised by s.170LW or one of its predecessors.³⁸

[50] I turn to consider on the terms of s.111 of the Act, the powers in s.111(1) are available when the Commission is dealing with a dispute notified under a dispute settlement procedure in a certified agreement which was approved under s.170LW or one of its predecessors.

[51] Bearing in mind that in the present case the Commission is concerned with the Act as it existed immediately prior to the commencement of the Reform Act, at that time s.111 commenced with s.111(1) opened with the words:

(1) Subject to this Act, the Commission may, in relation to an industrial dispute:

A list of particular powers followed in paragraphs (a) to (t) of sub-s 111(1). Subsection 111(2) provided:

(2) Unless the context otherwise requires, a reference in this section to an industrial dispute includes a reference to any other proceeding before the Commission.

There were no material changes to sub-s (1) and (2) of s.111 in the period to 12 May 2003. On 12 May 2003 s.111 was amended to include new sub-sections 111(1A) and s.111(1B) in the following terms:

(1A) Subject to this Act, the Commission may do any of the things mentioned in subsection (1) in relation to an industrial dispute arising under this Act.

(1B) Subject to the Registration and Accountability of Organisations Schedule, the Commission may do any of the things mentioned in subsection (1) in relation to an industrial dispute arising under that Schedule.

The opening words of s.111(1) were varied to read:

(1) The Commission may:

The list of particular powers in paragraphs (a) to (t) of sub-s 111(1) remain unchanged. Section 111(2) now provides:

(2) Unless the context otherwise requires, a reference in this section (except subsection (IAA)) to an industrial dispute includes a reference to any other proceeding before the Commission (whether under this Act, the Registration and Accountability of Organisations Schedule or otherwise).

[52] The issue is whether, on the terms of s.111 as it existed immediately prior to the commencement of the Reform Act, s.111(2) gave an operation to s.111(1) that extended to disputes dealt with by the Commission pursuant to a dispute settlement procedure in a certified agreement approved under s.134H of the 1988 Act.

“Proceeding”

[53] In my opinion there can be little doubt that the phrase “any other proceeding before the Commission” in s.111(2) has at all material times included the arbitration by the Commission of a dispute under a dispute settlement procedure in a certified agreement authorised by s.170LW or one of its predecessors.

[54] The meaning of the word “proceeding” was usefully summarised by the Full Bench in *Uink v Department of Social Security*³⁹:

“The word ‘proceeding’ has been held to be a term of wide application. In The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association (1906) 4 CLR 488 the High Court considered a case stated by the President of the Commonwealth Court of Conciliation and Arbitration under s.31 of the Conciliation and Arbitration Act 1904 (Cth). Section 31(2) provided:

“The President may, if he thinks fit, in any proceeding before the Court, at any stage and upon such terms as he thinks fit, state a case in writing for the opinion of the High Court upon any question arising in the proceeding which in his opinion is a question of law.”

A preliminary question arose as to whether the matter referred had arisen in a ‘proceeding before the Court’. Griffith CJ (with whom Barton and O’Connor JJ agreed) said, at 493-494:

“... it is objected that it is not a question arising in a proceeding before the Court, and that the President has therefore no power to state a case with respect to it, and that this Court has no jurisdiction to hear such a case ...

The term ‘proceeding’ is a term of very wide application. In my opinion the term ‘proceeding before the Court’ includes every matter brought before the President in the exercise of the judicial functions conferred on him by the Act.”

In Cheney v Spooner (1928) 41 CLR 532 the High Court considered the meaning of the expression ‘any civil or criminal trial or proceeding’ in s.16 of the Service and Execution of Process Act 1901 (Cth) . In a joint judgment their Honours Isaacs and Gavan Duffy JJ, said at 536-537:

“A ‘proceeding’, used broadly as it is used in sec 16 ... is merely some method permitted by law for moving a Court or judicial officer to some authorized act, or some act of the Court or judicial officer.”

In the course of his judgement Starke J said, at 538-539:

"A civil proceeding, I apprehend, includes any application by a suitor to a Court in its civil jurisdiction for its intervention or action." "

Of course, the Commission is not a Court but the word "proceeding" is used repeatedly throughout the Act to refer to matters being dealt with by the Commission. In *R v. Coldham; Ex parte BLF* 64 ALR 215, Gibbs CJ, Wilson and Dawson JJ at p. 219 observed that the "[t]he word 'proceedings' has frequently been said to have a wide and general application".

[55] In this context it should be remembered that s.89(b) of the Act authorises the Commission to exercise the functions conferred on it by a dispute settlement procedure in a certified agreement which the Commission derives from s.170LW or one of its predecessors⁴⁰.

[56] In *Alliance Petroleum Australia (NL) v Australian Gas Light Co*⁴¹ Bollen J was concerned with whether a private arbitration was a 'civil proceeding' for the purposes of s.16(2) of the *Service and Execution of Process Act 1901 (Cth)*. That provision imposes as a pre-requisite to a grant of leave to issue an interstate subpoena the requirement that a person should be required to give evidence or produce books or documents "in any civil or criminal trial or proceeding (including any proceeding before a coroner)". After careful analysis his Honour concluded⁴² that an arbitration is a civil proceeding within s.16 of the *Service and Execution of Process Act*. O'Leary J reached a similar conclusion in *TNT Bulkships Ltd v Interstate Construction Pty Ltd*⁴³.

[57] In my opinion there is no reason to limit the meaning of the phrase "proceedings before the Commission" in s.111(2) so as to exclude an arbitration by the Commission under a certified agreement dispute settling procedure approved under s.170LW or one of its predecessors. It is immaterial that the Commission is empowered under the agreement of the parties such that the arbitration occurs 'under' the agreement rather than 'under' the Act because, in any event, the proceeding arises under the Act to the extent that in dealing with the dispute, the Commission is performing a function conferred on it by the Act (s.89(b) and *Private Arbitration Case* at para [39]) being a function derived from an exercise of the power in s.170LW or one of its predecessors. With s.111(2) in its current form the issue is even clearer because the extended operation of s.111 to "any other proceeding before the Commission" occurs whether such proceedings are "under [the] Act, the Registration and Accountability of Organisations Schedule or otherwise". In other words, provided there is a "proceeding before the Commission" s.111 applies as if the references in s.111 to "industrial dispute" includes a reference to that proceeding "unless the context otherwise requires" and it matters not whether the proceeding is "under [the] Act... or otherwise".

"Unless the context otherwise requires"

[58] In the present case the question thus becomes whether the reference to "industrial dispute" in the opening words of s.111(1) and in s.111(t) should be read if it included a reference to "any other proceeding before the Commission (whether under [the] Act... or otherwise)" or whether "the context otherwise requires".

[59] The meaning of the word "context" in the expression "unless the context otherwise requires" s.111(2) is by no means clear. It may refer to the "context" of the particular part of s.111 upon which it is proposed the Commission ought rely in connection with a given

“proceeding before the Commission”. It may refer to the “context” not only in s.111 but also in the other parts of the Act where the exercise of the particular powers in s.111 arises. Finally, it may extend to the “context” of the particular proceeding or the particular class of proceeding before the Commission in which an issue as to the exercise of particular powers in s.111 arises.

[60] In these circumstances it is appropriate to have resort to extrinsic materials including the relevant explanatory memorandum and second reading speech⁴⁴. The relevant explanatory memorandum for s.111(2) states:⁴⁵

“Clause 111: Particular powers of the Commission

...

Under sub-clause (2), the powers available under this clause apply not only in relation to industrial disputes but also to other proceedings before the Commission, except where the Bill otherwise provides. (emphasis added)

The second reading speech is silent on the matter.

[61] The explanatory memorandum supports an interpretation that the word “context” in the phrase “unless the context otherwise requires” in s.111(2) refers to the context of the Act as a whole. This interpretation is supported by the purposive approach mandated by s.15AA of the *Acts Interpretation Act 1901 (Cth)*. In my opinion there is nothing in s.111 or the Act as a whole which would require that s.111(2) does not operate in relation to proceedings before the Commission constituted by the arbitration of a dispute notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors.

[62] Accordingly, in my opinion, the better view is that in relation to an arbitration under a dispute settlement procedure the “context” does not “otherwise require” within the meaning of s.111(2) and the Commission may exercise relevant powers in s.111(1) in connection with an arbitration of the present dispute under cl.17.2(a) of the Telstra Redundancy Agreement 2002.

[63] True it is that there are several powers enumerated in s.111(1) which are meaningless, or wholly inappropriate in the context of the arbitration of a dispute notified under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors. This includes the powers in paragraphs (c), (e), most of (g) and (o). However, this is also the position in relation to applications under, for example, s.127 and s.166A of the Act. It cannot seriously be contended that Parliament did not intend the relevant particular powers in s.111(1) to be available in connection with applications under those provisions. In *CFMEU v Yallourn Energy Pty Ltd*⁴⁶ a full bench of the Commission rejected a submission that the words “unless the context otherwise requires” in s.111(2) operate, in any proceedings pursuant to a notice under s.166A(3), to deny the Commission the powers conferred by s.111(1)(g). The Full Bench concluded:⁴⁷

“... There is nothing, we think, in the Act or in the context that would, in all proceedings pursuant to a s.166A(3) notice, exclude these powers.”

Is there any reason why this should not be so in relation to a private empowering of a tribunal such as the Commission? In my opinion the proper answer to that question is in the negative. The exercise or purported exercise of particular powers that are meaningless or wholly inappropriate in connection with the arbitration of a dispute under a dispute settlement procedure approved under s.170LW or one of its predecessors would necessarily involve error

in the form of an excess of jurisdiction. This is because the extent or ambit of the Commission's *jurisdiction* when dealing with a dispute notified under a dispute settlement clause in a certified agreement, derived as it is from s.89(b) and s.170LW or one of its predecessors, is determined, inter alia, by the agreement of the parties: the Commission has no jurisdiction to exercise any of the powers in s.111(1) unless the exercise of those powers was appropriate and adapted to the settlement of the dispute. Obviously, if the language of the agreement on its proper construction excludes or circumscribes the exercise of particular powers in s.111(1), or the exercise of those powers in a particular fashion, then the *jurisdiction* of the Commission to exercise the powers is circumscribed accordingly.

[64] Finally, it ought be noted that, assuming the correctness of my conclusion as to the operation of s.111(2) in cases of this sort, the availability of powers under s.111(1) when the Commission in dealing with a dispute referred under a dispute resolution procedure in a certified agreement approved under s.170LW or one of its predecessors may properly be seen as arising from the agreement of the parties in any event. In the absence of an indication to the contrary in the agreement, and particularly where the agreement is silent as to the powers that the Commission may exercise in dealing with such disputes, it may be presumed that the parties intended the Commission to have such powers as are conferred on the Commission by the Act that are necessary and appropriate for the resolution of disputes over the application of the agreement. This presumption is analogous to the presumption that operates where legislation confers jurisdiction on an established court or tribunal. In that circumstance it may be presumed that the legislature intended to take the court or tribunal as it finds it, with all its incidents: *Electric Light and Power Supply Corp Ltd v. Electricity Commission of New South Wales*⁴⁸.

The decision in ASU v Australian Taxation Office

[65] In *ASU v Australian Taxation Office*⁴⁹ (“**ATO case**”) a full bench considered whether it had jurisdiction under s.45 of the Act to hear an appeal of a decision of Smith C in connection with a dispute referred to the Commission under a dispute settlement procedure in a certified agreement that had been approved under s.170LW. The Full Bench held that it had no jurisdiction to entertain the appeal because the determination by Commissioner Smith was not an “order” within the meaning of s.45(1)(b) of the Act. I recognise that there is a tension between the reasoning adopted by the Full Bench in reaching that conclusion and the conclusion I have reached in relation to the operation of s.111. Moreover, in the *ATO Case* the Full Bench stated⁵⁰:

The power to settle disputes over the application of the agreement itself, and the extent of that power, if it exists at all, is to be found in the certified agreement and not in s.170LW.

On one view, this *obiter* statement suggests that the agreement of the parties is the sole source of power in the Commission when it is dealing with a dispute notified under a dispute settlement procedure in a certified agreement, a position contrary to the conclusion I have reached.

[66] In the circumstances it is appropriate to consider the *ATO Case* at some length. The ASU had submitted that “the decision of Commissioner Smith had the characteristics of an order; it binds the parties to it, it determines rights of those parties and it disposes of the proceedings in a final manner”. The Full Bench dealt with this submission as follows:

“[7] ... The ASU called in aid of this submission the decision of the Full Bench of the Commission in *Wright v Australian Customs Services (Wright)*. In that case the Full Bench had to consider whether a certificate issued under s 170CE (4) of the WR Act was an order for the purposes for s 45 (1)(b). The Full Bench stated:

*We agree with the observation of the Full Bench in *Meat and Allied Trades Federation of Australia v The Australasian Meat Industry Employees Union and Others* that what constitutes an "order" as that word might appear in the legislation "will doubtless vary and will depend upon the specific context in which it appears and the nature and function of the body empowered to make the order". However, what, in our view, is abundantly clear from these decisions is that a decision of a member of the Commission that effectively disposes of the proceedings before the Commission (at least in a final manner) is properly to be described as an "order" for the purposes of s.45 (1)(b) of the WR Act .*

*We do not agree that Commissioner Smith's decision is binding, determinative of the rights of the parties or otherwise disposes of the proceedings in a final manner. In our view, the Commissioner's decision in this case is in the nature of a declaration. It is not binding of its own force but dependent on the law which operates with respect to it. So much was decided in *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission (Private Arbitration Case)*, wherein it was observed:*

There is ... a significant difference between agreed and arbitrated dispute settlement procedures. As already indicated, the Commission cannot, by arbitrated award, require the parties to submit to binding procedures for the determination of legal rights and liabilities under an award because Ch III of the Constitution commits power to make determinations of that kind exclusively to the courts. However, different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.

Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.

[8] None of the parties before us identified any provision of the WR Act, other than s 170LW, as a law which operates with respect to Commissioner's Smith's decision. ...

[9] As can be seen from its terms s 170LW is silent on the operation and effect of a decision of a member of the Commission in the exercise of powers that the Commission has approved for inclusion in an agreement. The only other provision of note in this context is s 143 of the WR Act. While it provides for a decision or a determination to be constituted as an award if, in the Commission's opinion, it is an order affecting an award, no similar provision is made for a decision or determination that, in the Commission's opinion, is an order affecting a certified agreement.

[10] It is our tentative view the law that operates with respect to the Commissioner's decision is s 178 of the WR Act. As this matter has not been argued before us we do no more than record our tentative view. We have concluded that, consistently with the private arbitration case, the decision of Commissioner Smith is not binding of its own force. It is binding by force of the agreement of the parties to accept it as such.

[11] Commissioner Smith's decision might properly be regarded as determinative of the dispute over the Agreement, but not of the rights of the parties. The fact that one or some of the parties does or do not like the result gives rise to a dispute about the decision and not about the Agreement.

[12] We think that the Full Bench decision in Wright to the effect that a decision that effectively disposes of the proceedings is properly to be described as an order, must be seen in the context the matter with which it was dealing and in the context of the authorities upon which that principle was stated. Of particular note in this regard is the except from the decision of the Full Bench in The Australasian Meat Industry Employees Union and Others v Meat and Allied Trades Federation of Australia 9, in the following terms:

Returning to the IR Act, the Commission is empowered to make orders which clearly require something to be done (s.122 - preference) or which may prevent certain action (s.127 - industrial action in the public sector). Such orders would bind the persons to whom they were directed. The Commission may also make orders disposing of litigation such as an order dismissing an appeal (see Customs Officers Association (1985) 155 CLR 513, at 526 per Mason J) and it is at least arguable that the parties to such proceedings are bound by the order (as to which see Gibbs CJ in Customs Officers Association (1985) 155 CLR 513, at 519). 10

[13] Wright was itself an appeal dealing with summary termination of an application under Part VIA of the WR Act. Thus the reference to a decision that effectively disposes of a proceeding is a reference to a decision or order that disposes of proceedings in the sense that the decision is binding on the parties independently of their agreement or consent. That is not this case.

[14] We are not satisfied that the Commissioner's decision is an order or an award for the purposes of s 45 (1)(b) of the WR Act."

(underline emphasis added)

[67] While the Full Bench in the *ATO Case* characterised Commissioner Smith's decision as being "in the nature of a declaration"⁵¹, nothing would appear to turn on this characterisation. The mere fact that a decision is declaratory in nature does not prevent it amounting to a binding determination as the rights of the parties that, absent the consent of the parties in their agreement to submit disputes to arbitration, would involve an assumption of judicial power: *R v Portus; ex parte Thiess Bros Pty Ltd*⁵². In any event, a declaration is a form of order⁵³.

[68] Consistent with the observation of the High Court in the *Private Arbitration Case* that

"In the case of private arbitration ... the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of

its own force. Rather, its effect, if any, depends on the law which operates with respect to it.”

the Full Bench in the *ATO Case* considered provisions of the Act which might “operate with respect to” Commissioner Smith’s decision. However, the Full Bench did not consider whether his decision was binding as a matter of general law⁵⁴ nor whether s.111(2) extended the operation of s.111(1) to disputes dealt with by the Commission under a dispute settlement procedure in a certified agreement so as to empower the Commission to make a binding order under s.111(1)(b) and for these reasons, in my respectful opinion, the decision of the Full Bench in the *ATO Case* must be treated with some caution.

[69] In concluding that Commissioner Smith's decision was not “binding, determinative of the rights of the parties or otherwise disposes of the proceedings in a final manner” in accordance with the meaning of the term “order” laid down in *Wright* the Full Bench may have misinterpreted the intended meaning of the High Court in the paragraphs [30] and [31] of the judgment in the *Private Arbitration Case*. In my respectful opinion, in those paragraphs the High Court was seeking to demonstrate only that in a private arbitration the arbitrator is not exercising judicial power - notwithstanding that the decision of the arbitrator may be binding on the parties - because the power of the arbitrator to determine the dispute is not “exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force”⁵⁵. Thus, while the final award of a private arbitrator “is not binding [on the parties] of its own force”⁵⁶ in the way that the order of a Court is binding of its own force, that final award (absent reviewable error) is binding on the parties precisely because “the parties have agreed to... accept the decision of [the arbitrator] as binding on them”⁵⁷: that is the very essence of a private arbitration. This binding effect “depends upon the law that operates with respect to it”. This includes the general law of contract and commercial arbitration and, if the decision in the *ATO Case* is correct, the Commercial Arbitration Acts of the several States and Territories.⁵⁸

[70] It follows, the decision in the *ATO Case* turns critically on the conclusion in paragraph [13] that:

“Thus, the reference [in Wright] to a decision that effectively disposes of a proceeding is a reference to a decision or order that disposes of proceedings in the sense that the decision is binding on the parties independently of their agreement or consent.”

With respect to the Full Bench I have difficulty in seeing how this conclusion follows from either the decision in *Wright* or the analysis that precedes that conclusion.

[71] If, as I have found, s.111(2) operates to provide the Commission with power to make orders pursuant to s.111(1) in connection with an arbitration under a dispute settlement procedure in a certified agreement authorised by s.170LW or one of its predecessors then prima facie there is power to make final orders under s.111(1)(b) and not merely procedural or interim orders under s.111(1)(b) or (t). Apart from the gloss added in paragraph [13] of the *ATO Case*, a final order made under s.111(1)(b) would be an “order” within the meaning of s.45(1)(b) as explained by the Full Bench in *Wright*. It is hard to see how the exercise of such a power could amount to an exercise of judicial power and thus something which the Commission cannot do.

[72] In paragraph [31] of the *Private Arbitration Case* the High Court explicitly defines the nature of judicial power as “a power that is exercised independently of the consent of the person against whom the proceedings are brought **and** results in a judgment or order that is

binding of its own force”. While a final determination of a dispute under a dispute settlement procedure in a certified agreement by way of an order under s.111(1)(b) may, on one view, result in an “order that is binding of its own force” it would not involve the power to make that order being “exercised independently of the consent of the person against whom the proceedings are brought”. It is clear from paragraph [30] of the *Private Arbitration Case* that the critical difference between arbitrated dispute settlement procedures (i.e. procedures imposed on the parties without reference to their consent) and agreed dispute settlement procedures (into which class, by definition, the dispute settlement procedures in certified agreements fall). The first sentence of paragraph [31] then makes it clear that it is the agreement of the parties to submit their differences for decision by a third party which determines that the decision maker is not exercising judicial power.

[73] In *Re Dalrymple Bay Coal Terminal Pty Ltd*⁵⁹ a full bench of the Commission noted:

There is not a developed system of stare decisis in this jurisdiction ... However it is clearly desirable for members of the Commission sitting alone to adhere to Full Bench decisions which are relevant to the matter being determined. Such a policy aids consistent decision making which in turn provides the parties to Commission proceedings with greater certainty.

I proceed on the basis that in the absence of compelling reasons a member of the Commission sitting alone ought follow any decision of a full bench of the Commission that has determined an issue that falls for consideration by the single member and that a single member ought be extremely reluctant to determine any issue in a manner contrary to observations of a full bench that are on point notwithstanding that they might properly be classified as *obiter dicta*. In the context of the present case the Full Bench in the *ATO Case* was in no way concerned with the issue of whether s.111(2) extends the operation of s.111(1) to supply procedural and interlocutory powers in connection with the arbitration of disputes under a dispute settlement procedure in a certified agreement authorised by s.170LW or one of its predecessors. That matter was simply not addressed by the Full Bench. Accordingly, I do not regard myself as bound that decision. To the extent that there are obiter in the *ATO Case* contrary to the conclusion I have reached, I respectfully and with reluctance decline to follow those observations.

EXTENT OF THE POWERS AVAILABLE TO THE COMMISSION UNDER THE AGREEMENT AND S.111(1)

[74] In *Re: The National Union of Workers*⁶⁰ Heerey J gave the following summary of private arbitration⁶¹:

“The arbitrator in a private arbitration derives jurisdiction and power from the agreement of the parties. In appearance and practical effect, the process is very like that of litigation. The arbitrator hears evidence and argument, finds facts and applies the law to those facts. In the course of so doing, the arbitrator will rule on disputed questions of law. The result is an award which conclusively establishes the rights of the parties as to the arbitrated dispute, unless and until set aside by a court. Thus an arbitrator may find that A breached his contract with B, and that by reason of that breach B suffered damage in the sum of \$X, with the consequential award that B recovers \$X against A. That award can be enforced through the courts.”

[75] The nature of the substantive powers of private arbitrators was considered by the High Court in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint*

*Venture*⁶², a case in which it was held that a private arbitrator has power to award interest. Stephen J said⁶³:

“The principle ... is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable and the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. ... a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction. As Russell on Arbitration, 19th ed., puts it at p. 356, speaking of an arbitrator's power to award interest up to the date of his award, "it was always considered that he had power to do so, by virtue of his implied authority to follow the ordinary rules of law".
(emphasis added).

Mason J (with whom Murphy J agreed) said⁶⁴:

“The real question, as it seems to me, is whether there is to be implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.

In the United States it is accepted that the parties to an arbitration are free to clothe the arbitrator with such powers as they may deem it proper to confer, provided that they do not violate any rule of law (5 Am. Jur. (2d), p. 539). There it has been held that the parties may authorize the arbitrator to grant equitable relief, even including relief by way of injunction (5 Am. Jur. (2d), p. 620; 70 A.L.R. (2d), p. 1058). I see no reason why the parties cannot authorize an arbitrator to decide whether interest is payable by one party to another, just as they can authorize him to decide whether damages should be awarded. It is to the submission that one looks to find the powers of the arbitrator, though the powers thereby conferred are supplemented by the Arbitration Act and by other relevant statutory provisions.”

[76] In *IBM Australia Ltd v National Distribution Services Ltd*⁶⁵ Kirby P, while recognising the breadth of the powers conferred on the Courts by the Trade Practices Act, nevertheless concluded⁶⁶:

*“The appellant urged that the very width of the relief available under the Trade Practices Act (Cth) was an argument against imputing to the parties the intention to provide all of the relief of the kind afforded to courts by that Act. It is sufficient to answer this argument by saying that the holding in *Government Insurance Office of New South Wales v Atkinson-Leighton* contemplates that the very purpose of a reference to arbitration will frequently be to confer on the arbitrator the powers which be enjoyed, even by statute only, by the court of law of competent jurisdiction that would otherwise hear the case.”*
(emphasis added)

[77] Thus, to the extent that the certified agreement contains express provisions governing the powers of the private arbitrator those provisions take effect according to their terms. To the extent that an agreement containing an arbitration clause is silent on the powers of the arbitrator the law will imply a term that, as between the parties, the arbitrator can exercise all such powers as are necessary to fairly and effectively determine the dispute and provide a

claimant “just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction”.

[78] Turning specifically to the question of procedural and interlocutory powers, it is clear that under the general law a private arbitrator has a discretion as to the procedure to be adopted (subject, of course, to any indication to the contrary in the agreement). In *Esso Australia Resources Ltd v Plowman*⁶⁷ Mason CJ, relying inter alia on the decision of Diplock J (as he then was) in *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd*⁶⁸, summarised the principle as follows⁶⁹

“It is well settled that when parties submit their dispute to a private arbitral tribunal of their own choice, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision⁷⁰. No doubt the conferral of that power upon the tribunal is incidental to the power which it is given to determine the dispute submitted to the tribunal. Section 14 of the Commercial Arbitration Act 1984 (Vict) specifically empowers the arbitrator or umpire to: “conduct proceedings under [the] agreement in such manner as the arbitrator or umpire thinks fit”. That provision replaced earlier statutory provisions, the effect of which was to enable arbitrators to give directions as to procedural matters. However, independently of statute, arbitrators had authority to exercise that power.”

[79] In *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* Diplock J, in the context of a challenge to the procedure adopted by an arbitral appeal board, observed:⁷¹

“The first task of the court is to construe the arbitration agreement - that is to ascertain what procedure the parties have agreed. At this stage of its task the court is not directly concerned with whether the agreement ‘violates any rules of what is so often called natural justice’... Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted. ... But arbitration agreements seldom contain a complete code of procedure, and where there is no expressed written term relating to the point of procedure impugned the court has to ascertain the terms to be implied, which it does from the language the parties have used in their written agreement, the provisions of the [English equivalent of the Commercial Arbitration Acts], the surrounding circumstances, and - particularly in the kind of arbitration which comes before this court - any custom or trade practice which must be taken to be incorporated in their agreement. ...Where an arbitration agreement is silent as to procedure, what attitude should the court adopt in seeking to imply terms? Obviously it does not imply terms which tend or appear to tend to an unjust award; but the court, particularly in commercial arbitrations, does not now, as perhaps once courts did, start on the assumption that the parties, except as otherwise expressly agreed, intended to adopt in its full rigour the procedure which long experience, helped by a natural conservatism, has commended itself as most appropriate to the courts of law themselves. Rather should the courts start with the presumption that, in confiding their disputes, not to the courts of law, but to an arbitral tribunal of their own choice, the parties intended to confer upon that tribunal a discretion as to the procedure it should adopt to arrive at a just decision; and the court will not lightly assume a limitation on that discretion, unless the mode of exercising it tends, or appears to tend, to an unjust result.”

[80] Consistent with these principles, it has long been accepted that, in the absence of a contrary indication in the arbitration agreement, a private arbitrator has power to order or direct discovery and inspection of documents⁷², although the arbitrator has no power to enforce compliance with interlocutory orders or directions (which is a matter for the Court⁷³) other than by adopting default procedures (for example, moving to make an award directly against the defaulting party, debaring a party from relying upon that part of the party's case in respect of which there is a procedural default or moving direct to a final hearing⁷⁴).

[81] English authority suggests that a private arbitrator has no power to grant an injunction. In *Chandris v Isbrandtsen-Moller Co Inc*⁷⁵ Tucker LJ stated⁷⁶:

Although the Law Reform (Miscellaneous Provisions) Act, 1934, does not in terms apply to arbitrations, I think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every right and discretionary remedy given to a court of law can be exercised by him". To that there are, of course, certain well-known exceptions, such as the right to grant an injunction, which stand on a different footing; one of the reasons why an arbitrator cannot give an injunction is, of course, that he has no power to enforce it, but such an objection does not apply to the award of interest.

This supposed exception is incompatible with the broad approach subsequently adopted by the High Court in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* and the NSW Court of Appeal in *IBM Australia Ltd v National Distribution Services Ltd*. Jacobs in *Commercial Arbitration* comments⁷⁷ that "there seems to be no reason in principle why an arbitrator cannot award injunctive relief where this does not constitute an excess of jurisdiction." Nevertheless, the issue awaits a definitive appellate determination in this country. These cases and comments appear directed to the power to grant final injunctive relief. In a practical sense the issue does not arise in the context of private arbitrations because orders made by a private arbitrator are not binding of their own force and the Commercial Arbitration Acts allow the parties to seek (binding) interlocutory orders⁷⁸ which would necessarily include interlocutory injunctions. In the event, it is unnecessary to take the matter further in the present case because I have concluded that the power to make an order in the nature of an interlocutory injunction is available under s.111(1) of the Act.

[82] The general law principles as to the procedural and substantive powers of private arbitrators are subject to various constraints. The most important is that the power of the private arbitrator are subject to the terms of the agreement. Secondly, the agreement of the parties cannot empower an arbitrator to do that which the parties cannot do directly by their agreement. Thus, for example, a private arbitrator has no power to compel the production of documents from a third party and for this reason the Commercial Arbitration Acts of the States contain a provision empowering the Supreme Court to issue subpoenas requiring persons to attend an arbitration and give evidence or produce documents⁷⁹ and a private arbitrator has no power to impose an obligation of confidentiality on witnesses⁸⁰.

[83] In *Maritime Union of Australia v Australian Plant Services Pty Ltd*⁸¹ Lacy SDP considered the question of the orders the Commission may make in the exercise of the powers in settlement of a dispute referred under a dispute settlement clause. His Honour noted⁸²:

"What then of the orders that the Commission may make in the exercise of powers under an agreement in settlement of a dispute over its application. It seems that the scope and nature of the orders that the Commission may make in such circumstances will depend on the agreement of the parties as recorded in their certified agreement.

provided only that it is reasonably incidental to the application of the agreement to which the dispute relates (The Private Arbitration Case, [31]). ... (emphasis added)”

His Honour’s reasoning has been adopted by two subsequent full benches⁸³. I do not read this statement of principle as being inconsistent with the conclusion that the Commission may exercise appropriate powers under s.111(1) when arbitrating disputes under dispute resolution clauses in certified agreements approved under s.170LW or one of its predecessors. For the reasons given above, the jurisdiction of the Commission to exercise those powers “will depend upon the agreement of the parties” and be confined by any express or implied constraints in the agreement.

[84] I turn now to consider the power to make the relevant draft interim orders in the present case.

Draft Interim Order 2 - Order to restrain termination of employees pending arbitration of dispute

[85] The Commission has long exercised a jurisdiction to make interim awards or orders to preserve the status quo pending determination of matters before it. In my opinion there is power under s.111(1)(b) or s.111(1)(t) to make an interlocutory order restraining Telstra from terminating the remaining employees⁸⁴ the subject of the dispute until the dispute is determined. This is an order in the nature of an interlocutory injunction.

[86] Telstra relied upon clause 17.4 of the Telstra Redundancy Agreement 2002 as constraining the Commission’s jurisdiction to issue such an order. That clause provides:

17.4. Should any case of retrenchment become the subject of dispute, subject to it having been processed in accordance with the Agreement, there is no obligation on management to stay the retrenchment.

As noted above, the jurisdiction of the Commission when dealing with a dispute under a dispute settlement procedure in a certified agreement approved under s.170LW or one of its predecessors is limited, inter alia, by the terms of the agreement. Clause 17.4 limits the jurisdiction of the Commission, according to its terms, when the Commission is dealing with a dispute under cl. 17. The issue is whether cl. 17.4 is relevantly applicable to the circumstances of the present dispute. In my opinion the word “retrenchment” in cl. 17.4 must be read in the context of the agreement as a whole and thus ought be read as referring to a retrenchment to which the agreement applies. If the employees in question are not in truth redundant then the agreement does not apply to them and their proposed termination is not a retrenchment within the meaning of cl. 17.4. For this reason, in my opinion, cl. 17.4 does not assist Telstra.

[87] Telstra relied upon the decision of Burchett J in *CFMEU v Gordonstone Coal Management Pty Ltd*⁸⁵, and the authorities usefully collected in that decision, in support of the its contention that the Commission has no jurisdiction to make such an order in the nature of an interlocutory injunction. Most of those authorities relate to the question of whether the Federal Court (or the former Industrial Relations Court) has jurisdiction to issue an injunction to restrain the breach of an agreement or award. That question has been consistently resolved in the negative on the basis that the statutory imposition of penalties for such breaches provided the sole means by which enforcement of awards and agreements was to be secured. However, Draft Interim Order 2 sought by the CEPU does not seek to restrain an alleged breach by Telstra of a provision of the Telstra Redundancy Agreement 2002. It seeks to

preserve the subject matter of the dispute until the Commission has the opportunity to determine whether or not the agreement applies at all to the employees. Accordingly, in my opinion, the authorities relied upon by Telstra are not applicable. While the decision of Wilcox J in *Dunham v Randwick Imaging Pty Ltd*⁸⁶ relates to an application for an interlocutory injunction to restrain the termination of an employee on the basis that such termination would involve a contravention of the Act, that decision turns critically on statutory provisions that are no longer found in the Act.

[88] However, given that the order sought is in the nature of an interlocutory injunction, there is no reason not to require a party applying for such an order to establish the matters that a Court would require a party to establish before granting an interlocutory injunction. Those principles were summarised by Mason ACJ in *Castlemaine Tooheys Ltd v South Australia*⁸⁷:

In order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction.

[89] Moreover, an order in the nature of an injunction ought not be made unless an enforceable⁸⁸ undertaking as to damages is proffered by the Applicant: *National Australia Bank Ltd v Bond Brewing Holdings Ltd*⁸⁹. This is because the legal and policy considerations that underlie the requirement of an undertaking as to damages when a Court issues an interlocutory injunction are equally applicable where the Commission makes an order in the nature of an interlocutory injunction.

Draft Interim Order 3 - Order requiring Telstra to produce documents

[90] In my opinion there is power in the Commission to require Telstra to produce documents relevant to the issue in dispute, namely whether the employees in question are in truth redundant, to the extent that this is required to enable a fair and just determination of the dispute. That power arises from the agreement of the parties in the manner explained above. It also arises from s.111(1)(t). This ought not be taken as an endorsement that it is appropriate in the present case that orders be made *in the terms* of Draft Interim Order 3.

CONCLUSION

[91] In summary, in relation to the present case:

- The dispute notified by the CEPU is a dispute over the application of the agreement within the meaning of s.134H. Specifically the dispute notified by the CEPU involves a dispute over whether the workers the subject of the dispute are in truth redundant and thus whether the occasion for the operation of the Telstra Redundancy Agreement 2002 in relation to those workers has arisen.
- The power conferred on the Commission by clause 17.2 of the Telstra Redundancy Agreement 2002 is a power of private arbitration.
- The Commission does have power (under s.111(1) by virtue of the extended operation given by s.111(2) and under the general law) to direct discovery or otherwise require the production of documents relevant to the issues in dispute.

- The Commission does have power (under s.111(1) by virtue of the extended operation given by s.111(2)) to give a direction or make an interlocutory order preserving the subject matter of dispute until the dispute has been resolved.

[92] In relation to these conclusions as to the power of the Commission it is appropriate to note that it is one thing for the Commission to have a power, it is another thing altogether for it to be appropriate, as a matter of proper discretion, for the power to be exercised in any given circumstance. Where a party seeks to have the Commission exercise a particular power, it is always necessary for a proper case to be made out for the exercise of that power including the exercise of the power in a particular fashion.

BY THE COMMISSION

VICE PRESIDENT

Appearances:

C. M. Howell of Counsel with *P. Pasfield* for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

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¹ AG817967, PR921934

² (2000) 98 IR 10 at p. 16ff

³ *ibid* at [13] per Ryan J; see also Finkelstein J at [71; 103]

⁴ *Qantas Airways Limited v Australian Municipal, Administrative, Clerical and Services Union*, Print T0301, at [24]; the Full Bench of the Commission in *CFMEU v Gordonstone Coal Management Pty Ltd* (1997) 75 IR 249 at p.p. 258-260 (adverted to without disapproval by the full High Court in the *Private Arbitration Case* at [10] and see also [35]).

⁵ Kaufman SDP, Munro J, Cribb C, 3 September 2002, PR922053

⁶ *ibid*, per Munro J and Cribb C at [73]

⁷ *ibid* at [75]

⁸ Watson SDP, Kaufman SDP, Foggo C, 12 November 2002, PR924554

⁹ *ibid* at [23]

¹⁰ See generally *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337

¹¹ Watson SDP, Kaufman SDP, Foggo C, 12 November 2002, PR924554

¹² *ibid* at [12]

¹³ *ibid* at [31]

¹⁴ MacBean SDP, Maher DP, Merriman C, 15 August 1997, Print P3756

¹⁵ *ibid* at p. 9.

¹⁶ *ibid*

¹⁷ (2000) 203 CLR 645

¹⁸ That is, in the context of a New South Wales dispute, a dispute that is not an “interstate dispute”.

¹⁹ *Private Arbitration Case* at [32]

²⁰ In the context of the powers of the Federal Court exercised under s.23 of the Federal Court Act, this distinction between jurisdiction and power was emphasised in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at p. 622 per Deane J (with whom Mason CJ, Wilson and Dawson JJ agreed).

²¹ See for example, [30] of the *Private Arbitration Case*

²² *ibid* at [32]

²³ *ibid*

²⁴ *ibid* at [6]

²⁵ *ibid* at [31]

²⁶ Giudice J, Duncan SDP, Wilks C, 5 March 1999.

²⁷ *ibid* at [44]

²⁸ *ibid* at [45-48]

²⁹ *Private Arbitration Case* at [32]

³⁰ Watson SDP, Lacy SDP, O’Connor C, 23 April 2003, PR930565

³¹ *British Aerospace* at [8]

³² For example, obtaining documents from third parties (ss.17 and 18), the capacity for the parties to obtain enforceable interlocutory orders (s.42), enforcement of the arbitrator’s award (s.33)

³³ *Private Arbitration Case* at [32]

³⁴ *ibid* at [6]

³⁵ *ibid* at [36-39]

³⁶ A similar conclusion is implicit in the reasoning of Lacy SDP in *Maritime Union of Australia v Australian Plant Services Pty Ltd*, Lacy SDP, 3 September 2001, PR908236, at paras [59-60]

³⁷ Lacy SDP, 3 September 2001, PR908236

³⁸ If this analysis is correct it also follows that s.89A limits the matters that can be dealt with under dispute resolution procedures in certified agreements in connection with interstate disputes generally and with local disputes in Victoria and the Territories.

³⁹ Ross VP, Drake SDP, O’Connor C, 7 December 1998, Print Q5905

⁴⁰ *Private Arbitration Case* at [39]

⁴¹ (1982) 44 ALR 124

⁴² *ibid* at p. 136

⁴³ (1985) 44 NTR 15

⁴⁴ Section 15AB of the *Acts Interpretation Act 1901 (Cth)*.

⁴⁵ Industrial Relations Bill 1988 Explanatory Memorandum at p. 35.

⁴⁶ McIntyre VP, Watson SDP, Hoffman C, 12 January 2001, PR900132

⁴⁷ *ibid* at [9]

⁴⁸ (1956) 94 CLR 554 esp at p. 560; see also *Australian National Rail Commission v Rutjens* (1996) 66 IR 237 at p. 251

⁴⁹ Watson SDP, Lacy SDP, O’Connor C, 23 April 2003, PR930565

⁵⁰ *ibid* at [16]

⁵¹ *ibid* at [7]

⁵² (1969) 121 CLR 406

⁵³ *Marra Developments Ltd v B. W. Rofe P/L* [1977] 2 NSWLR 616 at 626 per Hutley JA; *Coles v Wood* [1981] 1 NSWLR 723 at 727 per Hutley JA See the language of High Court in *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at [36] - [37] and see generally P W Young *Declaratory Orders* esp at p. 3.

⁵⁴ see especially *Private Arbitration Case* at para [34]

⁵⁵ *Private Arbitration Case* at [31]

⁵⁶ *ibid*

⁵⁷ *ibid* last sentence of [30]

⁵⁸ For example, in NSW, s.28 of the Commercial Arbitration Act 1984 provides: “Unless a contrary intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement.”

⁵⁹ Ross VP, Hancock SDP, Bacon C, 20 March 1996, Print N0224

⁶⁰ (1992) 37 FCR 419

⁶¹ *ibid* at [26]

⁶² (1981) 146 CLR 206

⁶³ *ibid* at p. 235
⁶⁴ *ibid* at p.p. 246 -247
⁶⁵ (1991) 22 NSWLR 466
⁶⁶ *ibid* at p. 480
⁶⁷ (1995) 183 CLR 10
⁶⁸ [1958] 1 WLR 271 adopted and applied by Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd* [1978] VR 385
⁶⁹ *ibid* at p.p. 25-6
⁷⁰ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at p. 984; *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 271 at p.p. 278-280; [1958] 1 All ER 494 at p.p. 498-499; *Haddad v Norman Mir Pty Ltd* [1967] 2 NSWLR 676 at p. 683; *American Jurisprudence*, 2nd ed (1962), vol 5, par 30.
⁷¹ *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* at p.p. 277-80
⁷² see generally Mustill and Boyd, *Commercial Arbitration*, Butterworths (1982) at p.p. 285-6.
⁷³ hence s.47 of the Commercial Arbitration Acts
⁷⁴ See generally Mustill & Boyd, *Commercial Arbitration*, Butterworths (1982) at p 479ff
⁷⁵ [1952] 1 KB 240
⁷⁶ *ibid* at p. 262
⁷⁷ p 5821
⁷⁸ s.47 of the Commercial Arbitration Acts
⁷⁹ s.17 of the Commercial Arbitration Acts
⁸⁰ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at p. 29 per Mason CJ.
⁸¹ Lacy SDP, 3 September 2001, PR908236
⁸² *ibid* at [63]
⁸³ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Goodman Fielder Consumer Foods Limited*, Watson SDP, Acton SDP, Tolley C, 22 August 2002, PR921688 and *Big W*, PR924554.
⁸⁴ Some employees have left voluntarily. One employee has been redeployed within Telstra.
⁸⁵ (1997) 78 IR 360
⁸⁶ (1994) 54 IR 207
⁸⁷ (1986) 161 CLR 148 at p. 153
⁸⁸ The Commission has no contempt powers and it is doubtful whether the Commission can itself enforce an undertaking. The Commission could require the undertaking to be in the form of a deed in favour of the party to be restrained which would ensure that the undertaking is enforceable in a Court.
⁸⁹ (1990) 169 CLR 271