FEDERAL COURT OF AUSTRALIA

One Tree Community Services Inc v United Voice [2019] FCA 1309

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| File number: | WAD 389 of 2019 |
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| Judge: | **MCKERRACHER J** |
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| Date of judgment: | 19 August 2019 |
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| Catchwords: | **INDUSTRIAL LAW** – where dispute about payment of redundancy and recognition of service of transferred employees was referred to Fair Work Commission for arbitration – employer challenged Commission’s jurisdiction – Commission satisfied as to jurisdiction  **INDUSTRIAL LAW** – where the employer commenced proceedings in this Court challenging the Commission’s jurisdiction to arbitrate – whether the new employer ‘consented’ to arbitration – scope of agreement to arbitrate – parties to agreement to arbitrate  **CONSTITUTIONAL LAW** – whether the Commission would be impermissibly exercising judicial power in arbitrating the dispute – private arbitration – whether the Commission would be infringing Ch III of the *Constitution*  **PRACTICE AND PROCEDURE** – application for interlocutory relief – whether a *prima facie* case established – whether balance of convenience favoured relief |
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| Legislation: | *Constitution* s 71  *Fair Work Act 2009* (Cth) ss 50, 52(1), 53(3)(a), 122(1), 182(1), 186, 186(6), 311, 311(2), 313, 313(1), 313(1)(a), 320, 562, 595(1), 595(3), 595(5), 738(b), 739, 739(4), 793  *Judiciary Act 1903* (Cth) ss 39B(1), 39B(1A)(b), 39B(1A)(c), 78B, 78B(5) |
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| Cases cited: | *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57  *Balfour Beatty Power Construction Australia Pty Ltd v Kidston Goldmines Ltd* [1989] 2 Qd R 105  *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528  *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426  *Construction, Forestry, Mining and Energy Union v Australian Industrial Relation Commission* (2001) 203 CLR 645  *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2016) 244 FCR 178  *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245  *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* (2018) 363 ALR 60  *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 89 FCR 166  *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456  *Rinehart v Hancock Prospecting Pty Ltd* (2019) 93 ALJR 582  *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533  *United Voice v One Tree Community Services Inc* [2019] FWC 4285  *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 |
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| Date of hearing: | 14 August 2019 |
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| Registry: | Western Australia |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 64 |
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| Counsel for the Applicant: | Mr M Follett |
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| Solicitor for the Applicant: | DLA Piper Australia |
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| Counsel for the First Respondent: | Mr SS Bull |
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| Solicitor for the First Respondent: | United Voice |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent submits to any order of the Court, save as to the question of costs |

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| **Table of Corrections:** |  |
| 22 March 2021 | The medium neutral citation has been amended to ‘*One Tree Community Services Inc v United Voice* [2019] FCA 1309’ |

ORDERS

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|  | | WAD 389 of 2019 |
|  | | |
| BETWEEN: | ONE TREE COMMUNITY SERVICES INC. ABN 74 914 567 313  Applicant | |
| AND: | UNITED VOICE  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 19 AUGUST 2019 |

UPON THE APPLICANT, BY ITS COUNSEL, UNDERTAKING:

* 1. to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not that person is a party) affected by the operation of the order or undertaking or any continuation (with or without variation) of the order or undertaking; and
  2. to pay the compensation referred to in (a) to the person affected by the operation of the order or undertaking.

THE COURT ORDERS THAT:

1. Until the hearing and determination of the originating application or further order (the **Court’s Decision**), the Second Respondent be restrained from hearing or determining by way of arbitration the dispute the subject of Fair Work Commission proceeding number C2019/1489 (the **Dispute**).
2. These orders be stayed for 48 hours and thereafter discharged if the Second Respondent determines to adjourn the hearing of the Dispute and stay any interlocutory orders, until the Court’s Decision.
3. Costs reserved.

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

REASONS FOR JUDGMENT

MCKERRACHER J:

# THE APPLICATION

1. The applicant, **One Tree** Community Services Inc., seeks urgent interlocutory relief restraining the second respondent, the Fair Work **Commission**, from proceeding with an arbitration. The interlocutory relief is in support of substantive relief for constitutional writs, an injunction and a declaration.
2. One Tree raises the novel contention that the Commission will be invalidly exercising the judicial power of the Commonwealth by purporting to deal with the dispute by way of ‘arbitration’ under s 738(b) and s 739(4) of the *Fair Work Act 2009* (Cth) (the **FW Act**), in circumstances where the respondent to the dispute, being One Tree:
   1. did not make (in the sense defined by s 182(1) of the FW Act) the relevant enterprise agreement containing the term purporting to vest the Commission with the power to arbitrate or resolve the dispute;
   2. did not make, agree or otherwise consent to the terms of the relevant enterprise agreement which purports to vest the Commission with power to arbitrate or resolve the dispute;
   3. is covered by and subject to the application of the relevant enterprise agreement only by operation of s 313(1)(a) of the FW Act; and
   4. did not otherwise:
      1. agree with the dispute applicant or otherwise consent to dealing with the dispute by the dispute applicant under any term of a relevant enterprise agreement by way of private arbitration in accordance with s 738(b) and s 739(4) of the FW Act; or
      2. did not otherwise agree with the dispute applicant or otherwise consent to dealing with the dispute brought by the applicant by way of private arbitration under any other arbitral agreement.

# THE BACKGROUND

1. The underlying facts by way of summary are that on 23 July 2013, the Commission approved the *Mission Australia Early Learning Services Enterprise Agreement, 2013-2016* (the **EA**). The EA was made by **Mission** Australia Early Learning Services (as it was then known) and certain of its employees covered by the EA. One Tree was uninvolved with the making of the EA.
2. Over five years later, and as part of an agreement with Mission, One Tree made offers of employment to various employees employed by Mission, whose employment was covered by the EA. They subsequently commenced employment with One Tree in around January 2019 (the **Transferring Employees**) under separate employment contracts discussed below.
3. On 5 March 2019, the first respondent, **United Voice**, an industrial organisation, wrote to One Tree alleging that United Voice was in dispute with One Tree for the purpose of cl 77 of the EA, concerning the service histories of United Voice’s members who were Transferring Employees. United Voice allege that ‘it was not open for One Tree to decide not to recognise the transferring employees’ service for the purpose of redundancy’ (the **Dispute**). United Voice said it intended to notify the Commission of the Dispute as permitted by cl 77.5 of the EA.
4. On 7 March 2019, United Voice filed in the Commission a Form 10, an *Application for the Commission to deal with a dispute in accordance with a dispute settlement procedure*, seeking to refer the Dispute with One Tree to the Commission in accordance with s 739 of the FW Act and cl 77 of the EA.
5. Clause 77 of the EA, the Dispute Resolution Clause (the **DRC**), is in the following terms:

**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 a 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.

1. One Tree did not in any conventional sense ‘agree’ to cl 77 of the EA, not having been a party to the EA. It did not reach any agreement with United Voice or anyone else as to the terms of cl 77 of the EA.
2. Section 313 of the FW Act, in substance, however, purportedly applies the terms of the EA, including cl 77, to One Tree by operation of law as a ‘transferable instrument’ with respect to the Transferring Employees.
3. One Tree contends that it did not agree with United Voice or anyone else for the Commission to arbitrate or resolve any disputes with United Voice or its members, including the Dispute.
4. One Tree raised this objection and other matters in the Dispute proceedings, denying that the Commission had jurisdiction to arbitrate or otherwise resolve the Dispute in the absence of consent or agreement of One Tree. By decision delivered on 3 July 2019, the Commission held that it had jurisdiction to hear and determine the Dispute by way of arbitration. The Commission subsequently listed an arbitration hearing in relation to the Dispute for 3 September 2019.
5. Although the Commission determined that it did have jurisdiction, it noted a submission by United Voice that any constitutional challenge was a question that should be determined by a court. One Tree proceeds with this application in this Court. The Commission has filed a submitting appearance.

# CONSTITUTIONAL MATTER

1. Notices of a constitutional matter have been issued under s 78B of the ***Judiciary Act*** *1903* (Cth). The constitutional matter is self-evident. The notices have adequately described it. Most Attorneys-General have responded. None wishes to be heard at this stage. As the matter is interlocutory and prompt relief is sought, it would, in any event, be appropriate to proceed: see s 78B(5) of the *Judiciary Act*.

# EVIDENCE

1. Nothing in argument suggested, at least at this stage, that the content of the evidence was controversial save that United Voice points out that only contractual templates have been produced rather than the actual contracts with employees.
2. One Tree’s application was supported by an affidavit sworn by Ms Irina Cattalini, an Executive Director of One Tree, sworn on 7 August 2019, deposing to the essential matters, many of which in brief form have been referred to above.
3. In response and in opposition to the interlocutory relief sought, United Voice relies upon an affidavit of Mr Stephen Bull, Industrial Coordinator and lawyer for United Voice, who also appeared on its behalf to argue against the interlocutory relief.
4. The business which One Tree acquired from Mission was the operation of the assets in the Defence Childcare Program (**DCCP**) as a service provider on behalf of the Commonwealth’s Department of Defence. It involves the operation and management of various childcare service centres, outside school hours care facilities and case management services for defence personnel, families and local communities. One Tree is a registered charity. It has substantial assets and revenue.
5. Between the award of the tender by the Commonwealth to One Tree in July 2018 and it commencing pursuant to that tender the operation of the DCCP business on 1 January 2019, One Tree made offers of employment to a number of Mission’s employees. Those offers all stated that One Tree would not recognise the prior service of those employees with Mission for the purposes of current or future redundancy entitlements at One Tree. One Tree says that position was consistent with its rights at common law as recognised by s 122(1) of the FW Act. Such offers were accepted by 171 employees of Mission on that basis and who commenced employment on or about 1 January 2019. These were the Transferring Employees referred to above.
6. One Tree accepts that the Transferring Employees were and are covered by the EA. One Tree accepts that by operation of law and irrespective of the consent or agreement of One Tree to this outcome, the Transferring Employees remain so covered in their employment with One Tree. Pursuant to s 313(1)(a) of the FW Act, the agreement now covers and applies to One Tree and the Transferring Employees as a ‘transferable instrument’, with the elements of s 311 of the FW Act being satisfied.
7. United Voice raised the Dispute contending that cl 61 and perhaps cl 63 of the EA requires or compels One Tree to recognise prior service of the employees for that purpose. One Tree contends that such recognition is not required. Clause 61 and cl 63 of the EA are in these terms:

**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 [Mission].

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 [Mission] immediately before the termination; and

(ii) recognises the employee’s service with [Mission]; 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.

…

**63. Redundancy payments**

63.1 Where an employee is not able to be redeployed and he or she is terminated on the grounds of redundancy, the employee is entitled to the following redundancy payments:

…

## The Commission

1. In a detailed and considered decision (*United Voice v One Tree Community Services Inc* [2019] FWC 4235), the Commission, having set out in detail the submissions of One Tree and United Voice, rejected One Tree’s objection and held that it was properly vested with jurisdiction to hear and determine the Dispute.
2. Following this decision, directions were made by the Commission for filing of materials, including for One Tree to file its materials now in two business days’ time.

# JURISDICTION AND INTERLOCUTORY INJUNCTION

1. The Court has jurisdiction to hear and determine the originating application on one or more of the following bases:
   1. pursuant to s 39B(1) of the *Judiciary Act*, insofar as it seeks to a writ of prohibition against the Commission, which is constituted by officers of the Commonwealth;
   2. pursuant to s 39B(1A)(b) of the *Judiciary Act*, as a matter arising under the *Constitution*;
   3. pursuant to s 39B(1A)(c) of the *Judiciary Act*, as a matter arising under the FW Act; and
   4. pursuant to s 562 of the FW Act, which confers jurisdiction on this Court ‘in relation to any matter (whether civil or criminal) arising under this Act’.
2. There was no dispute between the parties as to the appropriate test to apply in considering whether to grant the interlocutory injunction sought: see, for example, *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 (at [65]-[72] and the authorities therein cited). At this interlocutory stage, the Court is concerned with whether the applicant has established a *prima facie* case and whether the interim order should be made on the balance of convenience, with regard to the prejudice which would flow and the interests of justice. The contention for United Voice is that neither limb of the test is made out such that no interlocutory relief should be ordered that impedes the progress of the arbitration of the Dispute by the Commission on 3 September 2019.

# THE PARTIES’ ARGUMENTS

1. United Voice’s argument is that the contentions advanced by One Tree are completely unfounded, novel only because they are unarguable and that the course proposed by United Voice accords entirely with many years of industrial process. United Voice also argues, in summary, that the relatively straightforward arbitration proceeding, listed for only half a day, should be permitted to proceed in its ordinary course, rather than be deferred for resolution of this jurisdictional dispute, which is much more likely to take up considerably greater resources and costs.
2. Shortly put, the argument raised by One Tree is that in the absence of any arbitration agreement between One Tree and United Voice or any transferring employee, the Commission has no jurisdiction to arbitrate the Dispute, as any attempt to do so against the will of One Tree involves the impermissible exercise of the judicial power of the Commonwealth. That is, it is said, because such arbitration in the Commission can only be consensual.
3. It is common ground that the Commission ordinarily exercises a power of ‘private arbitration’. One Tree contends that by the EA, which covers and applies to it by operation of statutory device, it has not accepted any private arbitration by the Commission. It argues that any attempt to arbitrate would amount to the determination of existing rights and obligations in the absence of One Tree’s consent and would amount to an impermissible exercise of judicial power by a body other than a Ch IIICourt**.** This follows, it says, from ss 595(1), 595(3), 595(5), 738(b) and 739(4) of the FW Act, all of which operate only on the premise of the parties agreeing that the Commission may arbitrate. Those provisions are relevantly as follows:

**595 [Commission’s] power to deal with disputes**

(1) The [Commission] may deal with a dispute only **if the [Commission] is expressly authorised to do so under or in accordance with another provision of this Act**.

(2) The [Commission] may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:

(a) by mediation or conciliation;

(b) by making a recommendation or expressing an opinion.

(3) The [Commission] may deal with a dispute **by arbitration** (including by making any orders it considers appropriate) **only if the [Commission] is expressly authorised to do so under or in accordance with another provision of this Act**.

**Example: Parties may consent to the [Commission] arbitrating a bargaining dispute (see subsection 240(4))**.

(4) In dealing with a dispute, the [Commission] may exercise any powers it has under this Subdivision.

Example: The [Commission] could direct a person to attend a conference under section 592.

(5) To avoid doubt, the [Commission] **must not exercise the power referred to in subsection (3) in relation to a matter before the [Commission] except as authorised by this section**.

…

**Subdivision B - Dealing with disputes**

**738 Application of this Division**

This Division applies if:

…

(b) **an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6)**; or

…

**739 Disputes dealt with by the [Commission]**

(1) This section applies if a term referred to in section 738 requires or allows the [Commission] to deal with a dispute.

…

(4) **If, in accordance with the term, the parties have agreed that the [Commission] may arbitrate (however described) the dispute, the [Commission] may do so**.

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

(5) **Despite subsection (4), the [Commission] must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.**

(6) **The [Commission] may deal with a dispute only on application by a party to the dispute**.

(Emphasis added.)

1. Section 313 of the FW Act, which is pivotal to resolution of this issue, provides:

**313 Transferring employees and new employer covered by transferable instrument**

(1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee’s employment with the old employer, then:

(a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the ***transfer time***) the transferring employee becomes employed by the new employer; and

(b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.

(2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee’s employment with the old employer.

(3) This section has effect subject to any FWC order under subsection 318(1).

1. One Tree contends that the drafting and structure of the combination of the statutory provisions no doubt reflects constitutional limitations on the capacity of the Commonwealth legislature to confer judicial power on a body other than a Ch III court and no doubt seeks to conform with the judgment of the **High Court** of Australia in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relation Commission* (2001) 203 CLR 645 (the ***Private Arbitration* case**). The High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) stated ([26], [29]-[31]):

26 So far as concerns arbitrated provisions with respect to dispute resolution procedures, it should be noted that a dispute as to the powers the Commission should, but does not have, is not an industrial dispute and will not ground an award by which the Commission gives itself power to do that which it is not otherwise authorised to do. **Moreover, an arbitrated dispute resolution provision will be invalid to the extent that it purports to confer judicial power on the Commission or any one else. For present purposes, it is sufficient to note that a power to make a binding determination as to legal rights and liabilities arising under an award or agreement is, of its nature, judicial power**.

…

29 What was said in *Hegarty* applies, but with some modification, to an agreement by parties to an industrial situation. **As already indicated, 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.

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.

(Emphasis added, citations omitted.)

1. One Tree argues that there is a constitutional necessity for agreement (which is usually embodied in a contract) by the parties to a dispute to have the difference resolved by the Commission as expressly recognised by s 739(4) of the FW Act. The passages referred to in the *Private Arbitration* case make clear that the essential characteristic grounding the arbitrator’s power is the agreement between the parties to submit disputes to a third party for determination. French CJ and Gageler J repeat this requirement in ***TCL*** *Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533 (at [29]) in these terms:

**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**.

(Emphasis added, citations omitted.)

1. Similarly in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 93 ALJR 582 (at [85]), Edelman J observed that it was a ‘fundamental principle that arbitration is a matter of contract’.
2. One Tree contends that general law conventional contractual principles of offer and acceptance apply in determining whether an arbitration agreement has been formed. That, it is said, is apparent from a number of cases, including the decision of Dowsett J in *Balfour Beatty Power Construction Australia Pty Ltd v Kidston Goldmines Ltd* [1989] 2 Qd R 105, followed by Emmett J in *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 89 FCR 166 (at 194-195).
3. In this instance there is no suggestion or evidence, One Tree argues, of any express or implied offer or acceptance necessary to establish an arbitration agreement, either between One Tree and United Voice or One Tree and any of the Transferring Employees. The only offer and acceptance, if any, was between Mission and its employees at the point the EA was ‘made’ under s 182(1) of the FW Act. Clearly One Tree had no involvement in that process.
4. It is not sufficient, One Tree argues, that the EA now ‘covers’ and applies to One Tree by operation of statute (s 313 of the FW Act), whether it likes it or not. That, One Tree says, cannot of itself establish a valid arbitration agreement. It is not even clear, for example, what the identity of the other party to that purported agreement would be. On this topic, One Tree also argues, even if United Voice could establish a valid arbitration agreement, the doctrine of ‘separability’ would apply requiring specific evidence of an intention to agree to cl 77.5: see ***Walter Rau*** *Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 per Allsop J (as the Chief Justice then was) (at [89]).
5. Significantly, according to One Tree, unlike all the other various terms and conditions of employment agreed to between One Tree and the Transferring Employees, the terms of the EA, their existence and applicability to the employment were recognised ‘as a matter of law’ only, but were expressly noted as not forming part of the contract of employment. By cl 51 of the Contracts of Employment, it was provided:

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**.

(Emphasis added.)

1. One Tree argues, therefore, that insofar as One Tree and the Transferring Employees were concerned, both parties expressly agreed to ‘not agree’ to the terms of the EA.
2. Further, the relevant parts of the agreement between One Tree and the Transferring Employees provided:

One Tree will recognise the length and continuity of your period of service with [Mission] (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 [FW Act] or any Applicable **Industrial Instrument**).

(Emphasis added.)

1. One Tree argues that just as it did not ‘have’ to acquire Mission’s assets, employees were not ‘bound’ to take One Tree’s employment.

## Whether there is a *prima facie* or arguable case

1. In addition to United Voice’s argument noted above (at [25]), United Voice says that the Commission has already considered and determined the argument raised by One Tree. However, I note that in submissions to the Commission, United Voice did appropriately note that some arguments of constitutionality were matters that needed to be raised before a court. An avenue that One Tree has pursued.
2. From a balance of convenience point of view, United Voice argues that One Tree had the opportunity to appeal to a full bench of the Commission and did not use its right to do so. As to that, One Tree argues that it would be at risk of submitting to the jurisdiction by lodging such an appeal. On its face, there is some merit in that contention: see *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245 (at [146]).
3. United Voice also relies on *TCL*. In *TCL*, Hayne, Crennan, Kiefel and Bell JJ observed (at [106]):

*No delegation of judicial power*

106 The submission by TCL that the judicial power of the Commonwealth was delegated under the IA Act to arbitral tribunals in contravention of the requirements of Ch III of the *Constitution* invoked the principle established in *R v Kirby; Ex parte Boilermakers’ Society of Australia*. That submission also reflected a failure to acknowledge the consensual foundation of private arbitration which governs the relationship between private arbitration and the courts.

(Citations omitted.)

1. But reliance on this passage only invites the first question of whether or not arbitral power has been validly conferred by agreement or is otherwise constitutionally valid under statute, particularly s 313 of the FW Act.
2. I accept that United Voice identifies an important facet of the dispute when it contends that the EA and its DRC came to cover One Tree because of ‘what it did’. The transfer of the EA to One Tree was an intentional act. One Tree executed an asset transfer agreement that brought about the transfer of the EA with a cohort of employees. On any ordinary meaning, United Voice argues One Tree gave its consent to being covered by the EA.
3. United Voice argues that the transfer of the EA to One Tree was done according to the scheme of Pt 2-8 of the FW Act. While transfers of business take effect by operation of law, One Tree intentionally did the necessary things for the transfer to take place and did so with clear knowledge that the EA, in its entirety, would cover One Tree with regard to the employment of the Transferring Employees. United Voice points out that the transfer of the EA with its DRC was considered, hard fought and anticipated by One Tree. United Voice says the issue the subject of the Dispute in the Commission was a critical aspect of the negotiations and the asset transfer agreement. The EA was known and the DRC in the EA should have been an important part of One Tree’s due diligence for the transaction. It had clear choices. It could have walked away from the transfer of business arrangement or possibly applied under s 320 of the FW Act for variation of the transferable instrument. (One Tree doubts the latter provision would be applicable and I share One Tree’s doubt as to the applicability of s 320 as the necessary conditions for a variation would need to be satisfied.)
4. United Voice also stresses (correctly) that any enterprise agreement must have a clause for settling disputes. It is mandatory content as prescribed by s 186(6) of the FW Act.
5. United Voice also argues that a person, whether an employee or an employer, cannot, by less beneficial contractual terms exclude the operation of an enterprise agreement, the rights pursuant to which would be able to be vindicated by civil penalty proceedings under s 50 of the FW Act. While this contention may be correct, it would appear to stand and fall with the answer to the reasonably narrow question of whether or not One Tree has ‘agreed’ to arbitrate the Dispute and whether to otherwise to compel it to do so and be bound by the outcome would be unconstitutional.
6. Importantly, I think, United Voice emphasises that enterprise agreements made under the FW Act apply to persons due to the agreement’s coverage. The use by One Tree of contractual terms of offer and acceptance United Voice argues, is misleading. An enterprise agreement applies to employees and employers if the agreement is expressed to cover (however described) the employees and employers: s 52(1) of the FW Act. It is not limited to those covered at the time the enterprise agreement is made and an enterprise agreement will cover an employee, employer or employee organisation as a result of, amongst other things, ‘a provision of [the FW Act] or of the Registered Organisation Act’ pursuant to s 53(3)(a) of the FW Act. It is commonplace, United Voice argues, and I think correctly, for enterprise agreements to cover employees not within an original cohort that made the agreement. New employees engaged after the approval of an enterprise agreement will be covered. Similarly, United Voice argues, employee organisations are not parties to enterprise agreements and do not make agreements but are covered by enterprise agreements and able to assert rights under those agreements on behalf of employees who they are entitled to represent by force of the FW Act. In other words, the fact that no agreement was reached between United Voice and One Tree does not mean United Voice is not entitled to pursue rights on behalf of employees affected by the EA pursuant to the provisions under the FW Act in the Commission.
7. United Voice argues that *Walter Rau* and other authorities relied upon by One Tree, which are essentially commercial cases, are of limited assistance in light of the statutory character of enterprise agreements. This argument may well be correct, but I think it is part and parcel of the very question to be determined as to whether there was actual or deemed consent to arbitration or whether such consent is necessary.
8. There was debate between the parties on the issue of the role of United Voice, which was not a direct party to the EA, but is a direct party to the proceedings in the Commission, having raised the Dispute. United Voice relies upon *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245, where Bromberg J held that a union was able to initiate a dispute under the agreement in the absence of a disputed employee being named and that all affected would be bound by the outcome. That approach was confirmed on appeal in *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* (2018) 363 ALR 60, where Rares and Barker JJ described the enterprise agreement as a ‘statutory artefact’ made by persons specifically empowered by the FW Act to do so by having a ‘legislative character’. Their Honours said (at [60]):

An enterprise agreement is a statutory artefact made by persons specifically empowered by the [FW Act] to do so: *Marmara* at [90]. It has a legislative character, because it is a fair work instrument, as defined in s 12 of the [FW Act]. The Act enables an enterprise agreement to be made between an employer and both its employees (by majority vote) and employee organisations, such as the five unions.

# CONSIDERATION

1. Much of this case turns on whether the EA’s DRC is such that it encompasses authorising an arbitration between One Tree and United Voice in respect of the Dispute involving the Transferring Employees. Did One Tree consent? Can One Tree be deemed by statute, in effect, to have consented? Would a provision having the effect of deeming such consent be constitutional?
2. Enterprise agreements represent bargains concluded by industrial parties – employers and employees and their nominated union representatives, or employers and employees – that are generally enterprise or business specific, though they may in certain circumstances cover multiple enterprises. Enterprise agreements are not, in and of themselves, ‘laws’, but are given the force of law by the federal industrial relations regime: cf *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 per French J (at [51] and the authorities therein cited). Enterprise agreements are given statutory force by a registration process prescribed by legislation.
3. However, while contemplated by statute, enterprise agreements are related to contracts of employment as they presuppose the existence of a contract of employment and relationship of employment. Enterprise agreements may be categorised as analogous to contracts as they are arrangements entered into by private parties, albeit within a particular statutory framework. How, and if there is a distinction between a public and private instrument, may be an important question. (There is some discussion of this issue in a paper by Boncardo P, ‘Enterprise Agreements and Contracts: Convergent and Divergent Approaches to Interpretation’ (2011) 18 JCU Lw Rw 4.)
4. The case for One Tree is that as United Voice is a party principal to the Dispute it would be necessary to find an arbitration agreement between One Tree and United Voice. One Tree argues there is no such agreement. Again, One Tree says absent such agreement, there can be no contract.
5. One Tree says that United Voice is the party principal to look to in determining whether agreement was reached with One Tree because in *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 (at [30]) it was made clear that a union does act as a party principal, as distinct from acting as an agent for its members which was the case until the decision of *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528. As such, One Tree argues, it would be necessary both to satisfy the requirements in s 793 of the FW Act as well as common-law requirements that there was an agreement to arbitrate between One Tree and United Voice. One Tree contends that no such agreement exists as it must by virtue of authority and no statutory construct can constitutionally deem the necessary agreement which agreement in turn is required by statute.
6. One Tree contends that the Commission is not acting as private arbitrator as no agreement has ever been reached for it to be appointed in that capacity. Rather, it is in fact exercising, against the will of One Tree, the judicial power of the Commonwealth. One Tree argues that it is not within the constitutional competence of the Parliament to require, by coercion, a party to go to arbitration in the Commission in the context of disputes arising under an award or an agreement where no agreement has been reached to arbitrate in the Commission.
7. One Tree argues, with some force, that while s 186(6) of the FW Act mandates a dispute resolution clause in enterprise agreements it, does not mandate arbitration per se for that very reason. It is not within parliamentary power to mandate arbitration in circumstances where no agreement has been reached to arbitrate.
8. One Tree accepts that it is open to adopt an enterprise agreement after the event even though one was not a party to it, but of course, that is not, One Tree says, what it has done. It has not reached any agreement with United Voice and has not reached any agreement with the Transferring Employees, other than to the extent identified in evidence and, in relation to the Dispute before the Commission, in circumstances which exclude existing redundancy allowances. While an enterprise agreement is certainly a statutory artefact, the distinction which One Tree underlines is that it is one thing to be bound by a legal instrument by operation of statute. It is another thing to say that the proper construction of that instrument is that an agreement to arbitrate on certain terms and conditions has been reached, let alone with an entity that is not a party to the agreement.
9. United Voice contends there is no jurisdiction for constitutional writs to go as it is clear from ***Endeavour Energy*** *v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2016) 244 FCR 178 (at [33]) that the Commission and its members act as private arbitrators. Ordinarily, One Tree would agree, however, One Tree says that it only does so when the Commission sits in a private arbitration capacity and that, in turn, can only occur when the parties agree to that course. That position is made clear also from *Endeavour Energy* (at [31]).
10. The question here is whether there was any such agreement. There was certainly no specific agreement written or oral between One Tree and United Voice. The question is whether there is implied agreement or some other statutory obligation to displace agreement and if so whether such statutory obligation is constitutionally valid.
11. On balance, although I have some misgivings, I consider that One Tree’s argument is sufficiently arguable that it ought not be shut out from determination in this Court, unless the balance of convenience suggests otherwise.
12. Insofar as the balance of convenience is concerned, it clearly favours resolving this dispute in this Court as it is an issue which is capable of affecting numerous other circumstances and is obviously capable of being of wide import in industrial disputation. More specifically, in relation to the balance of convenience concerning these parties, I appreciate that the argument would expose United Voice to a more expensive dispute, but if it is correct on the view it takes about the Dispute which it has raised, it will be compensated to some extent by a costs order of the Court. It is equally true and of significance that if One Tree’s contention concerning the Commission’s jurisdiction is correct, but no interlocutory relief were to be ordered by this Court, it would be required to defend the Commission proceeding, which is generally a no cost jurisdiction, such that it would be unable to recover the costs in that jurisdiction. Further, and more importantly I think, if the Commission proceeding is determined adversely to One Tree, it will be faced with the choice of either complying with the determination (rendering these proceedings nugatory) or consciously refusing to comply, exposing it to penal consequences pursuant to s 50 of the FW Act. Apart from the question of costs, which United Voice may incur, there is no other readily identifiable prejudice to it or to those members it represents other than modest delay in conferral upon them of rights, if they are entitled to the rights they claim in the Dispute before the Commission.

# CONCLUSION

1. I consider the contention One Tree seeks to press is arguable and I have no doubt that the balance of convenience and the interests of justice favour resolving the point raised sooner rather than later by this Court so that the parties may, if necessary, proceed in the Commission if One Tree fails.
2. The strength of the arguable case and the balance of convenience (together with the interests of justice) should always be measured collectively. Having regard to my clear views about the balance of convenience and interests of justice and my view that the case is arguable, I consider that the granting of relief would be appropriate.
3. By conveying this view in written reasons in this proceeding to which the Commission is a party, I consider it appropriate not to make any order for 48 hours (or such further period as the Commission may reasonably deem necessary) to permit the Commission the opportunity of considering whether or not it would stay its present procedural orders and adjourn the arbitration of the Dispute pending resolution of this issue in this Court.

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| I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 19 August 2019