Federal Court of Australia

One Tree Community Service Inc v United Workers’ Union [2021] FCAFC 15

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| Appeal from: | *One Tree Community Service Inc v United Voice (No 2)* [2020] FCA 390 |
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| File number: |  |
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| Judgment of: | **FLICK, BROMBERG AND KERR JJ** |
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| Date of judgment: | 24 February 2021 |
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| Catchwords: | **CONSTITUTIONAL LAW** – judicial power of the Commonwealth – dispute resolution clause (cl 77) in an enterprise agreement made under the *Fair Work Act 2009* (Cth) provided for binding arbitration – whether in resolving by arbitration a dispute involving the employer brought pursuant to cl 77, the Fair Work Commission was purporting to exercise judicial power – where employer was not involved in the making of the enterprise agreement but became bound by that agreement by reason of the operation of the transfer of business provisions in Pt 2-8 of the Fair Work Act – distinction between a private arbitration and the exercise of judicial power discussed – whether the source of the authority of the Fair Work Commission to arbitrate was the consent of the disputants or the sovereign power of the Commonwealth – whether only an *inter partes* agreement made between the disputants could provide the requisite consensual foundation for a private arbitration – whether the requisite consent of the employer was established by its voluntary assumption of the binding force of the enterprise agreement and cl 77 thereof upon the employer taking steps to trigger the transfer of business provisions in Pt 2-8.  **INDUSTRIAL LAW** – s 739 of the Fair Work Act – whether in resolving by arbitration a dispute pursuant to a dispute resolution clause in an enterprise agreement the Fair Work Commission was purporting to exercise judicial power. |
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| Legislation: | *Australian Constitution,* Ch III, s 71  *Fair Work Act 2009* (Cth), ss 318, 320, 739, Pt 2-2, Pt 2-8  *Superannuation (Resolution of Complaints) Act 1993* (Cth)  *Superannuation Industry (Supervision) Act 1993* (Cth) |
| Cases cited: | *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542  *Attorney-General v Breckler* (1999) 197 CLR 83  *Ah Yick v Lehmert* (1905) 2 CLR 593  *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245  *Byrne v Australian Airlines Limited* (1995) 185 CLR 410  *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  *Construction, Forestry, Mining and Energy Union v Australian Industrial Relation Commission* (2001) 203 CLR 645  *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112  *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153  *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330  *Polyukhovich v The Commonwealth* (1991) 172 CLR 501  *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167  *Private R v Cowen* [2020] HCA 31  *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254  *R v Davison* (1954) 90 CLR 353  *R v Humby; Ex parte Rooney* (1973) 129 CLR 231  *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361  *Re Wakim; Ex parte McNally* (1999) 198 CLR 511  *Soliman v University of Technology, Sydney* (No 2) [2009] FCAFC 173  *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533  *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152  *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476  *United Voice v One Tree Community Services Inc.* [2019] FWC 4235  *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73  *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434  *Workpac Pty Ltd v Rossato* [2020] FCAFC 84 |
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| Division: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 94 |
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| Date of hearing: | 24 August 2020 |
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| Counsel for the Appellant: | Mr M J Follett with Mr D Ternovski |
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| Solicitor for the Appellant: | DLA Piper Australia |
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| Counsel for the First Respondent: | Mr C Dowling SC with Mr C J Tran |
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| Solicitor for the First Respondent: | United Workers’ Union |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

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| **Table of Corrections** |  |
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| 7 February 2022 | At [63] “*Ay Yick v Lambert*” has been corrected to “*Ah Yick v Lehmert*”. |
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| 7 February 2022 | At [67] “*TCL Air Conditioner*” has been corrected to “*TCL Air Conditioner (Zhongshan) Co Ltd*”. |

ORDERS

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|  | | WAD 93 of 2020 |
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| BETWEEN: | ONE TREE COMMUNITY SERVICES INC (ABN 74 914 567 313)  Appellant | |
| AND: | UNITED WORKERS’ UNION  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| order made by: | FLICK, BROMBERG AND KERR JJ |
| DATE OF ORDER: | 24 February 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FLICK J:

1. In the absence of the agreement or consent of the parties to a dispute, and subject to very limited exceptions, it is only a Court established under Chapter III of the *Australian Constitution* which can exercise judicial power to conclusively resolve a dispute.
2. Disputes arising under the *Fair Work Act* *2009* (Cth) (the “*Fair Work Act*”) are no exception. But s 739(1) of that Act provides that the Fair Work Commission (the “Commission”) may “*deal with a dispute*” and s 739(4) provides that the Commission “*may arbitrate… the dispute*” if “*the parties have agreed that*” it may do so. So much is consistent with the well-accepted proposition that parties to a dispute may agree to be bound by arbitration: e.g., *Construction, Forestry, Mining and Energy Union v Australian Industrial Relation Commission* [2001] HCA 16 at [31], (2001) 203 CLR 645 at 658 (the “*Private Arbitration Case*”).
3. Within this Constitutional context there is thus no room for any argument that the Commonwealth Parliament could legislatively provide for a party to be conclusively bound by a decision of the Commission in the absence of an “*agreement*” or the consent of the parties to the dispute: *Private Arbitration Case* [2001] HCA 16, (2001) 203 CLR 645. Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ there concluded (at 657):

[29] …it is incidental to the conciliation and arbitration power for the Parliament to permit parties to an industrial situation to agree on the terms on which they will settle the matters in issue between them conditional upon their agreement having the same legal effect as an award. So, too, it is incidental to that power for the Parliament to give legal effect to agreed procedures for maintaining a settlement of that kind and, also, for it to authorise the Commission to participate in those procedures.

(footnote omitted)

Their Honours there went on to further observe (at 657 to 658):

[30] There is, however, 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.

[31] 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.

1. The matter which presently divides the parties to the proceeding in this Court, and as summarised by the Commission, is whether the Fair Work Commission has jurisdiction to arbitrate “*whether One Tree is required to recognise the prior service that some employees had with a previous employer (Mission Australia) if, in the future, One Tree decides to terminate the employment of those employees by reason of redundancy*”: *United Voice v One Tree Community Services Inc.* [2019] FWC 4235 at [2].
2. In March 2020 a Judge of this Court concluded that the Commission did have jurisdiction and dismissed an *Originating Application* seeking (*inter alia*) an order prohibiting the Commission from hearing and determining an application which had been made to it: *One Tree Community Service Inc v United Voice (No 2)* [2020] FCA 390.
3. Contrary to the conclusion of the primary Judge, that question as summarised by the Commission is to be answered in the negative. Contrary to the conclusion of Bromberg and Kerr JJ, it is respectfully considered that the appeal should be allowed.

### The factual background – the transfer of employees

1. The factual background to the present proceeding dates back to early 2018.
2. In about March 2018 the Commonwealth Department of Defence invited tenders for the acquisition of the childcare facilities then provided to the families of Defence personnel and local communities. Those facilities were operated on behalf of the Department by Mission Australia Early Learning (“Mission Australia”). At that time it was the *Mission Australia Early Learning Services Enterprise Agreement, 2013-2016* (the “*Enterprise Agreement*”) which applied to and covered the relevant employees of Mission Australia.
3. One Tree submitted a tender in April 2018. In July 2018 One Tree was advised that its tender had been successful.
4. Negotiations began in August 2018 between Mission Australia and One Tree, including negotiations going to the potential for One Tree to employ some or all of Mission Australia’s employees who had been involved in the childcare program.
5. Ultimately, offers of employment were made by One Tree to the former employees of Mission Australia. The standard form offer of employment was relevantly in the following terms:

This offer of employment is subject to, and incorporates, the following documents (which are enclosed with this letter):

(a) Schedule 1 – Employment Details;

(b) Schedule 2 – Terms and Conditions of Employment; and

(c) Schedule 3 – Position Description.

…

Full details of the terms of your employment are detailed in the Terms and Conditions of Employment set out in Schedule 2 which is enclosed with this letter. Please read these Terms and Conditions of Employment carefully and contact us in relation any queries you may have. You are also free to seek independent advice should you so wish.

The letter of offer also provided as follows:

This offer of employment is conditional upon completion occurring under an asset transfer agreement between One Tree and Mission Australia Early Learning (**MAEL Agreement**) and you providing us with the following prior to … 5 December 2018: …

There then followed a list of the documents required. The “*asset transfer agreement*” was the subject of subsequent correspondence, but that can presently be left to one side. Importantly, the letter of offer set forth the following exclusion from the subject of the offer:

Mission Australia Early Learning (MAEL) transferring employees:

One Tree will recognise the length and continuity of your period of service with Mission Australia Early Learning (including any period of service deemed by law or contract) for all purposes (except redundancy entitlements) and will assume and take on any:

* accrued but untaken annual leave entitlements;
* accrued but untaken long service leave entitlements;
* accrued but untaken personal/carer’s leave entitlements;
* accrued but untaken parental leave entitlements; and
* associated service-related entitlements that have accrued to you prior to the Commencement Date.

One Tree will not recognise prior service for the purposes of current or future redundancy entitlements (including any redundancy entitlements which may arise under Subdivision B of Division 11 of Part 2-2 of the Fair Work Act 2009 (Cth) or any Applicable Industrial Instrument).

Importantly, and of present relevance, is that part of Sch 1 to the standard form offer of employment which provided:

**Schedule 1 – Employment Details**

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| --- | --- |
| Commencement Date: | 1 January 2019 |
| … | … |
| Applicable Industrial Instrument: | Mission Australia Early Learning Services Enterprise Agreement 2013-2016 |
| … | … |

Schedule 2 was headed “*Terms and Conditions of Employment*” and provided in relevant part as follows:

**Applicable industrial instruments**

4. An industrial instrument such as a modern award or enterprise agreement may apply to your Employment (**Applicable Industrial Instrument**).

5. As at the date of the letter of offer of employment, your Employment will be governed by the Applicable Industrial Instrument set out in Schedule 1 (if any) and your relevant commencing classification is set out in Schedule 1 (if any). Any Applicable Industrial Instrument may change from time-to-time including in accordance with applicable legislation.

Clauses 50 to 52 of Sch 2 further provided as follows (without alteration):

**Entire agreement**

50. This Agreement has been implemented to set out all terms of the Employment with us. It supersedes and replaces all prior contacts of employment either oral or in writing as well as any prior discussion, agreement or understanding on anything connected with the subject matter of this Agreement.

51. To the extent permitted by law, any legislation or Applicable Industrial Instrument applies to the Employment as a matter of law and does not form part of this Agreement.

52. If an industrial instrument applies to the Employment, then, to the extent of any inconsistency between the provisions of the industrial instrument and this Agreement, the provisions of the industrial instrument will apply without affecting the other provisions of this Agreement.

…

The form of “*Acceptance of offer of employment*” as contained within the letter of offer provided for the employee agreeing to “*the terms and conditions as set out in [that] letter*…”.

1. One hundred and seventy one employees of Mission Australia accepted the offer of employment made by One Tree. One Tree purported to elect not to recognise their prior service with Mission Australia for redundancy purposes.
2. Perhaps not surprisingly, it was in March 2019 that One Tree received an email from the Industrial Coordinator of United Voice (the “Union”) claiming that by reason of cl 61 of the *Enterprise Agreement,* “*it was not open for One Tree to decide not to recognise the transferring employees service for the purpose of redundancy…*” (without alteration). The Union foreshadowed that it intended to notify the Fair Work Commission of a dispute “*as permitted by clause 77.5 of the*” *Enterprise Agreement*. One Tree responded. An *Application* was then made to the Fair Work Commission by United Voice in March 2019 to “*deal with*” the dispute. One Tree objected to the jurisdiction of the Commission. One Tree filed its *Application* with the Commission objecting to its jurisdiction later in March 2019, contending (*inter alia*) that United Voice had not complied with the dispute resolution procedure set forth in cl 77 of the *Enterprise Agreement* and that “*[i]n any event, the Commission is unable to arbitrate any dispute or otherwise make any determinative decision under the MAEL EA which is binding on the Respondent*”. In July 2019 the Commission published the reasons for its decision that it did have jurisdiction: *United Voice v One Tree Community Services Inc* [2019] FWC 4235.
3. It was in that context that the proceeding was commenced in this Court.

### The Enterprise Agreement

1. Clause 2.1 of the *Enterprise Agreement* provides as follows:

**2. Coverage, parties and persons bound**

2.1 This Agreement is made under Section 172 of the Fair Work Act. In accordance with Section 53 of that Act, this Agreement covers:

(a) Mission Australia Early Learning Services (MAELS); and

(b) all employees of MAELS working in Early Learning Services Centres except employees whose total remuneration is at or above the high income threshold.

1. Clause 61 of the *Enterprise Agreement*, which assumes no real importance to the present proceeding, provided as follows:

**61. Transfer of Employment**

61.1 Where there is a transfer of employment in relation to an employee as specified in subsection 22(7) of the Fair Work Act, the employee is not entitled to any redundancy pay due to the termination of his or her employment by MAELS.

61.2 An employee is not entitled to redundancy pay in relation to the termination of his or her employment if:

(a) the employee rejects an offer of employment by another employer (the second employer) that:

(i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee’s terms and conditions of employment with MAELS immediately before the termination; and

(ii) recognises the employee’s service with MAELS; and

(b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee,

subject to any order by the Fair Work Commission to pay the employee redundancy pay where it is satisfied that the employee was treated unfairly.

1. Clause 77 provided as follows:

**PART M. DISPUTE RESOLUTION**

**77. Procedures for preventing and settling disputes**

77.1 If a dispute relates to:

(a) a matter arising under this Agreement other than relating to termination of employment; or

(b) the National Employment Standards;

this Section sets out procedures to settle the dispute.

77.2 An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this Section.

77.3 In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and the relevant supervisors and/or managers.

77.4 If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the Fair Work Commission.

77.5 The Fair Work Commission may deal with the dispute in two stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

77.6 While the parties are trying to resolve the dispute using the procedures in this Section;

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless;

(i) the work is not safe;

(ii) applicable occupational health and safety legislation would not permit the work to be performed;

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

77.7 The parties to the dispute agree to be bound by a decision made by the Fair Work Commission in accordance with this Section.

### The transfer of a business & enterprise agreements

1. As cl 2.1 of the *Enterprise Agreement* makes apparent, One Tree was not a party to that *Agreement.*
2. Such provision as is made in the *Fair Work Act* for the continued application of an enterprise agreement subsequent to the transfer of a business is to be found within Pt 2-8.
3. Within Div 1 to that Part, s 307 provides the following “*Guide*”:

This Part provides for the transfer of enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from one national system employer to another national system employer. (For a transfer of business from a non-national system employer that is a State public sector employer to a national system employer, see Part 6-3A.)

1. One Tree accepts that by reason of the offer it made for the acquisition of the business of Mission Australia and the employment of its former employees that “*these facts triggered the ‘transfer of business’ provisions in Part 2-8*” of the *Fair Work Act*. One Tree further accepts that “*[a]s a result, One Tree became covered by the [Enterprise Agreement] by operation of law, without otherwise agreeing to its application or its terms (and indeed, irrespective of its position with respect to those matters)*”.

### The decision of the Commission

1. The March 2019 *Application* filed with the Commission by the Union identified the dispute it sought to have resolved as relating to the “*Part J – Redundancy*” clauses of the *Agreement* and “*Clause 61 – Transfer of Employment*”. In part, the *Application* further stated that One Tree “*has purported to exclude for the purpose of redundancy the service of the transferring employees with Mission Australia and earlier employers pursuant to subsection 122(1) of the Act*”. In summary, the *Application* further stated that the Union’s view was “*that [One Tree] did not have the capacity under the Agreement to refuse to recognise the transferring employees’ service for the purpose of redundancy and is obliged to recognise their service generally*”.
2. In rejecting the objection to jurisdiction filed with it by One Tree, the Commission reasoned in part as follows:

[30] One Tree contends that it is not bound by the arbitration power in clause 77(b)(i) of the Agreement because it is not a party to the Agreement and it did not agree to the Commission arbitrating disputes in accordance with s.739(4) of the FW Act.

[31] One Tree is covered by the Agreement by operation of s.313 of the FW Act. One Tree further contends that the fact that it is covered by the Agreement (by virtue of the transfer of business provisions in the FW Act) is not sufficient to make it a party to the Agreement or that it consented to private arbitration.

[32] One Tree then contends that because it “has not agreed to private arbitration, the Commission would not be exercising a private arbitral power but rather judicial power in any ‘arbitration’ of the purported dispute.”

[33] One Tree relies upon the High Court of Australia decision in *CFMEU v AIRC* where it was held that “judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought...”

…

[35] It is a cute argument but it is an argument that is fundamentally flawed and fails to recognise what occurs as a matter of fact when there is a transmission of business. One Tree is not being compelled against its will into arbitration. The Commission in the present matter is not seeking to exercise arbitral power independently of the consent of One Tree.

[36] No-one and nothing compelled One Tree to:

1. tender to take over the operation of 17 Department of Defence childcare centres; or
2. enter into an asset transfer agreement with Mission Australia; or
3. make offers of employment to former employees of Mission Australia.

[37] One Tree did all of the above voluntarily.

[38] It did so, I am entitled to assume, in the full knowledge of the operation of the transfer of business provisions in the FW Act. Likely some junior solicitor sat in a data room and trawled over contracts of employment and applicable industrial instruments (including the Agreement) and this resulted in a due diligence report being received by One Tree about the same.

[39] Likely the diligence report advised One Tree about the significant service accruals of Mission Australia employees. Consequently One Tree negotiated a term in the asset transfer agreement, purporting to relieve it of an obligation to recognise service for the purposes of redundancy. That is to say, there is clear evidence that One Tree turned its mind to the implications of making offers of employment to former employees of Mission Australia.

[40] Likely also that due diligence report advised One Tree of the existence of the arbitration power in the Agreement. Notwithstanding, One Tree decided to proceed with entering into the transfer agreement and making offers of employment to former employees of Mission Australia.

[41] At all times One Tree had it within its power to avoid coverage of the Agreement transmitting to it. It chose not to do so. It knew about the existence of the arbitration power in clause 77.5(b)(i) and it voluntarily elected to enter into a transmission of business that would see it covered by the Agreement and thus subject to the arbitration power. It is plainly wrong for One Tree to seek to characterise the arbitration clause as transferring by operation of law and nothing more (as if One Tree had nothing to do with it). That argument simply ignores the many voluntary acts engaged in by One Tree that brings it to this position. For these reasons, I reject the submission made by One Tree that it is not subject to the arbitration power in the Agreement.

### An agreement to arbitration?

1. The case for One Tree is simply that it has never agreed, especially with the Union, to the Fair Work Commission having jurisdiction to arbitrate a dispute in respect to (in summary form) reliance upon “*prior service*” of former employees for the purposes of redundancy. It has never agreed, so it maintains, to cl 77 of the *Enterprise Agreement*. Indeed, on its case, to the extent permitted by law, it has “*expressly agreed not to agree to the terms of the MAEL EA*”.
2. Contrary to the conclusion of the primary Judge, it is respectfully concluded that One Tree is correct in its central argument with the consequence that the Fair Work Commission lacks jurisdiction to “*deal with*” a “*dispute*” in relation to “*prior service*”.
3. The starting point for One Tree’s submission is that – in the absence of agreement or the consent of the parties to a dispute – it is only (relevantly) a Court created pursuant to s 71 of the *Constitution* that can exercise the judicial power of the Commonwealth by, in this case, conclusively resolving a dispute: *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254. The only “*exceptions*” to such a generally expressed proposition are military tribunals and the power of each of the House of Parliament to punish for contempt or breach of privilege: *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 626 per Deane J. See also, in relation to military tribunals: *Private R v Cowen* [2020] HCA 31. Standing outside of the judicial resolution of disputes, however, are those situations in which there may be agreement between the parties to a dispute to have their rights conclusively arbitrated – or resolved – by a third party. Whereas judicial power has effect irrespective of the consent of those involved, the power of arbitration gives effect to an agreement to be bound. In explaining that fundamental difference, French CJ and Gageler J in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, (2013) 251 CLR 533 at 553-554 observed:

[28] Underlying each of those dimensions of the judicial power of the Commonwealth is its fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise. That fundamental character of the judicial power of the Commonwealth is implicit in the frequently cited description of judicial power as “the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects”, the exercise of which “does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action”. Judicial power “is conferred and exercised by law and coercively”, “its decisions are made against the will of at least one side, and are enforced upon that side in invitum”, and it “is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved”.

[29] Therein is the essential distinction between the judicial power of the Commonwealth and arbitral authority, of the kind governed by the Model Law, based on the voluntary agreement of the parties. The distinction has been articulated in the following terms:

“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.”

The context of that articulation puts its reference to “private arbitration” in appropriate perspective. The context was that of a challenge to the capacity of a statutory body consistently with Ch III of the *Constitution* to exercise a statutory function to settle a dispute where so empowered by an agreement entered into as a result of statutory processes. The reference to “private arbitration” was not to a private function, as distinct from a public function, but rather to a function the existence and scope of which is founded on agreement as distinct from coercion.

(footnotes omitted).

The reference there made by their Honours to the articulation of the proposition in the *Model Law* is a reference to the observations of Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ in *The Private Arbitration Case* [2001] HCA 16 at [31], (2001) 203 CLR 645 at 658. See also: *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112 at [56] to [57], (2017) 251 FCR 1 at 16-17 per Tracey, Wigney and O’Callaghan JJ; *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [132] per Lyons J.

1. For the reasons which follow it is respectfully concluded that:

* the offer made by One Tree and the acceptance of that offer by the employees does not contain any agreement on the part of One Tree to have a dispute arbitrated by the Fair Work Commission;
* any finding of fact as to “*agreement*” on the part of One Tree to be conclusively bound by a decision of the Commission is to be discerned by reference to its conduct during negotiations and the offers of employment it in fact made to employees and their acceptance of those offers, and no finding of agreement can be made by reference to the fact that One Tree could have structured its commercial arrangement differently;
* there is no room for any concept of “*a statutorily mandated consent*” or “*deemed consent*”; and
* consent on the part of One Tree cannot be gleaned from the fact that it was open to One Tree to apply to the Fair Work Commission to vary the *Enterprise Agreement* but that no such application was made.

Each of these conclusions should be briefly expanded upon.

#### The contract of employment

1. Although it is common ground that:

* by reason of Pt 2-8 of the *Fair Work Act*, One Tree “*became covered by the [Enterprise Agreement] by operation of law*”; and
* the offer that was made by One Tree and accepted by the employees had identified in Sch 1 the “*Applicable Industrial Instrument*” as the *Enterprise Agreement*,

it is nevertheless the case that:

* Schedule 1 does no more than identify the *Enterprise Agreement* as the “*Applicable Industrial Instrument*” which regulates the statutory rights and entitlements of (*inter alia*) the employees, and does not thereby convert those rights and entitlements into contractual obligations to which One Tree has agreed: cf. *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 (“*Byrne*”); and
* to “*the extent permitted by law*”, cll 51 and 52 of Sch 2 to the offer made by One Tree expressly stated that the “*Applicable Industrial Instrument*” did “*not form part of this Agreement*”.

Clause 77, and in particular cl 77.7, of the *Enterprise Agreement* cannot be relied upon as forming any basis for a finding as to whether One Tree had “*agreed*” for all purposes to arbitration, without also construing that clause within the context of what was being proposed by One Tree and what was under consideration by the employees. Even though One Tree did not put in issue that it was “*covered by*” the *Enterprise Agreement*, the search for any “*agreement*” on the part of One Tree to arbitration by the Fair Work Commission cannot start and finish with reliance upon cl 77 alone. Nor can there be avoided the necessity to identify with some precision the subject-matter of the “*dispute*” to which cl 77.1 refers.

1. Comparable to the position in *Byrne*, it is concluded that the application of the *Enterprise Agreement* by reason of Pt 2-8 of the *Fair Work Act* does not of itself either expressly or impliedly carry with it any agreement on the part of One Tree to have disputes resolved by the Fair Work Commission. In *Byrne*, two baggage handlers had been dismissed by their employer. One argument they relied upon was that cl 11 of an industrial award protected them from “*unfair dismissals*” and that that term had become a term of their contract of employment. The argument was rejected because the award was not imported into the contracts independently of the intention of the parties. Brennan CJ, Dawson and Toohey JJ expressed their conclusion on this issue as follows (at 420):

A right to the payment of award rates is imported by statute into the employment relationship, which is contractual in origin, and, express promise apart, it is only in that sense that it can be said that award rates are imported into the contract of employment. The award regulates what would otherwise be governed by the contract. But award rates are imported as a statutory right imposing a statutory obligation to pay them. The importation of the statutory right into the employment relationship does not change the character of the right. As Latham CJ points out in his judgment in *Amalgamated Collieries of WA Ltd v True* [(1938) 59 CLR 417 at 423], the legal relations between the parties are in that situation determined in part by the contract and in part by the award. And as the judgment of the Privy Council in that case suggests, a provision in an award may also be made a term of the contract by agreement between the parties, but that is only to emphasise the distinction between an obligation imported by statute and one arising by agreement.

Their Honours there continued (at 421 to 422):

In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award. The contract may provide additional benefits, but cannot derogate from the terms and conditions imposed by the award and, as we have said, the award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations. There is, therefore, an insuperable obstacle in the way of the appellants’ second argument that the terms of an award such as cl 11(a) are implied terms of the contract of employment.

(footnote omitted).

The “*legal efficacy*” of the terms of an industrial agreement, it is thus recognised, “*arise under statute, not contract*”: *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84 at [89], (2014) 222 FCR 152 at 179 per Jessup, Tracey and Perram JJ. The terms of an industrial agreement are thus not incorporated into a contract of employment “*as a matter of course*”: *Workpac Pty Ltd v Rossato* [2020] FCAFC 84 at [363], (2020) 378 ALR 585 at 664 per White J. See also: *Soliman v University of Technology, Sydney (No 2)* [2009] FCAFC 173 at [14] to [24], (2009) 191 IR 277 at 281- 283 per Graham, Logan and Flick JJ.

1. Accordingly, if there be a search for the actual intention of One Tree in making the offer of employment to the former employees, both the form of the letter of offer and cll 51 and 52 of Sch 2 of that standard form offer would stand in the way of any conclusion that One Tree had in fact agreed to disputes relating to “*prior service*” forming part of any “*agreement*” on its part to have such disputes “*dealt with*” by the Commission. One Tree may well have recognised that the *Enterprise Agreement* covered and applied to those employees, but if the search be for any agreement on the part of One Tree to arbitration by the Commission of disputes relating to “*prior service*”, and the contractual entitlement of former employees to rely upon “*prior service*” for the purposes of redundancy entitlements, cll 51 and 52 would present an insurmountable obstacle.
2. The offer being made by One Tree excluded the very subject matter the Union sought to have resolved by the Commission. The letters of offer thus expressly recognised that One Tree would recognise an employee’s “*length and continuity of [the employee’s] period of service … for all purposes (except redundancy entitlements) .*..”. The letters of offer further emphasised this exclusion when One Tree went on to further state that “*One Tree will not recognise prior service for the purposes of current or future redundancy entitlements*…”. The reason for this express exclusion from the offer being made was not hard to find, one estimate of the liability being a sum of up to $2 million.
3. When taken in combination, both cll 51 and 52 and the exclusion of liability for redundancy payments in the offer letter clearly manifest the absence of agreement on the part One Tree to arbitration of any dispute in relation to “*prior service*”. Whether the Union be correct in its *Application* to the Commission that One Tree “*did not have the capacity … to refuse to recognise the transferring employees’ service*” is, with respect, a different question to whether One Tree had agreed to arbitration. Whether One Tree had the “*capacity*” to exclude liability for redundancy is an issue not presently to be resolved and does not in any event answer the question of present relevance, namely whether it manifested an agreement to be bound by arbitration.
4. The letters of offer being forwarded to employees by One Tree, it is respectfully concluded, manifested a very clear intent on its part that it was not agreeing to assume liability for past redundancy entitlements and, more importantly, in making the offers it was excluding any agreement on its part to the terms of the *Enterprise Agreement* forming any part of the contractual relationship between itself and the employees.
5. It is thus concluded that:

* although the *Enterprise Agreement* confers (*inter alia*) statutory rights and entitlements upon the employees who accepted the offer made by One Tree, that *Agreement* – including, in particular cl 77 – cannot be relied upon as the source of any “*agreement*” on the part of One Tree to have the Commission “*deal with*” disputes relating to a subject-matter (i.e., “*prior service*”) which was expressed to form no part of the relationship between it and the transferring employees; and
* clauses 51 and 52 of Sch 2 deny any conclusion that One Tree had in fact “*agreed*” to the terms of the *Enterprise Agreement*.

On the approach of One Tree:

* there could be no “*dispute*” for the purposes of cl 77.1 of the *Enterprise Agreement* in relation to a subject-matter which had been expressly excluded from its dealings with the former employees;

and/or

* there certainly could be no “*agreement*” on its part to have the Commission “*deal with*” a particular subject-matter, and to deal with that subject-matter in a conclusive manner and in a manner which it agreed to be “*bound by*” the Commission’s resolution, where that subject-matter was expressly stated to be excluded from the offer being made.

1. If the search for an “*agreement*” be not directed to a finding as to the actual subjective intention of a party, and not even directed to a finding that there be an enforceable contractual agreement, but rather to a finding founded upon an objective assessment of the facts as to what One Tree had “*agreed to*”, no different conclusion would be reached. Even an objective assessment as to the existence of an agreement would inevitably have to confront not merely such matters as the operation of Part 2-8 of the *Fair Work Act,* but also an objective assessment as to the subject-matter of what was being offered to employees. Assuming that “*agreement*” for the purposes of accepting the jurisdiction of the Commission to arbitrate a dispute need not necessarily be found in a contractual agreement, clauses 51 and 52 of Sch 2 would preclude a finding that an agreement could be objectively distilled from the conduct of One Tree. Nor can the decision in *Attorney-General v Breckler* (1999) 197 CLR 83 dictate any contrary conclusion. Leaving aside any differences that may arise by reason of differences between the *Superannuation (Resolution of Complaints) Act* *1993* (Cth) and the *Fair Work Act*, every case must necessarily depend upon its own facts and – in particular – the fact that in the present case One Tree had expressly stated what it was and was not agreeing to.

### An ability to vary the agreement – deemed consent?

1. Rejected are two further threads to an argument that One Tree should be taken to have agreed to have a dispute relating to “*prior service*” being conclusively resolved by the Commission by reason of an ability on the part of One Tree to have either:

* “*structured*” the acquisition of the Mission Australia business and the transfer of its employees in a different manner and thereby place itself outside of Pt 2-8 of the *Fair Work Act*; and/or
* applied to the Fair Work Commission for a variation of the *Enterprise Agreement*.

1. These are the arguments which commended themselves to the primary Judge where his Honour reasoned as follows:

[89] The question in the present case is whether there was any form of consent or agreement by One Tree. The primary issue is what the effect of s 311 and s 313 of the FW Act have upon One Tree’s acquisition of the business and the employment of the Transferring Employees.

[90] In my view, the FW Act achieves a statutorily mandated consent. This is necessary for the protection of employees who are not parties in any sense to the contractual acquisition of a business. None of the cases discussed denies the capacity of Parliament to stipulate that consent will be deemed to have been given in the circumstances of acquisition of a business. Part 2-8 of the FW Act establishes a mechanism whereby an enterprise agreement will come to apply to a ‘new employer’ as if the new employer were the original employer to whom it originally applied. Clearly this is a statutory mechanism for establishing deemed consent for the benefit of clarity and certainty, particularly for employees who have legal rights which can be dispensed with as One Tree has purported to do in acquiring the business.

[91] Importantly, this should not be understood as imposing a mandatory deemed consent in circumstances where consent cannot be avoided. A form of mandatory consent may give rise to other questions, but that is certainly not the case in the present circumstances.

[92] A new employer does not need to structure itself in a manner that gives rise to a ‘transfer of business’ under s 311(1) of the FW Act. Very simply, One Tree could have recruited its own workforce. Indeed, it had contingency plans to recruit its own workforce if it could not reach agreement on the Transferring Employees. This was made clear by Ms Callan in her oral evidence. Further, as noted, in an appropriate case a new employer who does not want the transferable instrument to apply to it or wants that instrument to be varied in some way can apply to the Commission under s 318 and s 320 of the FW Act seeking to have the transferable instrument modified to reflect its preferred position.

[93] The effect of an enterprise agreement is that consent is deemed in certain circumstances, not only for an acquiring employer, but also for employees who did not vote to approve an enterprise agreement by virtue of the fact that they were not employees at the time. These future employees are taken to have consented to the agreement even though the agreement was approved by a historical majority of [employees], some or all of whom may no longer be employed. By One Tree’s argument, these future employees would all be able to avoid an arbitration pursuant to a dispute resolution clause if they preferred not to go to arbitration. This is clearly not the intent of the statutory regime. The effect of One Tree’s subjective, personalised consent argument would be to allow all such persons who did not personally vote to approve the EA to disregard it if they so chose. Construction of the statute consistent with that argument should not be accepted.

[94] The effect of Pt 2-8 is that One Tree is deemed to have consented to the EA, including cl 77. As a result, the Commission can exercise arbitral power, given the consent objectively construed by statute of One Tree and the United Workers Union to the ongoing application of the EA.

With the greatest of diffidence to the primary Judge, concurrence cannot be expressed with this reasoning.

1. Disagreement is expressed for either of two reasons, namely:

* it matters little whether an entity that wants to acquire the business of another could have “*restructured*” the proposal and the offers being made. Whatever other commercial arrangements could have been pursued, the search of present relevance is to identify the source of an agreement to be bound by arbitration relating to “*prior service*” by reference to the course of the negotiations in fact pursued. The starting point is not to be found in some other hypothetical commercial arrangement but rather the offers and the acceptance of those offers by the employees in the present case; and/or
* there is no room for any concept of “*a statutorily mandated consent*” or “*deemed consent*” (at para [90]). If it be accepted, as with respect it must be, that no statutory provision could relevantly deem an employer to have agreed to arbitration in the absence of agreement, and let alone in the face of a denial of agreement, there is equally no room for “*a statutory mechanism for establishing deemed consent for the benefit of clarity and certainty*” (at para [90]).

Neither reason is, with respect, adequately answered by:

* reliance upon any notion of “*inconvenience*” if such were not the result. In the absence of actual agreement or consent to have a dispute conclusively resolved by arbitration by a third party, any “*inconvenience*” occasioned by a Chapter III Court being the sole repository of judicial power to resolve a dispute contrary to the wishes of a party remains Constitutionally entrenched.

There is, moreover, the necessity to confine for present purposes the question to be resolved by reference to:

* those clauses of an industrial agreement which depend upon actual agreement for their efficacy (such as an arbitration clause) and other clauses (such as rates of pay and other onsite allowances) which apply to all employees covered by the agreement irrespective of whether (for example) they voted in favour of the agreement or opposed its adoption. A recognition that an employer may be faced with (for example) statutory obligations imposed by an industrial agreement irrespective of whether the employer actually agreed to that obligation says little as to whether an employer has agreed – in this case – to cl 77 of the *Enterprise Agreement*.

Part 2-8, it may be noted, does not expressly seek to “*deem*” an acquiring business entity to have “*agreed*” to arbitration. No question thus arises as to whether that Part of the *Fair Work Act* is beyond the legislative competence of the Commonwealth Parliament.

1. Also rejected is the argument advanced on behalf of the United Workers’ Union that One Tree had relevantly “*agreed*” to have the dispute as to “*prior service*” arbitrated by the Commission by reason of it being open to One Tree applying to the Commission pursuant to s 318 and/or s 320 of the *Fair Work Act* to have the *Enterprise Agreement* varied. That argument, with respect, impermissibly reverses the order of analysis. The correct analysis is to search for an agreement rather than impermissibly elevating an existing arrangement into the status of an agreement because a party can opt out of that arrangement. No proposition can be accepted that a party can “*agree*” to have a dispute arbitrated because it is open to that party to later seek to opt out of such a situation.

## CONCLUSIONS

1. The Fair Work Commission erred in concluding that it had jurisdiction to resolve a dispute as to whether the “*prior service*” of the employees was required to be recognised by One Tree if a decision were made to terminate an employee’s service “*by reason of redundancy*”.
2. Whatever may be other subject-matters which could potentially give rise to a “*dispute*” with which One Tree had “*agreed*” that the Commission had jurisdiction to “*deal with*”, One Tree had expressly removed from the arena of discourse the prospect of any contractual entitlement on the part of employees to their “*prior service*” being recognised for redundancy purposes. One Tree’s form of offer to the former employees was on the express basis that it would “*not recognise prior service for the purposes of current or future redundancy entitlements (including any redundancy entitlements which may arise under Subdivision B of Division 11 of Part 2-2 of the Fair Work Act 2009 (Cth) or any Applicable Industrial Instrument)*.” It was a claim that employees had a contractual entitlement to rely upon “*prior service*” which, it is understood, was the subject-matter which the Union sought to have “*dealt with*” by the Commission.
3. That was a subject-matter which was not capable of giving rise to any “*dispute*” within the jurisdiction of the Commission to resolve. There could be no prospect of an employee disputing or making any claim in respect to a subject-matter which had been agreed not to form part of the contract.
4. On such an approach, One Tree was certainly making apparent that “*prior service*” was to form no part of its relationship with the employees and that it was an area of discourse which was not susceptible of being disputed. Such an approach negatives any prospect of distilling “*agreement*” on its part or “*consent*” to have the Commission “*deal with*” a subject-matter which had been expressly excluded from the dealings between itself and the employees.
5. On this approach, there is no room for there to be any “*dispute*” for the purposes of cl 77.1 of the *Enterprise Agreement*, let alone a dispute relating to “*a matter arising under [the Enterprise] Agreement…*” for the purposes of cl 77.1(a). The dispute the Union sought to have the Commission “*deal with*” was a dispute in relation to a non-existent contractual entitlement.
6. Even if such matters alone did not negative an “*agreement*” on the part of One Tree to have such a subject-matter of dispute “*dealt with*” by the Commission, cll 51 and 52 of Sch 2 only reinforce such a conclusion.
7. By clause 51, moreover, and to the extent One Tree was “*permitted by law*” to do so, any “*Applicable Industrial Agreement*” was expressed by One Tree not to “*form part of this Agreement*”. One Tree, it is to be recalled, was not a party to that *Enterprise Agreement* and had not as a party “*agreed*” to be bound by any arbitration provision. No provision within Pt 2‑8 of the *Fair Work Act* can “*deem*” One Tree to have agreed that “*prior service*” was susceptible of resolution by the Commission.
8. Such express provisions preclude, with respect, any conclusion that One Tree had by its conduct either subjectively or objectively manifested any “*agreement*” that “*prior service*” could be the subject matter of a “*dispute*” which it had “*agreed*” or “*consented*” to have “*dealt with*” by the Commission.
9. But that conclusion does not preclude judicial resolution of the question as to whether it was open to One Tree to purport, in the offer it made to former employees, to preclude their reliance on “*prior service*” for the purpose of redundancy. Nor does it preclude judicial resolution as to whether it was open to One Tree to accept that it “*became covered by the [Enterprise Agreement] by operation of law*” and yet purport to make an offer including a provision such as cl 51 in Sch 2. Such questions could, presumably, be resolved by this Court. Those questions, however, are not matters now before this Court; the only question presently in need of resolution is whether One Tree had agreed to any dispute relating to “*prior service*” being resolved by the Commission and agreed “*to be bound by a decision of the Fair Work Commission*” as to those matters. The prospect of One Tree perhaps seeking judicial review of a decision of the Commission on the basis of “*jurisdictional error*” should it erroneously conclude that “*prior service*” was to be taken into account for redundancy purposes cannot be transformed into “*agreement*” on its part to the involvement of the Commission.
10. The objection taken on behalf of One Tree founded upon its absence of agreement to have any dispute concerning “*prior service*” resolved by the Commission should have been upheld. It follows that *Grounds* 1 and 2 of the *Notice of Appeal* should be upheld. The appeal should be allowed.
11. Although the *Enterprise Agreement* may confer statutory rights and obligations upon employees by reason of Pt 2-8 of the *Fair Work Act*, One Tree has not agreed that those statutory rights and obligations operate as contractual terms to which it has agreed in its contracts of employment. Indeed, One Tree has expressed the very opposite positon, namely that it has not agreed to be bound.
12. There is no room for any statutory deeming of “*consent*” on the part of One Tree.
13. In the absence of agreement on the part of One Tree to have the Fair Work Commission conclusively resolve the dispute with the Union, the Commission has no jurisdiction.
14. Regrettably and with great diffidence to the contrary conclusion of Bromberg and Kerr JJ, concurrence cannot be expressed with their Honours’ conclusions.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Flick. |

Associate:

Dated: 24 February 2021

REASONS FOR JUDGMENT

BROMBERG AND KERR JJ:

1. The issue raised by this appeal is whether the Fair Work Commission (“**FWC**”) would impermissibly purport to exercise the judicial power of the Commonwealth if, pursuant to cl 77 of the *Mission Australia Early Learning Services Enterprise Agreement, 2013-2016* (“**EA**”), it arbitrated and determined a dispute (“**the dispute**”) raised by the first respondent (“**UWU**”) against the appellant (“**One Tree**”).
2. The EA is an enterprise agreement made under the *Fair Work Act 2009* (Cth) (“**FW Act**”). Clause 77 of the EA provides procedures for preventing and settling disputes. The terms of that clause are set out in the reasons for judgment of Flick J and need not be here repeated. It is necessary, however, to observe that the dispute resolution clause relates to either a matter arising under the EA (other than relating to termination of employment) or the National Employment Standards provided for by the FW Act. The procedure for the FWC to settle disputes in relation to those matters is laid out by cl 77. The FWC must attempt to resolve the dispute through mediation or conciliation and, if the dispute is unable to be so resolved, the FWC may arbitrate the dispute and make a determination that “is binding on the parties”. Clause 77.7 expressly provides that the parties to the dispute “agree to be bound by a decision made by the [FWC]”.
3. Although many of its functions are carried out in a quasi-judicial manner, the FWC is a tribunal empowered by the FW Act to exercise administrative powers. Section 71 of the Constitution, found in Ch III thereof, provides for the judicial power of the Commonwealth to be vested in the High Court and such other federal courts as the Parliament creates or such courts as it invests with federal jurisdiction. It has long been held that the vesting of judicial power in Ch III courts precludes the vesting of such power in any institution, body or person other than a Ch III court: *Huddart, Parker &* *Co* *Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355 (Griffith CJ) (“***Huddart Parker***”); *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 445 (Griffith CJ); *Victorian Stevedoring* & *General Contracting* Co *Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97-98 (Dixon J); *R v* ***Davison***(1954) 90 CLR 353 at 364-5 (Dixon CJ and McTiernan J), 380-1 (Kitto J); *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249-50 (Mason J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26 (Brennan, Deane and Dawson JJ), 54-5 (Gaudron J), 66 (McHugh J). It is uncontentious that the FWC is not a Ch III court and that it cannot be invested with the judicial power of the Commonwealth.
4. There is no “exclusive and exhaustive” definition of judicial power: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Whether or not judicial power is being exercised is usually analysed by a multi-factorial examination of various characteristics of the power conferred and of the body in which the power is reposed. Those characteristics include the nature of the body exercising the power (see *Davison* at 370 (Dixon CJ and McTiernan J); the historical treatment of the power reposed in the body (see *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 (Isaacs J)); whether the power is a power to create new rights or conversely to determine existing rights (see *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374–5 (Kitto J); the finality and enforceability of the determination made by the body in the exercise of the power (see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268 (Deane, Dawson, Gaudron and McHugh JJ) and the availability of judicial review (see *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 579 (Hayne J)) amongst other characteristics.
5. The submissions of the parties did not address those characteristics. The submissions were principally directed at only one characteristic of judicial power – an essential characteristic that distinguishes it from an arbitral power exercised in the context of a private arbitration. The characteristic in question is whether the source of the FWC’s authority to arbitrate the dispute between the UWU and One Tree under cl 77 is the sovereign power of the Commonwealth or, alternatively, the consent of the disputants.
6. In that respect, the essence of the UWU’s position is that the source of the FWC’s authority to arbitrate and determine the dispute is not the sovereign power of the Commonwealth. The UWU contended that the FWO’s authority to arbitrate is derived from the conduct and consent of the parties to the dispute. Consequently, the FWC would not be exercising the judicial power of the Commonwealth in resolving the cl 77 dispute between it and One Tree but, upon the consensual foundation provided by the parties to the dispute, the FWC would determine the dispute in its capacity as a private arbitrator.
7. In contrast, the essence of One Tree’s position is that if it were permissible for the FWC to arbitrate and determine a dispute raised against it pursuant to cl 77, the source of the FWC’s purported authority to do so would necessarily be the sovereign power of the Commonwealth. One Tree accepted that it may be possible for the FWC to determine a dispute raised under cl 77 acting as a private arbitrator. One Tree accepted that in such a case the FWC would not be exercising the judicial power of the Commonwealth. However, One Tree maintained that, in this case, any purported authority for the FWC to arbitrate and determine a dispute must necessarily be derived from the sovereign power of the Commonwealth because the necessary consensual foundation for a private arbitration did not exist. In that respect, One Tree contended that a consensual source of authority had to be founded in nothing less than the *inter partes* agreement of the parties to a dispute raised under cl 77 for the FWC to arbitrate and determine that dispute. One Tree contended, and it was not in contest, that no such contract existed. One Tree rejected that its unilateral consent, either expressly given or to be inferred from its conduct, even if accompanied by the consent of the other putative party in common terms,could suffice to provide the necessary consensual foundation for the FWC to privately arbitrate and determine the dispute and, in any event, One Tree denied that any such consent had been given by it. It contended that it had neither agreed by contract nor otherwise consented to the FWC determining a dispute raised under cl 77 involving itself as a disputant and that, accordingly, the FWC would not be conducting a private arbitration. It followed that in arbitrating and determining the dispute the FWC would necessarily purport to impermissibly exercise the judicial power of the Commonwealth.
8. For essentially those reasons, One Tree submitted by reference to ground 2 of its Notice of Appeal that the primary judge erred in finding that it had consented to the FWC hearing and determining the dispute raised by the UWU and, by reference to appeal ground 1, that it followed that the primary judge erred in finding that the FWC had jurisdiction to hear and determine that dispute.
9. The primary judge (at [86]) held that a body does not exercise the judicial power of the Commonwealth “if the source of the body’s decision-making authority lies in the consent of the parties for it to determine a dispute, rather than in the sovereign power of the State as authorised by a democratic body politic”. In our view and with respect to the primary judge, that proposition is correct. It is well supported by a wealth of authority.
10. As Griffith CJ said in *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603 “judicial power is an attribute of sovereignty”. This is also reflected in the oft-cited description of judicial power made by Griffith CJ in *Huddart Parker* in the following passage at 357:

I am of opinion that the words “judicial power” as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

1. By reference to that description of judicial power, Gummow and Hayne JJ in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [108] observed that by its nature, judicial power is the power of a sovereign authority and that it is derived from the sovereign authority concerned and not from some other source. That judicial power is of its nature sovereign power, was also recognised and relied upon in a decision of central significance to the determination of this appeal to which we will return: *Attorney-General (Commonwealth) v* ***Breckler***(1999) 197 CLR 83 at [43].
2. As in *Breckler*, the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 (“***Private Arbitration Case***”) also characterised the power reposed in the body there under consideration by looking to the source of the power. The power there in question (a power given to the predecessor of the FWC to arbitrate and determine a dispute raised under a dispute resolution clause in an industrial agreement made under a predecessor of the FW Act), was held not to be judicial but to be the exercise of an arbitral power in a private arbitration. Relevantly, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ stated (at [31]) that:

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.

1. As is apparent from that passage, two critical and related matters distinguish judicial power from arbitral power exercised in a private arbitration. *First*, judicial power is sourced in the sovereign power of the body politic, whereas private arbitration has a consensual foundation. *Second*, decisions made in the exercise of judicial power are binding of their own force, whereas decisions made in the exercise of a power of private arbitration depend upon the parties’ agreement to be bound or upon the operation of the law upon the arbitral award.
2. The distinction noted in the *Private Arbitration Case* was endorsed by a unanimous High Court in ***TCL*** *Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [29] (French CJ and Gageler J) and at [108] (Hayne, Crennan, Kiefel and Bell JJ).
3. At [28], French and Gageler JJ observed that what underlies each of the dimensions of the judicial power of the Commonwealth (references omitted):

is its fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise. That fundamental character of the judicial power of the Commonwealth is implicit in the frequently cited description of judicial power as ‘the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects’, the exercise of which ‘does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action’. Judicial power ‘is conferred and exercised by law and coercively’, ‘its decisions are made against the will of at least one side, and are enforced upon that side in invitum’, and it ‘is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved’.

1. The plurality at [81] and at [109] also referred to the “consensual foundation” of private arbitration in emphasising the distinction between the power exercised by a private arbitrator and judicial power.
2. In addressing the distinction between judicial and arbitral power, the primary judge found that there was a consensual foundation which authorised the FWC to arbitrate and determine the dispute and that accordingly the FWC was not purporting to exercise the judicial power of the Commonwealth: at [95]. That determination is at the heart of the appeal. The relevant, and in our view, primary question is whether the facts demonstrate a consensual foundation sufficient to support a conclusion that the FWC has been authorised by the disputants to hear and determine by way of private arbitration the cl 77 dispute raised by the UWU.
3. However, before turning to the relevant facts, it is necessary to reject One Tree’s contention that a sufficient consensual foundation cannot be demonstrated in the absence of a contract made between the parties to the dispute which obliges those parties to be bound by the arbitral determination. A contractual provision of that kind is undoubtedly the common means of creating the necessary consensual foundation for a private arbitration. However, as the unanimous decision of the High Court in *Breckler* demonstrates, the requisite consensual foundation for a private arbitration is not dependent upon the existence of an *inter partes* agreement between the disputants.
4. *Breckler* concerned the constitutional validity of a power conferred upon the Superannuation Complaints Tribunal (“**SCT**”), by the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (“**Complaints Act**”) to review decisions made by trustees. Section 14 of the Complaints Act allowed a beneficiary of a “regulated superannuation fund” to complain to the SCT in respect of a decision of a trustee that was “unfair or unreasonable”. The SCT was empowered to review and redetermine a decision made by the trustee and where it did so the decision of the SCT would be substituted for that of the trustee. A regulated superannuation fund was defined as a superannuation fund to which the *Superannuation Industry (Supervision) Act 1993* (Cth) (“**Supervision Act**”) applied. Trustees could elect to bring a fund within the application of the Supervision Act by providing a notice to the Insurance and Superannuation Commissioner. The election brought with it certain tax benefits. Crucially, the SCT’s jurisdiction was only engaged where such an election was made by a trustee.
5. The controversy in *Breckler* arose when the SCT determined that a decision made by particular trustees was unfair and unreasonable and substituted its own determination for that made by those trustees. The principal basis on which the determination of the SCT was sought to be impugned was that the SCT had impermissibly exercised the judicial power of the Commonwealth. The trustees’ submissions, and indeed the reasons of the Full Court of this Court from which the successful appeal was brought, pointed to the indicia of judicial power which they said were apparent from the SCT’s functions. For example, it was said that, like a court, the SCT had adjudicated a dispute regarding past rights and obligations, rather than creating new rights and obligations. It was also pointed out that failure to comply with a determination of the Tribunal attracted criminal sanctions.
6. The High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J agreeing in separate reasons) unanimously upheld the validity of the determination, holding that the SCT had not exercised judicial power. The first reason for this conclusion was simply that the terms of the trust instrument in question created a private obligation to observe determinations by the SCT. Crucially, however, even if this had not been the case, the fact that the trustees had elected to be governed by the provisions of the Supervision Act (and therefore the Complaints Act) was enough to validate the exercise of power by the SCT because the exercise of its power in that context did not involve the exercise of sovereign (and thus judicial) power by the SCT.
7. At [43]-[44] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ relevantly said this (references omitted):

The present case does not fall under that proscription [a contravention of Ch III] for several reasons. The first is founded in the terms of the trust deed constituting the Plan. The evident purpose as well as the effect of the variations of the trust deed to which we have referred were to change the terms themselves of the charter by reference to which the rights and obligations of the trustees and the members of the Plan were, as a matter of private law, to be determined and decided. The trustees became expressly obliged by cl 1.2 to observe the requirements which have their source in the Supervision Act and the Supervision Regulations. These included obligations to observe determinations by the Tribunal under the Complaints Act (reg 13. 17B). Thus, the determination by the Tribunal involved not the exercise of the sovereign power referred to by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* but the arbitration of a dispute using procedures and criteria adopted by the constituent trust instrument, the existing charter, for the resolution of certain disputes arising thereunder.

Secondly, even without a provision in the trust deed such as cl 1.2, the situation would bear a similar character. The application of the provisions of the Complaints Act was possible only because the Plan had the status of a regulated superannuation fund. The attainment of that status was the product of the exercise of an election provided to the trustees by the Supervision Act. Given the importance of attracting the operation of Pt IX of the Income Tax Act, cases may readily be imagined where it would be a breach of trust not to exercise the election so as to obtain the revenue benefits which follow, albeit at the concomitant price of attracting the regulatory regime of which the Tribunal is a component. The availability of an election of this nature may be, and in the context of the present legislative scheme is, a decisive pointer in favour of validity.

1. On the facts of *Breckler*, there was no agreement made between the trustees and the beneficiaries of the trust including, in particular, the beneficiary who brought the complaint to the SCT for the SCT to review and redetermine the impugned decision of the trustees. The obligation to observe the determination of the SCT was voluntarily assumed by the trustees by the election the trustees made. It was that voluntary assumption of the obligation to observe any determination made by the SCT which sufficed to provide the source of the requisite authority which underpinned the non-sovereign character of the power exercised by the SCT. One Tree’s insistence on the need for an *inter partes* agreement as the only available mechanism for establishing the requisite consensual foundation is denied by *Breckler*.
2. There is no inconsistency between the approach taken in *Breckler* and the later authorities. Whilst several observations made in the *Private Arbitration Case* and in *TCL* refer to an “agreement” for private arbitration as providing the authority for arbitration of that kind, those observations do not confine the source of the requisite authority to an *inter partes* agreement. Nor is there any principled basis for rejecting the common voluntary submission of the disputants to a private arbitration, as providing the necessary authority to bind those persons to the outcome of an arbitration which each has separately bound itself to observe. As long as the arbitrator’s authority is sourced in the consent of the parties, for the purpose of establishing that the arbitrator’s authority is not sourced in the coercive sovereign power of the Commonwealth, it does not matter whether the arbitrator derives authority from a single multi‑party agreement or the unilateral consent of each party.
3. There is, on the facts of this case, a basis for the conclusion that One Tree voluntarily submitted to the binding force of the EA, including the binding force of cl 77 and the requirement made by cl 77.7 that it “agreed to be bound by a decision made by the [FWC]” pursuant to cl 77.
4. The voluntary assumption of that binding obligation by One Tree is contended by the UWU to constitute the relevant agreement or consent of One Tree. That voluntary assumption by One Tree together with the consent of the UWU implicit in its initiation of the cl 77 dispute resolution procedure is, in our view, sufficient to provide the requisite consensual foundation to support the conclusion that private arbitration rather than the exercise of judicial power is the basis upon which the FWC is to hear and determine the dispute raised by the UWU under cl 77.
5. Whilst the primary judge made observations with which we respectfully disagree, in particular (at [90]) that “the FW Act achieves a statutorily mandated consent” and (at [94]) that “the effect of Part 2-8 is that One Tree is deemed to have consented to the EA including cl 77”, the findings made by the primary judge as to the conduct of One Tree are sufficient to establish the voluntary assumption by One Tree of the binding force of the EA including the binding force of cl 77. It is necessary to briefly outline some background facts, the relevant (unchallenged) findings of the primary judge and the operation of the relevant provisions of Pt 2-8 of the FW Act.
6. It is not in contest that despite One Tree having had no involvement in the making of the EA, the EA applies to One Tree. Section 310 of the FW Act states that Div 2 of Pt 2-8 of that Act “provides for the transfer of rights and obligations under enterprise agreements…if there is a transfer of business from an old employer to a new employer”. Section 311 then specifies when a transfer of business occurs. It relevantly provides that when a new employer re-employs an employee of an old employer within three months of the termination of the employee’s employment with the old employer and the employee is employed to perform substantially the same work as the work the employee performed for the old employer, there will be a transfer of the business where there is “a connection between the old employer and the new employer”. One such “connection” is where the new employer has acquired some or all of the assets of the old employer that relate to or are used in connection with the work that has transferred to the new employer.
7. The employer party that agreed to the making of the EA was “Mission Australia Early Learning” (“**Mission**”) and the EA applied to Mission in respect of its business in operating the “Defence Childcare Program” (“**DCCP**”) for the Department of Defence. That operation essentially involved providing childcare services to the children of defence personnel. In 2018 One Tree successfully tendered to become the DCCP service provider and replaced Mission in that role. After winning the tender, One Tree purchased some of the assets of Mission and from 1 January 2019 employed 171 former Mission DCCP employees whose employment with Mission ceased at the end of December 2018 (“**transferring employees**”). It is uncontentious that those facts triggered the “transfer of business” provisions in Pt 2-8 of the FW Act and resulted in the EA applying to One Tree.
8. At [95] the primary judge held that One Tree’s consent to being bound by the EA “was manifested through its actions” which the primary judge described at [96] as follows:
9. it was entirely optional as to whether or not One Tree acquired the business. It did not have to take any steps that would trigger the transfer of business provisions of the FW Act. However it did so knowing of the existence of the EA; and
10. no application has ever been made by One Tree (as might be expected shortly following the acquisition) to the Commission for an order that the EA not apply to it under s 318 or for an order to vary cl 77 of the EA pursuant to s 320 of the FW Act. No comment is made about the likely prospects of either such applications, but given that the statutory regime contemplates such applications in appropriate circumstances, the absence of making such an application might suggest acquiescence on One Tree’s part to the terms of the EA.
11. At [92] the primary judge observed that “[a] new employer does not need to structure itself in a manner that gives rise to a ‘transfer of business’ under s 311(1) of the FW Act”. His Honour went on to find that One Tree could have recruited its own workforce and that it had contingency plans to recruit its own workforce if it could not reach agreement in relation to the transferring employees.
12. Those factual findings sustain the objectively ascertainable conclusion that One Tree made a voluntary election to have the binding force of the EA (including that of cl 77) applied to it. In other words, in circumstances where One Tree could have conducted its business without being legally bound by the obligations imposed upon an employer by the EA, One Tree knowingly chose to structure its business in a manner which would subject it to those obligations. One of those obligations was that it agreed to be bound by the determination of the FWC of a cl 77 dispute.
13. Contrary to One Tree’s submissions, the consensual foundation evident from those facts is not relevantly different from that in *Breckler*. One Tree contended that the election made by the trustees in *Breckler* was an act directly expressing the trustees’ wishes to subject themselves to the very statutory provisions which empower the SCT to resolve disputes between the trustees and its members. That was said to be very different to One Tree’s entry into a commercial transaction which triggered a mandatory statutory consequence.
14. There is no finding in *Breckler* as to the subjective intent of the trustees, although it is unlikely that the trustees wished to have their decisions reviewed and substituted by decisions of the SCT. If the subjective intent of the trustees was relevant (which we doubt) it is more likely they were driven by an intent to provide to the trust the tax benefits which their election provided. Equally, it may be said here that One Tree was driven by the commercial benefits available to the conduct of its business by its employment of the transferring employees and its acquisition of some of the assets of Mission. However, in each case, the incentives that may have subjectively motivated the choice or election made do not deny the voluntary acceptance of and voluntary submission to the legal consequences of the making of the election.
15. It may be accepted, as One Tree contended, that the contracts of employment made by One Tree with the transferring employees do not embody One Tree’s agreement to be bound by private arbitrations conducted by the FWC under cl 77. But no reliance on that source of authority was made by either the primary judge or the UWU. Nor do the terms of the employment agreements made with the transferring employees serve to deny the fact that One Tree voluntarily elected to submit to the binding force of the EA. To the contrary, the offers made by One Tree to the transferring employees confirmed that One Tree had elected to submit to the binding force of the EA. Although those offers stated that the EA would not be incorporated into the employment agreements as a contractual term, they nevertheless acknowledged that the binding force of the EA would govern their relationship. The “relevant commencing classification” One Tree offered to each transferring employee was referrable to it. An employee who accepted One Tree’s offer was entitled, having regard to the terms in which it was expressed, to have accepted that offer on the basis that the offer had acknowledged that the EA would remain binding in all regards on both them and their prospective employer without exception. Clauses 51 and 52 of the individual offers simply reflected that position.
16. We accept One Tree’s contention that if consent is sufficient, the requisite consent must be actual, rather than deemed by the statute. One Tree is correct to contend that if Parliament could simply legislate to deem or mandate consent to a private arbitration, the Ch III restrictions (founded as they are on the important doctrine of the separation of judicial power) could be readily usurped. However, although the primary judge (wrongly in our respectful view) spoke in terms of the FW Act deeming consent, his Honour appreciated that consent could not be mandated by the statute. At [91], the primary judge adverted to the need for consent to be voluntary rather than “mandatory”. The primary judge’s findings as to One Tree’s conduct which his Honour regarded as manifesting its consent, were clearly findings made about voluntary rather than involuntary conduct. Those findings are not challenged. The suggestion made by One Tree that evidence would need to be considered about how commercially practicable it would have been for One Tree to do otherwise than to trigger Pt 2‑8 of the FW Act, is unpersuasive. If One Tree wanted to establish that the commercial circumstances in question mandated its conduct to the extent that that conduct should be regarded as involuntary, it was for One Tree to establish that before the primary judge. In doing so One Tree would have had to confront observations made in *Breckler*,particularly those at [44].
17. One Tree also relied upon the terms of s 739(4) of the FW Act which empower the FWC to arbitrate disputes and provide that:

If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

1. One Tree contended that the word “agreed” in s 739(4) must be construed to refer to an *inter partes* agreement or, in other words, an agreement embodied in a common law contract. There is no imperative to construe “agreed” in that limited way. To the contrary, the provision should be construed to encompass the full breadth of the constitutionally available means by which a private arbitration may be authorised by its disputant parties. That construction is available on the text of the provision and is consistent with the evident purpose of the scheme of the Act dealing with dispute resolution processes required to be included in enterprise agreements, of facilitating rather than mandating the resolution of disputes by arbitration.
2. Finally, at [93] the primary judge observed that it would not be consistent with the intent of the statutory regime created by the FW Act for employees who become employed after the making of an enterprise agreement not to be bound by a private arbitration conducted pursuant to a process provided for by that enterprise agreement. This was a passing observation made by the primary judge, not critical to his Honour’s conclusions and not directly challenged on the appeal, although the correctness of that view was referred to in the submissions made. It is not necessary that the correctness of that view be here considered, however, with respect to the primary judge, it is necessary to observe that the intent of the statutory regime does not address the correct question. It may well be the case that the FW Act intends that all employees be bound by a private arbitration process provided for in an applicable enterprise agreement made under that Act. However, that does not answer the question of whether by reference to the restrictions imposed by Ch III it is constitutionally valid for the FW Act to so provide. Whether a sufficient consensual foundation exists is a factual inquiry which will need to be determined by reference to the specific facts which pertain to the particular case. In the case of an employee employed after the making of the relevant enterprise agreement, the facts of relevance may not be confined to the fact of the employee choosing to accept employment and (arguably) thus voluntarily submitting to the binding force of an applicable enterprise agreement (as was assumed by the submission made by One Tree), but will likely extend to those facts which gave rise to the employee’s involvement and participation in the dispute resolution process itself.
3. Appeal grounds 3 and 4 depend upon One Tree succeeding on appeal grounds 1 and 2. As One Tree has failed on grounds 1 and 2, appeal grounds 3 and 4 need not be considered.
4. The appeal should be dismissed. No party has applied for costs, presumably because of the operation of s 570 of the FW Act. Accordingly, no order as to costs should be made.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromberg and Kerr. |

Associate:

Dated: 24 February 2021