FEDERAL COURT OF AUSTRALIA

Duggan v Metropolitan Fire and Emergency Services Board [2017] FCAFC 112

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| Appeal from: | *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWCFB 8120 |
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| File number: | VID 1455 of 2016 |
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| Judges: | **TRACEY, WIGNEY AND O'CALLAGHAN JJ** |
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| Date of judgment: | 3 August 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – application for judicial review of a decision of the Full Bench of the Fair Work Commission in performance of a private arbitration – whether the Full Bench erred in construing ss 194(c) and 253(1) of the *Fair Work Act 2009* (Cth) – whether the Full Bench erred in deciding that a “probation policy” was not properly part of the dispute referred for arbitration – whether error of law on the face of the record – identification of scope of the “record” in the context of a private arbitration award  **PRACTICE AND PROCEDURE** – whether the Federal Court of Australia has jurisdiction pursuant to s 39B(1) or (1A)(c) of the *Judiciary Act 1903* (Cth) or s 562 of the *Fair Work Act 2009* (Cth) to consider the application |
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| Legislation: | *Constitution* ch III, s 76(ii)  *Fair Work Act 2009* (Cth) ss 194(c), 253(1), 253(1)(b), 383, 562, 738, 739  *Fair Work Amendment Act 2012* (Cth) sch 9  *Industrial relations Act 1988* (Cth) s 170MH  *Judiciary Act 1903* (Cth) ss 39B, 39B(1), 39B(1A)(c)  *Commercial Arbitration Act 1984* (NSW) s 38  *Metropolitan Fire Brigades Act 1958* (Vic) |
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| Cases cited: | *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; [2005] HCA 38  *Australasian Meat Industry Employees’ Union v Fair Work Australia (No 2)* (2012) 203 FCR 430; [2012] FCAFC 103  *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1; [2000] FCA 864  *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305; [2015] FCAFC 123  *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645; [2001] HCA 16 (“*Gordonstone*”)  *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* (2012) 203 FCR 371; [2012] FCAFC 87  *Craig v South Australia* (1995) 184 CLR 163  *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2016) 244 FCR 178; [2016] FCAFC 82  *Felton v Mulligan* (1971) 124 CLR 367  *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58  *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575  *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257  *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWC 5028  *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWC 6053  *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWCFB 8120  *Re McJannet; Ex parte Australian Workers’ Union of Employees (Q) (No 2)* (1997) 189 CLR 654  *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27  *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5  *Transport Workers Union v Lee* (1998) 84 FCR 60; [1998] FCA 756  *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239; [2011] HCA 37 |
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| Date of hearing: | 3 April 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 95 |
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| Counsel for the Applicant: | Mr MR Pearce SC with Mr DC Langmead |
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| Solicitor for the Applicant: | Davies Lawyers |
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| Counsel for the First Respondent: | Mr JL Bourke QC with Ms RM Nelson |
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| Solicitor for the First Respondent: | DLA Piper Australia |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
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ORDERS

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|  | | VID 1455 of 2016 |
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| BETWEEN: | GARTH DUGGAN  Applicant | |
| AND: | METROPOLITAN FIRE AND EMERGENCY SERVICES BOARD  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| JUDGES: | TRACEY, WIGNEY AND O'CALLAGHAN JJ |
| DATE OF ORDER: | 3 AUGUST 2017 |

THE COURT ORDERS THAT:

1. The application be refused.

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

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. The applicant, Mr Garth Duggan, was employed by the Metropolitan Fire and Emergency Services Board (“the MFB”) as a recruit firefighter. Shortly after he was employed, a dispute arose about his conduct in a previous occupation and the implications of that conduct for his suitability to perform the duties of a firefighter.
2. Mr Duggan’s employment was regulated, in part, by the Metropolitan Fire and Emergency Services Board and United Firefighters Union Operational Staff Agreement 2010 (“the Agreement”). The Agreement contained a clause which prescribed the means by which such disputes were to be resolved. After a series of discussions between representatives of the MFB and the United Firefighters Union (“the UFU”), the MFB advised the UFU and Mr Duggan that it proposed to terminate his employment. The UFU contended that the dispute remained unresolved. The MFB disagreed. The MFB notified the Fair Work Commission (“the FWC”) of the dispute. The notification was made under the dispute resolution clause in the Agreement.
3. A Commissioner found that the underlying dispute had not been resolved and made various orders. A consequence of his decision was that the MFB could not, consistently with the Agreement, terminate Mr Duggan’s employment.
4. The MFB appealed to a Full Bench of the FWC. It did so pursuant to the dispute resolution clause. The Full Bench upheld the appeal and set aside the Commissioner’s orders. The MFB then terminated Mr Duggan’s employment.
5. Mr Duggan has applied to this Court seeking various forms of relief under s 39B of the *Judiciary Act 1903* (Cth) (“the Judiciary Act”). In his original application, Mr Duggan sought a declaration that the Full Bench had made an error of law on the face of the record as it had misconstrued and misapplied a section of the *Fair Work Act 2009* (Cth) (“the FW Act”). He also applied for an order quashing the decision of the Full Bench. At the conclusion of the hearing, Mr Duggan sought leave to file and rely on an amended application in which he sought a further declaration that the Full Bench had erred by deciding that a “probation policy” did not form part of the dispute and, in the alternative to the quashing order already sought, the grant of a writ of certiorari to quash the Full Bench’s decision.
6. The MFB did not oppose leave being granted and the Court determined to grant leave, subject to any objections later raised by the first respondent. After the hearing, the amended application was accepted for filing in the absence of any such objections.

# THE FACTUAL BACKGROUND

1. The Full Bench’s reasons record that Mr Duggan applied for employment with the MFB in 2013, although we note that an affidavit of the solicitor for the MFB, filed in this Court, indicated that the application to become a recruit firefighter was made in late 2015. A protracted recruitment process followed. As part of that process Mr Duggan was required to provide a national police certificate. He did so and the certificate recorded that, as at 16 September 2015, “no disclosable court outcomes [were] recorded” against him. By letter dated 23 December 2015, the MFB offered Mr Duggan employment as a recruit firefighter. A term of the offer was that Mr Duggan would serve a three month period of probation commencing from the date on which his employment started. The letter advised Mr Duggan that the conditions of his employment would be in accordance with the Agreement, the “MFB policies and procedures (i.e. [the] MFB Workplace Behaviour Policy)” and the *Metropolitan Fire Brigades Act 1958* (Vic) (“the MFB Act”). Mr Duggan accepted the offer on 12 January 2016 and commenced his employment on 9 February 2016.
2. Around the time of the recruitment process, Mr Duggan had been the subject of complaints of professional misconduct as an osteopath in New South Wales. The complaints were lodged with the New South Wales Civil and Administrative Tribunal (“the Tribunal”) on 9 June 2015 and were the subject of directions hearings conducted on 15 and 29 January 2016. Mr Duggan made no admissions but advised the Tribunal that he did not propose to attend the Tribunal hearings. Following a substantive hearing, the Tribunal found that the allegations had been established and, in a decision published on 17 March 2016, made various orders against Mr Duggan, including a reprimand, the cancellation of his registration and an order prohibiting him from providing any health services.
3. Mr Duggan was aware of the Tribunal’s decision within a week of it being published but did not inform the MFB of the proceeding or its outcome. The decision was drawn to the MFB’s attention by some of Mr Duggan’s fellow recruits.
4. Having become seized of the matter, the MFB advised Mr Duggan that it did not consider it to be appropriate for him to continue beyond the probationary period of his employment and that he was to be stood down. On 30 April 2016, the UFU notified the MFB that the two entities were in dispute concerning Mr Duggan about matters “including but not limited to the failure [of the MFB] to undertake the proper process in the enterprise agreement, consultation, change, policy and termination”. The UFU urged the MFB to retain Mr Duggan in employment. By letter dated 5 May 2016, the MFB confirmed to Mr Duggan that he was to be stood down on full pay until further notice and advised him of its preliminary view that his employment should not continue beyond the expiry of the three-month probationary period which ended on 9 May 2016. Following exchanges of correspondence between the UFU, Mr Duggan and the MFB, the MFB determined that Mr Duggan’s employment should be terminated and he was so advised by letter dated 24 May 2016.
5. On the same day, the MFB notified the FWC of a dispute and sought a determination that it had not failed to follow any process mandated under the Agreement with respect to the termination of Mr Duggan’s employment. It made the notification because it wished to establish that no outstanding dispute remained unresolved relating to Mr Duggan’s employment. This was necessary because Clause 27.1.3 of the Agreement prevented the termination of Mr Duggan’s employment unless any dispute notified by him or the UFU had been resolved.

# THE AGREEMENT

1. The Agreement is an extremely lengthy document. A brief survey of the relevant clauses is necessary in order to understand the issues which fell to be determined by the FWC.
2. Clause 27 deals with termination of employment. Clause 27.1 provides as follows:

27.1 An employee’s employment may not be terminated unless:

27.1.1 the Employee Code of Conduct has been complied with in accordance with clause 26.3;

27.1.2 the employee and the union have been notified that the employer intend to terminate an employee’s employment; and

27.1.3 any dispute notified by the employer or the union has been resolved.

1. Clause 15 deals with introduction of change and provides that, if the MFB wishes to implement change in matters pertaining to the employment relationship, the provisions of Clause 13 are to apply. Clause 13 is headed “CONSULTATIVE PROCESS”. “Consultation” is defined to mean “the full, meaningful and frank discussion of issues/proposals and the consideration of each party’s views, prior to any decision”. The consultation is to involve representatives of the MFB and UFU.
2. The process of dispute resolution is prescribed by Clause 19. That clause relevantly provides:

19.1 This dispute resolution process applies to all matters arising under this agreement, which the parties have agreed includes:

19.1.1 all matters for which express provision is made in this agreement; and

19.1.2 all matters pertaining to the employment relationship, whether or not express provision for any such matter is made in this agreement; and

19.1.3. all matters pertaining to the relationship between the [MFB] and UFU, whether or not express provision for any such matter is made in this agreement.

The parties agree that disputes about any such matters shall be dealt with by using the provisions in this clause.

19.2. To ensure effective consultation between the employer, its employee(s) and the union on all matters, the following procedure shall be followed in an effort to achieve a satisfactory resolution of any dispute or grievance.

19.2.1. Step 1 The dispute shall be submitted by the union and/or employee(s) to the employee’s immediate supervisor.

19.2.2. Step 2 If not settled at Step 1, the matter shall be submitted to the appropriate senior officer.

19.2.3. Step 3 If not settled at Step 2, the matter shall be recorded. The matter shall be submitted to the appropriate delegated Industrial Representative of the employer for consultation.

19.2.4. Steps 1 - 3 Must be concluded within a period of ten (10) consecutive days. Disputes are to be resolved at a local level wherever possible.

19.2.5. Step 4 If the matter is not settled at Step 3, the dispute shall be formally submitted in writing to the Manager Employee Relations, setting out details of the dispute and, where appropriate, with supporting documentation. The Manager Employee Relations shall convene a meeting of the employer, employee(s) and the union within a period of one week (7 days) of receipt of such submissions and endeavour to reach a satisfactory settlement.

19.2.6. Step 5 If the matter is not settled following progression through the disputes procedure it may be referred by the union or the employer to FWA. FWA may utilise all its powers in conciliation and arbitration to settle the dispute.

19.3. Notwithstanding the words contained in the above sub-clause, the steps of the procedure apply equally to a dispute raised by an employee, the union or Officer in Charge.

19.4. While the above procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.

19.5. …

19.6. A dispute may be submitted, notified or referred under this clause by the UFU.

19.7. A decision of the FWA under this clause may be appealed. A dispute is not resolved until any such appeal is determined.

The references to “FWA” in this clause are to the title previously accorded to the present FWC, namely “Fair Work Australia”. The name change was effected by Schedule 9 of the *Fair Work Amendment Act 2012* (Cth). Neither the UFU nor the MFB suggested that anything turned on the change for present purposes.

# THE COMMISSION’S DECISION

## The application

1. As already noted, it was the MFB which referred a dispute to the FWC. This occurred under Clause 19.2.6 of the Agreement. In its application to the FWC (at [2.1]), the MFB identified the nature of the dispute as follows:

1. The MFB became aware of a decision of the NSW Civil and Administrative Tribunal regarding one of its probationary recruit firefighters, Mr Duggan, which raised serious concerns about Mr Duggan’s continued employment.

2. The MFB met with Mr Duggan on 3 May 2016 and stood him down on full pay.

3. By letter dated 5 May 2016, the MFB notified the employee that it had formed the preliminary view that it would not continue the First Respondent’s employment beyond his probationary period and confirmed that he was stood down on full pay.

4. The MFB has made a decision to terminate the First Respondent’s employment and such decision has been notified to the employee and the Union.

5. In accordance with the status quo provisions of clause 19.4, the decision to terminate cannot take effect until resolution of the dispute over process notified by the UFU on 30 April 2016.

6. The MFB seeks resolution of the dispute by the Commission. That is, it seeks a determination that:

(a) the dispute is resolved. (i.e. that there is no failure by the MFB to follow any process mandated under the enterprise agreement with respect to termination of the employee’s employment); and

(b) that consistent with clause 27.1.3 of the enterprise agreement, the decision to terminate the employee’s employment can therefore now be implemented.

(References to annexures omitted.)

1. The Commissioner, before whom the reference came, was conscious of the need to define the parameters of the dispute. In his reasons for decision (see *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWC 5028 at [43]) he characterised the dispute as follows:

1. Whether or not there was a failure by the MFB to follow any process mandated by the Agreement with respect to the termination of Mr Duggan’s employment;

2. Whether the dispute the subject of this proceeding is resolved; and

3. Whether the decision to terminate the employee’s employment can therefore now be implemented by the MFB.

Elsewhere he framed the dispute in terms of “the question of whether there was any impediment arising from the [Agreement] to the [MFB] … implementing the decision it had made to terminate the employment of a recruit firefighter, Garth Duggan”: see *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWC 6053 at [1].

## The parties’ submissions

1. The MFB submitted to the FWC that the answer to the first question, posed by the Commissioner, was “no”, and that the second and third questions should be answered “yes”. The UFU submitted that the first question should be answered “yes”, and that the latter two questions should be answered “no”.
2. In dealing with the first question, the submissions of both parties concentrated on what was described as the MFB’s “police check policy”. The formal title of the policy was “Recruitment Police Criminal History Check”. The policy required all applicants for employment as firefighters to supply a National Police Certificate prior to proceeding to interview. It provided that any applicant who deliberately supplied false, incomplete or misleading information in an attempt to gain employment would automatically be disqualified from further consideration for employment.
3. The gist of the MFB’s submissions was that there had been no change by it to its police check policy nor any breach of that policy, that all processes required by the Agreement had been complied with and that, as a result, the dispute must be regarded as being at an end.
4. The UFU submitted that the MFB was not entitled to terminate Mr Duggan’s employment for the reasons upon which it relied because such termination would be contrary to the police check policy. The UFU also contended that, when the MFB took the Tribunal decision in to account in deciding to terminate Mr Duggan’s employment, it had unilaterally amended part of that policy by introducing a new criterion that adverse findings by an occupational tribunal can render a person unsuitable for employment as a firefighter, and had done so without prior consultation with the UFU, contrary to Clause 15 of the Agreement.
5. On the day of the hearing before the FWC, the Commissioner directed certain written questions to the parties. They subsequently provided some written responses. Relevantly, question 4 read:

The *MFB Act* refers to every appointment or promotion of an operational staff member being subject to 3 months’ probation (s25B);

* What does “on 3 months’ probation” mean?
* Is it agreed that the operation of the *MFB Act*, and the probation provision in particular, is unimpeded by the Operational Staff Agreement?

1. Counsel for the MFB responded to the Commissioner’s questions. Relevantly the MFB advised the Commissioner that:

* it was entitled to end the employment of a probationary employee whom it considered not to be suitable for employment, subject only to any terms of the Agreement that relate to such employees;
* the only applicable requirement of the Agreement was compliance with Clause 27; and
* there was “no other MFB policy or term of the Agreement that impede[d]” its ability to make an assessment as to Mr Duggan’s suitability and whether his employment ought to continue beyond the three month probationary period.

1. In a later submission to the Commissioner, which replied to answers given by the UFU and Mr Duggan to the Commissioner’s question, the MFB contested the assertion by the UFU and Mr Duggan that the MFB had not purported to rely on Mr Duggan’s status as a probationary employee when terminating his employment. The MFB pointed out that the UFU had first raised a grievance about the MFB’s intention to terminate Mr Duggan’s employment whilst he remained a probationary employee.

## The Commissioner’s decision

1. Despite the parties identifying the relevant “process” for the purposes of question 1 as relating to the police check policy, the Commissioner cast the net more broadly when he said (at [50] of his reasons) that:

[t]he nature of the evidence requires consideration of whether the MFB has complied with the mandated processes in respect of a desired change to the Police Check Policy and whether it has followed its obligations in relation to Mr Duggan, being on “probation” and a “probationary employee”.

The Commissioner did not explain how it was that any obligation, on the part of the MFB, which arose from Mr Duggan’s probationary status, was governed by any relevant “process” mandated by the Agreement.

1. Nonetheless the Commissioner expressed his views about the terms “probation” and “probationary employee” and then proceeded (at [83] of his reasons) to say that:

[a] desire on the part of the MFB to depart from the accepted meaning of probation is a matter pertaining to the employment relationship. A matter will pertain to the relationship of employers and employees if it directly affects the conditions of employees, and, in relation to whether consultation is required, it is not the changes themselves which must pertain, but the matters the subject of the change. In this case, a desire to dismiss an employee during probation for conduct prior to employment and discovered after employment commenced is a matter over which clauses 15 and 13 of the Agreement will require consultation to be undertaken prior to any decision.

(Citations omitted.)

The Commissioner answered question 1 as follows (at [84] of his reasons):

Q1: Whether or not there was a failure by the MFB to follow any process mandated by the Agreement with respect to the termination of Mr Duggan’s employment;

A: Yes; in respect of changes to the MFB’s application of policies in relation to “probation” and “probationary employee”.

No; in respect of a change to the Police Check Policy.

1. The Commissioner next considered questions 2 and 3. He said (at [86]–[87]) that:

86. I consider that the dispute is not resolved, with there being a need either for consultation over changes to the MFB’s use of “probation” and “probationary employee” or, if that is considered not appropriate, for appropriate action to deal with Mr Duggan’s conduct after employment commenced.

87. A threshold issue is whether Mr Duggan’s conduct, at any stage, warrants dismissal. I consider not. Dismissal at this time, for reason of him being under “probation” or a “probationary employee”, would not be consistent with the well accepted meanings of the terms. While perhaps he should not have been employed in the first place, no warrant exists from his pre-employment conduct to now dismiss him. Mr Duggan’s conduct after employment commenced, while not to be condoned, is not sufficient to dismiss him, for the reason it does not undermine his suitability for ongoing employment or the viability of continuing the employment relationship.

The Commissioner went on (at [90]) to express the opinion that:

while Mr Duggan’s failure to notify the MFB of the [Tribunal’s] decision is to be deprecated, and is not fully answered by his candour after being approached on the subject by the MFB, his failure is unlikely to be either “wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment” or “conduct that causes serious and imminent risk to … the reputation, viability or profitability of the employer’s business”.

He then spent some time examining the ramifications of the Tribunal’s order prohibiting Mr Duggan from providing any “health services” on his capacity to undertake the emergency medical response duties of a firefighter. The Commissioner turned next to examine the circumstances in which Mr Duggan had failed to advise the MFB of the Tribunal’s decision and orders. Having done so, he expressed the view (at [122]) “that Mr Duggan can and should be sanctioned for failing to have brought the decision and Orders to the MFB’s attention. The MFB had that right under the Agreement and the Respondents should accept that sanctions ought be applied”.

1. The Commissioner answered questions 2 and 3 as follows (at [128]):

Q2: Whether the dispute the subject of this proceeding is resolved.

A: No. The dispute is not resolved and will not be resolved until either the Commission issues, by consent, an order consistent with the matters set out above, or the Commission determines the dispute following a further hearing.

Q3: Whether the decision to terminate the employee’s employment can therefore now be implemented by the MFB.

A: No. Mr Duggan remains a probationary employee until the resolution expressed in answer to Q2 is determined.

The Commissioner went on (at [126]) to say that he considered:

it to be appropriate and consistent with the parties’ legal rights and obligations under the Agreement for Mr Duggan’s probationary period to be extended for between 3 and 6 months from the date of this decision. I also consider it to be consistent with the Police Check Policy and appropriate in all the circumstances for Mr Duggan to be formally asked by the MFB to disclose in writing all charges and arrests since turning 18 years of age, whether or not they were withdrawn or he was acquitted, and that he be required to respond to that enquiry by way of a Statutory Declaration.

He also said that it would be appropriate for the MFB to issue Mr Duggan with a written first and final warning that any future misconduct may lead to his dismissal.

1. Having heard the parties, the Commissioner purported to made orders on 25 August 2016. They were that:

1. Garth Duggan will remain a probationary employee until 5:00 PM on 19 December 2016 or until he completes a recruitment training course, whichever is the later.

2. The Metropolitan Fire and Emergency Services Board (MFB) be permitted to request in writing to Mr Duggan that he disclose all charges and arrests he has been subject to since turning 18 years of age, whether or not such charges were withdrawn or he was acquitted.

3. Mr Duggan must answer by way of a statutory declaration within seven days of any request made pursuant to (2).

4. The MFB be permitted to provide Mr Duggan with a first and final warning, with such warning to state that any future misconduct by Mr Duggan may lead to his dismissal. Any such warning will be kept on file for 12 months from the date it is issued to him.

5. The MFB is not permitted to terminate the employment of Garth Duggan by reason of any matter the subject of my decision of 3 August 2016.

6. The MFB’s application for the Commission to deal with a dispute in accordance with the dispute settlement procedure dated 24 May 2016 is otherwise dismissed.

# THE FULL BENCH’S DECISION

1. The MFB appealed from the Commissioner’s orders. It did so pursuant to Clause 19.7 of the Agreement. The UFU and Mr Duggan cross-appealed.
2. The Full Bench in *Metropolitan Fire and Emergency Services Board v Duggan* [2016] FWCFB 8120 (“Full Bench’s reasons”), summarised and grouped the MFB’s appeal grounds as follows (at [27]):

1. MFB’s submissions that a merits review would be contrary to s.194(c) of the Act – ignored by the Commissioner – should have been upheld (Grounds 1 and 2).

2. Clause 27 of the Agreement does not contemplate a merits review of a pending dismissal (Ground 2A).

3. The Commissioner acted beyond power by acting outside the scope of the dispute (Grounds 3, 4, 6 and 9(b)).

4. Probationary employees are given special protection not enjoyed by full-time employees (Ground 5).

5. There were no bases for the finding that the MFB failed to consult in respect of changes in policies (Grounds 6, 7 and 9(a)).

6. The determination that Mr Duggan cannot be dismissed because his misconduct occurred prior to his employment is contrary to other findings (Ground 10).

The reference in Ground 1 to s 194(c) of the FW Act relates to a submission which the MFB had made to the Commissioner but with which the Commissioner did not deal. That submission had been that any attempt by the Commission, in the course of the arbitration, to engage in a merits review of the decision to terminate Mr Duggan’s services, could not be undertaken on the basis that no valid term of the Agreement could support such a review because s 194(c) rendered unlawful any provision in the Agreement which would have facilitated such a review.

1. The UFU and Mr Duggan pressed three grounds of cross-appeal.
2. The Full Bench did not find it necessary to deal with all of the grounds relied on by the MFB. It did not need to consider those advanced by the UFU and Mr Duggan. No complaint is made in this application about the Full Bench’s failure to deal with these grounds.
3. The Full Bench concentrated on the MFB’s third ground, which it had distilled from four of the grounds in the MFB’s notice of appeal. The Full Bench recorded the MFB’s submissions on the third ground at [42] of its reasons:

MFB contends that the Commissioner travelled beyond the dispute been the parties and ruled on matters that were not part of the dispute before the Commission. More specifically, it contends that the dispute was confined to an allegation of a failure to consult over changes to the Police Check Policy and having concluded that there was not, that should have been the end of the dispute. It further contends that issues of probationary employment policies were not subject to debate before the Commissioner and were not part of the relevant dispute. Hence they should not have been the subject of consideration by the Commissioner. Insofar as the decision deals with such matters the MFB contends that it travels beyond the dispute between the parties and is beyond the power of arbitration provided by the parties.

1. It then set out at length the written submissions of the UFU before the Commissioner. Those submissions concentrated on the construction and application of the police check policy. The UFU had sought a determination that “the MFB’s purported termination of Mr Duggan’s employment … was contrary to the Recruitment Police Criminal Check policy and therefore contrary to the Agreement” (at [43]). Notably absent from those submissions was any complaint by the UFU relating to any alleged failure by the MFB to consult about any policy relating to the treatment of probationary employees.
2. The Full Bench upheld what it had identified as Ground 3. It said (at [49]) that:

We consider that there is substance to this ground of appeal. The dispute over changes in policy related specifically to the Police Check Policy. The UFU made no allegation about breach of any probation policy and the matter was not subject to evidence or submissions by the parties. The UFU did raise general merit issues relating to the basis for the decision to terminate. These concerned the appropriateness of relying on the [Tribunal] decision. However, we are unable to discern any basis in the material before the Commissioner to suggest that the dispute between the parties included a dispute about the extent of consultation over a change to a policy regarding probation and probationary employee. In purporting to determine such a dispute the Commissioner ventured beyond the dispute between the parties, made findings on matters that the parties were not given an opportunity to address and exceeded the power of private arbitration conferred by the agreement.

1. The Full Bench further held that it followed that “the elements of the decision of the Commissioner that relate to, or flow from, the consideration of the issue of an alleged failure to consult over a change of policy regarding probation cannot stand”: at [50].
2. The Full Bench next turned its attention to what it had identified as Ground 1 relied on by the MFB. It did so under a separate heading: “The Availability of a Merits Review of the Decision to Terminate”. The first paragraph under that subheading, which was the subject of some attention in argument before us, was as follows (at [51]):

An issue remains as to whether the Commissioner could have dealt with other issues relating to the decision to terminate Mr Duggan’s employment by reference to the matters raised by the UFU concerning the appropriateness of relying on the [Tribunal] decision. As the dispute evolved in the arbitration before the Commissioner, it can be said that these matters were the subject of a dispute.

1. The Full Bench then examined Clause 19 of the Agreement and concluded that a dispute relating to the dismissal of an employee was a dispute to which the Clause applied because it dealt with the employment relationship. This led to the further conclusion that the Agreement contained an unlawful term which had no effect. The reasons for these conclusions are elaborated on at [57] of the Full Bench’s reasons:

Permitting the dispute settlement clause to be a vehicle for determining the fairness of the decision to terminate Mr Duggan’s employment within the six month qualifying period for an unfair dismissal remedy in ss.383-4 of the Act confers a remedy in relation to the termination of the employee’s employment. Hence such a use of the dispute settlement clause renders the term to be an unlawful term under the Act and no effect to that extent. It is of no consequence that the MFB sought the imprimatur of the Commission under the disputes procedure over what it considered to be an unfounded allegation of breach of a consultation obligation. Further, a remedy that purports to result in an order or determination not to terminate the employment of an employee pursuant to a decision to do so is clearly a remedy in relation to termination of the employee’s employment.

1. The Full Bench found that the Commissioner lacked power to make orders to reflect the outcome of the arbitration. It then stated its conclusions and determination:

63. For the reasons above we allow the appeal, quash the decision of the Commissioner and quash the orders made by the Commission.

64. The dispute before the Commission is determined by our confirmation of the determination by the Commissioner at [84] of his decision that there has not been a failure by the MFB to follow any process mandated by the Agreement with respect to termination of Mr Duggan’s employment in respect to a change in the Police Check Policy.

# THE APPLICATION TO THE COURT

1. In his amended application, Mr Duggan seeks declarations that the Full Bench erred in law on the face of the record by:

(i) deciding that the probation policy was not properly part of the dispute; and

(ii) deciding that s 194(c) of the *Fair Work Act* 2009 invalidated provisions of the [Agreement] … to the extent that those provisions may be relied [on] to resolve a dispute concerning a proposed termination of employment within six months of commencement of the employment.

He also seeks an order quashing the Full Bench’s decision or, alternatively, the issuing of a writ of certiorari to quash the decision.

## Jurisdiction

1. The declarations and orders were sought pursuant to s 39B(1) and (1A)(c) of the Judiciary Act.
2. Section 39B(1) confers original jurisdiction on this Court “with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth”.
3. Section 39B(1A)(c) confers original jurisdiction on this Court “in any matter … arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter”. The words “in any matter … arising under any laws made by the Parliament” have the same meaning that they have in s 76(ii) of the *Constitution*: see, by way of example only, *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1 at 6; [2000] FCA 864 at [11] (Burchett J, Wilcox and Tamberlin JJ agreeing); *Transport Workers Union v Lee* (1998) 84 FCR 60 at 66; [1998] FCA 756 at pp 7–8 (Black CJ, Ryan and Goldberg JJ).
4. Section 562 of the FW Act also provides that “[j]urisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under this Act”. It has been said that the words “any matter … arising under this Act” in s 562 should also be construed consistently with the approach taken with respect to s 76(ii) of the *Constitution*: see *Australasian Meat Industry Employees’ Union v Fair Work Australia (No 2)* (2012) 203 FCR 430 at 438; [2012] FCAFC 103 at [28] (Flick J).
5. The question that thus arises under s 39B(1A)(c) of the Judiciary Act and s 562 of the FW Act is whether the right or duty that is sought to be enforced by Mr Duggan in this case owes its existence to a provision of the FW Act or depends upon that Act for its enforcement: see *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581–582 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Re McJannet; Ex parte Australian Workers’ Union of Employees (Q) (No 2)* (1997) 189 CLR 654 at 656–657 (Brennan CJ, McHugh and Gummow JJ). It is, of course, not necessary that the proceeding be disposed of or succeed according to the federal claim, provided that it is “pursued bona fide”: see *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1 at 8–9; [2000] FCA 864 at [15] and the decisions of the High Court and Federal Court there cited. And it has also long been clear that federal jurisdiction may be attracted at any stage of a legal proceeding, including by way of a defence: see *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262; [2005] HCA 38 at [29] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) (“*Agtrack*”), citing *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ). In civil cases, “indentify[ing] the justiciable controversy … will ordinarily require close attention to the pleadings”: *Agtrack* at 262 [29], citing *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585; [1999] HCA 27 at [139] (Gummow and Hayne JJ).
6. Both parties contended that the Court has jurisdiction to entertain Mr Duggan’s application under s 39B(1A)(c). Mr Duggan also contended that the Court had jurisdiction pursuant to s 562 of the FW Act.
7. Mr Duggan also sought to reserve his position, “should the matter go further”, on the question whether the decision of the Full Court in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* (2015) 235 FCR 305; [2015] FCAFC 123 (“*ALS*”) was correct in holding that the public law remedies identified in s 39B(1) of the Judiciary Act, including certiorari, were not available to impugn a private arbitration undertaken by the FWC. As a formal matter, Mr Duggan thus submitted that the Court also has jurisdiction under s 39B(1).
8. One of the bases on which the MFB sought to persuade the Commissioner that there existed no ongoing dispute which would engage Clause 27.1.3 of the Agreement and prevent it from terminating the services of Mr Duggan, was that Clause 19 could not operate in respect of any proposed termination of Mr Duggan’s services because any term that facilitated that outcome would be unlawful and inoperative by reason of ss 194(c) and 253(1) of the FW Act. The Commissioner did not deal with this ground. The Full Bench did, finding (at [57] and [59]) that those provisions do render Clause 19 an unlawful term and of no effect such that it could not be used to agitate the general issues of fairness of the termination of Mr Duggan’s employment. At the forefront of Mr Duggan’s case in this Court was the proposition that, in doing so, the Full Bench had misconstrued and misapplied those sections. Mr Duggan’s amended application, for example, pleaded that the Full Bench “made an error of law on the face of the record by … deciding that section 194(c) of the [FW Act] invalidated provisions of the Operational Staff Agreement 2010 between the [MFB] and the [UFU]”. The written submissions filed on behalf of Mr Duggan made it clear that he also contended that the Full Bench had erred in finding that s 253(1) of the FW Act invalidated those same provisions.
9. It is, therefore, clear from the applicant’s pleaded case, and from his submissions made to the Court in respect of that case, that there is a matter before the Court which arises under the FW Act. We are accordingly satisfied that the Court has jurisdiction to deal with Mr Duggan’s application pursuant to s 39B(1A)(c) of the Judiciary Act and s 562 of the FW Act.

## Nature of the proceeding in the FWC

1. The dispute was referred to the FWC by the MFB, relying on Clause 19.2.6 of the Agreement. That provision said that the FWC could utilise all its powers in conciliation and arbitration to settle the referred dispute.
2. The appeal to the Full Bench was pursuant to Clause 19.7 which says simply that a decision of the FWC under the clause “may be appealed”.
3. The power to deal with the dispute was thus conferred on the FWC by the parties to the Agreement. The power of the Full Bench to entertain and deal with the appeal was, likewise, conferred under the dispute resolution clause of the Agreement.
4. It is a requirement of the FW Act that an enterprise agreement (of which the Agreement is one) must include a term that requires or allows the FWC or another independent person to settle disputes about matters arising under the Agreement: see s 186(6).
5. Section 739 relevantly provides as follows:

**739 Disputes dealt with by the FWC**

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

(2) …

(3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

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

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

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

(6) The FWC may deal with a dispute only on application by a party to the dispute.

Section 738 relevantly provides:

**738 Application of this Division**

This Division applies if:

(a) …

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

1. The Full Bench proceeded on the basis that it was undertaking an appeal which formed part of a process of private arbitration. It was correct to do so. In so directing itself it acted consistently with authority: see *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (2001) 203 CLR 645; [2001] HCA 16 (“*Gordonstone*”); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 (“*TCL*”); *ALS* at 328 [58], 338–339 [84]–[86]; *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* (2012) 203 FCR 371 at 379; [2012] FCAFC 87 at [31]–[32] (Buchanan and Katzmann JJ) (“*Wagstaff Piling*”); and *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2016) 244 FCR 178 at 183–189; [2016] FCAFC 82 at [10]–[35] (North, Jessup and Reeves JJ) (“*Endeavour Energy*”). These cases establish that sections 738 and 739 of the FW Act, and their predecessors, are facilitative and do not confer any public duties on the Commission.
2. The leading authority is *Gordonstone*. The High Court there considered the operation of s 170MH of the former *Industrial Relations Act 1988* (Cth). That section provided that procedures in an industrial agreement which were designed to prevent and settle disputes between employers and employees covered by the agreement could, if the former Industrial Relations Commission so approved, empower the Commission to settle disputes over the application of the agreement. The Court said (at 658 [31]–[32]) that:

[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.

[32] To the extent that s 170MH of the IR Act operates in conjunction with an agreed dispute resolution procedure to authorise the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement, *it merely authorises the Commission to exercise a power of private arbitration*. And procedures for the resolution of disputes over the application of an agreement made by parties to an industrial situation to prevent that situation from developing into an industrial dispute are clearly procedures for maintaining that agreement. Parliament may legislate to authorise the Commission to participate in procedures of that kind. Accordingly, s 170MH of the IR Act is valid.

(Emphasis added).

These principles were subsequently applied in the context of ss 738 and 739 by Full Courts of this Court in *ALS*, *Wagstaff Piling* and *Endeavour Energy*.

1. In dealing with the dispute referred to it, the Commission acted, at both levels, as a private arbitrator. Its task was to determine the dispute referred to it by the parties and to make an award or determination which was binding on the parties because they had agreed to be so bound.
2. The Full Bench’s determination of the private arbitration which had been referred to the Commission by the MFB appeared at [63] and [64] of its decision.
3. The application to this Court seeks a review of that determination.

## The Award

1. It was common ground that this Court could not intervene unless it was satisfied that an error of law appeared on the face of the Full Bench’s award.
2. Both parties argued their cases on this point on the basis that the common law requirements for intervention rather than the legislative provisions of the Commercial Arbitration Acts applied.
3. The question of what constitutes an arbitrator’s “award” is not always one which is susceptible of an easy answer. The question was considered by Windeyer J in *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Ltd* (1968) 118 CLR 58 at 76 (“*Gold Coast City Council*”):

What then is an award the face of which can be examined for error of law? An award is very often a document which announces only the arbitrator’s ultimate finding on the matter submitted for his determination. This finding may be no more than that a specified sum of money is payable by one part or the other. But the arbitrator may put more into his award than that. He may incorporate a statement of his reasons or make some other document part of his award. Whether he has done so does not depend simply upon mechanics such as the pinning of documents together or on the mere fact of a reference or allusion in one document to some other document. The question is rather did the arbitrator incorporate his reasons with his conclusions to the intent that the whole should form his award. This is to say, was his award equivalent to a “speaking order”?

The extent of any material which constitutes an “award” is, therefore, to be determined on a case-by-case basis. It may be no more than the ultimate decisions or it may extend to all of the reasons provided for the making of those decisions. The Court will examine all of the circumstances with a view to determining whether the arbitrator intended that all or some of his or her reasons form part of the award. Other documents may also be incorporated by reference.

1. In *ALS* the Full Court dealt with a similar application to review the determinations of a Full Bench following an appeal from a private arbitration undertaken by a Commissioner. It held (at 343 [94], see also 341 [91]), relying on *Craig v South Australia* (1995) 184 CLR 163 at 182, that the starting point for identifying the record of the Full Bench’s decision was that it comprised (at minimum):

* the documentation which initiated the proceedings and thereby grounds the tribunal’s jurisdiction;
* the pleadings (if any); and
* the adjudication or determination.

It further held that the reasons for and the transcript of the Full Bench’s decision would only be incorporated by reference into the formal determination (and therefore the record) to the extent that the reference brought about its incorporation “as an integral part of the order (and record)”.

1. In *ALS*, as in the present case, the document recording the whole of the Full Bench’s disposition of the appeal was headed “Decision”. The Full Court in *ALS* at 343 [95] held that the Full Bench’s formal orders were its ultimate conclusions, namely that it was appropriate for the Full Bench to grant permission to appeal, to allow the appeal and to substitute its answers to the questions posed by the parties. The Full Court considered that the questions and answers referred to in the formal order were incorporated by reference as the order could not be understood without them, but that otherwise there was no basis for incorporating into the record any other parts of the Full Bench’s reasons for decision (at 343 [96]). While the Commissioner’s award and reasons were held to be incorporated by reference, this was because he had taken into account factual matters, and the way he treated those matters could have affected the capacity of the Full Bench to find error and to exercise its powers on appeal. The Full Court noted (at 343 [97]) that, were the question limited to the construction of a written document, the record would be more likely to include only the Commissioner’s final order.
2. In reaching its conclusions, the Full Court in *ALS* drew on authorities about the constitution of the record for the purposes of determining the availability of the writ of certiorari for error of law on the face of the record. The “record” for the purposes of private arbitrations and certiorari are analogous. In *Gold Coast City Council* at 77, Windeyer J had to determine whether an arbitrator’s reasons for decision were incorporated in his award. His Honour regarded the “law concerning certiorari” to provide “a convenient analogy” to the question he was considering as to what constituted “the award” in the context of a private arbitration. This passage was cited by the High Court in *Craig* at 182 n 79 when it was determining what constituted “the face of the record” for the purposes of certiorari.
3. In *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239 at 264; [2011] HCA 37 at [32] (French CJ, Gummow, Crennan and Bell JJ) (“*Westport*”) and *TCL* at 569 [86] (Hayne, Crennan, Kiefel and Bell JJ), the High Court quoted with evident approval the advice of the Privy Council in *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257 at 261 where Lord Diplock said that:

[b]efore the *Common Law Procedure Act*, 1854 (Imp) the Court of King’s Bench exercised over awards of arbitrators a supervisory jurisdiction to set aside the award for errors of law apparent on its face, analogous to that which it asserted over inferior tribunals by use of the prerogative writ of certiorari. It treated the award itself as corresponding to the “record” of an inferior tribunal which alone was examinable for the purpose of detecting errors of law.

1. *TCL* was relied on by the Full Court in *ALS*: see at 320–322 [33]–[34]. *Westport* was referred to at 335 [77].
2. Mr Duggan submitted that the whole of the Full Bench’s “decision”, including both its reasons and its adjudication, constituted the award. He submitted that *ALS* was not consistent with the High Court’s decisions in *Westport* and *TCL*. He further submitted that, if *ALS* was correctly decided, then the record in the present case comprised at least:

* the application by MFB for the Commission to deal with the dispute pursuant to the Agreement;
* the “decisions” of the Commissioner, which were subject to the appeal to the Full Bench, namely the decision dated 3 August 2016 and the orders issued on 25 August 2016;
* the MFB’s notice of appeal to the Full Bench from the Commissioner’s decision; and
* paragraphs [57], [63] and [64] of the Full Bench’s decision, as being necessary to understand its disposition. In oral submissions, counsel for Mr Duggan also contended that this Court should have regard to paragraph [49] of the Full Bench’s decision.

1. The MFB contended that the Court should follow *ALS* and submitted that the Full Court’s decision in that case was not inconsistent with the High Court’s decisions in *Westport* or *TCL*. It submitted that the record (or award) in the present proceeding comprised:

* the MFB’s application to the Commission to deal with the dispute;
* the notices of appeal and cross-appeal from the Commissioner’s decision; and
* those parts of the Full Bench’s decision which recorded its formal order or adjudication, the questions which were asked and answered, and the orders below that were quashed. As a result, paragraphs [13], [16], [17], [20], [25], [63] and [64] were the only parts of the Full Bench’s decision which the MFB said formed part of the award.

1. Both *Westport* and *TCL* were considered by the Full Court in *ALS*. *Westport* arose under s 38 of the *Commercial Arbitration Act 1984* (NSW) as an appeal on a question of law arising out of an award. That Act required arbitrators to include in the award a statement of reasons for making their award. The Court was called on to determine whether the reasons provided were adequate and thus whether they disclosed a manifest error of law on the face of the award or strong evidence of an error of law where determination of the question may add, or may be likely to add, substantially to the certainty of commercial law. In dealing with these issues the High Court did not expound any definition of what constituted an award at general law.
2. In *TCL* the issue was whether this Court could enforce an arbitral award consistently with the limitations imposed on it by Chapter III of the *Constitution*. Again, the High Court said nothing about what constituted an award.
3. We accordingly reject Mr Duggan’s submission that there is any inconsistency between the decision of the Full Court in *ALS* and the earlier decisions of the High Court in *Westport* and *TCL*. We do not consider that *ALS* was wrongly decided. On the contrary, in our opinion it was, with respect, correctly decided. It follows in this case that we consider that the Full Bench’s decision, its determination and the award that we were called on to consider appear at paragraphs [63] and [64] of the Full Bench’s reasons for decision. Paragraph [64] incorporates by reference question 1, as framed by the Commissioner, and his answers to it.
4. Paragraphs [49] and [57] of the Full Bench’s reasons are not incorporated into the award.

## Error on the face of the award

1. Mr Duggan submitted that reviewable error of law on the part of the Full Bench was exposed by what it said at [49] and [57] of its decision. We have already held that these paragraphs did not form part of the award but we would add that, in any event, legal error was not apparent in either of these paragraphs.
2. In paragraph [49] the Full Bench upheld the MFB’s complaint that the Commissioner had dealt with matters which were not the subject of a dispute which had been referred to him, namely matters concerning the probation policy. He had purported to determine a dispute relating to the merits of MFB’s decision to terminate Mr Duggan’s employment without giving the parties an opportunity to deal with those issues and thereby exceeded his powers. The Commissioner had also purported to make detailed orders about how a perceived dispute about the fairness of the treatment by the MFB of Mr Duggan, as a probationary employee, should be resolved.
3. The substance of the dispute which was referred, by the MFB, to the Commission can be seen from the terms of its application which has been set out above at [16]. Paragraph 6 of the application is of particular relevance. It invited the Commission to determine that there had been no failure by the MFB to comply with any precondition, imposed by the enterprise agreement, with respect of the termination of Mr Duggan’s employment and, in particular, that the requirements of Clause 27.1.3 had been satisfied.
4. There was no reference in the referred dispute to any policies of the MFB relating to probation or probationary employees and no reference to any such policy with which the Agreement required the MFB to comply.
5. Counsel for Mr Duggan contended that the scope of the dispute had been widened as a result of exchanges between the Commissioner and counsel prior to him handing down his decision. He referred to the Commissioner’s questions and the answers provided to them by the MFB. These questions and answers are set out above at [22]–[24].
6. Mr Duggan argued that these exchanges constituted part of the award and that they demonstrated that the Full Bench had made a “clear error” when it said, at paragraph [49] of its decision, that the “UFU made no allegation about breach of any probation policy”.
7. We reject these submissions. The written exchanges do not form part of the record. Even if they did, all that would be disclosed is that the Commissioner asked certain questions about matters which fell outside the scope of the notified dispute and that the questions had been answered by the MFB. The Full Bench was perfectly correct to find that no allegation about any breach of a probationary policy occurred or fell within the parameters of the notified dispute. Indeed, there was no evidence before the Commissioner that any such policy existed. None was in evidence. The Full Bench was also correct to make the related finding that the Commissioner had dealt with matters that did not form part of the dispute referred to him and had thereby exceeded his powers.
8. We would add that, in any event, we are unable to discern any error of law in paragraph [49] of the Full Bench’s decision which would justify curial interference with the award.
9. Mr Duggan also argued that the Full Bench erred in construing and applying various provisions of the FW Act. Those provisions were ss 194(c) and 253(1). The errors were said to be found in [57] of the Full Bench’s reasons.
10. Section 194(c) provides as follows:

**194 Meaning of *unlawful term***

A term of an enterprise agreement is an ***unlawful term*** if it is:

…

(c) if a particular employee would be protected from unfair dismissal under Part 3-2 after completing a period of employment of at least the minimum employment period — a term that confers an entitlement or remedy in relation to a termination of the employee’s employment that is unfair (however described) before the employee has completed that period; …

(Emphasis in original.)

The minimum employment period referred to in this paragraph, in the case of an employer who is not a small business employer, is six months: see s 383.

1. Section 253(1)(b) provides that a term of an enterprise agreement has no effect to the extent that it is an unlawful term.
2. These provisions form part of a statutory scheme which is designed to afford large employers, such as the MFB, the opportunity to engage new employees on a probationary basis for up to six months. If, within that period, the employee is found to be unsatisfactory for any reason, his or her employment can be terminated. Such a termination cannot be impugned for being unfair and may not be subject to review under Part 3-2 of the FW Act.
3. Mr Duggan argued that these provisions had no application to the resolution of the dispute which had been referred to the Commission. This was said to be because:

* When the MFB made its application to the Commission, Mr Duggan’s employment had not been terminated. Whilst he had been notified, on the same day, of the MFB’s decision to terminate his employment, the implementation of that decision was subject to compliance with Clause 27.1.3 of the Agreement. It was premature to consider the application of ss 194(c) and 253(1) before there was a dismissal.
* Assuming it was permissible to apply ss 194(c) and 253(1) to an anticipated dismissal, neither Mr Duggan nor the UFU had complained that any termination of his employment would be unfair. Rather, their claim was that the consultation provisions in the Agreement had not been complied with in respect of a proposed change of policy and that the dispute could not be considered to be resolved until there had been proper consultation.

1. It is first to be observed that s 194(c) may be engaged if an employee is protected, by a term in an enterprise agreement, from unfair termination during a probationary period. The paragraph does not require that the term only operate on or after the termination taking effect.
2. What is required by s 194(c) is the identification of a term which would have the effect of providing an employee with an entitlement or remedy for unfair termination during the minimum six-month employment period, where such an employee would be protected under Part 3-2 of the FW Act *after* the completion of that period. It is strongly arguable that Clauses 27.1.2 and 27.1.3 of the Agreement, when read together, act as an impediment on the MFB’s capacity to terminate an employee within the first six months of that employee’s engagement.
3. In a practical sense, the Commissioner’s decision supported a contention that Clause 27 operated to prevent the MFB from terminating Mr Duggan’s employment within the first six months for any reason, including unfairness. His answers to questions 2 and 3 meant that one of the necessary preconditions for the termination of Mr Duggan’s employment (namely that a dispute was resolved, as provided for in Clause 27.1.3 of the Agreement) had not been satisfied. Had this standoff persisted until after the six months period had expired, the legislative purpose advanced by s 194(c) would have been frustrated; any termination thereafter would become subject to challenge on fairness grounds whether or not those grounds formed part of the extant dispute.
4. It is not necessary for the Court to make a final determination on whether Clause 27 of the Agreement contained an unlawful term for the purposes of s 194(c) of the FW Act. This is because the Full Bench’s decision is supportable on the basis of the finding it made at [49] of its reasons that the Commissioner went beyond the scope of the referred dispute.
5. Mr Duggan argued that the Full Bench’s determination was founded conjointly on the findings made at [49] and [57]. This was said to be apparent from the words used by the Full Bench at [51] of its reasons.
6. Whilst we accept that there is some ambiguity in the language of paragraph [51], we understand the reference to “[a]n issue remains” to be directed at the MFB’s complaint that the Commissioner had not dealt with the issue concerning ss 194(c) and 253, which the MFB had raised before him by way of defence to the claims made by the UFU and Mr Duggan. The Full Bench’s findings on the operation of those sections had provided an additional reason for upholding the appeal from the Commissioner’s decision. The Full Bench’s determination could have been sustained without reference to this additional argument.
7. We note for completeness that it was common ground that, on no view, could the Commissioner’s orders stand, because he had no power to make them. He had power, as a private arbitrator, to make a determination; he could not make binding orders of the kind which the Commission was empowered to make under the FW Act.

# disposition

1. The application must be dismissed.

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| I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Wigney and O’Callaghan. |

Associate:

Dated: 3 August 2017