FEDERAL COURT OF AUSTRALIA

Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union [2015] FCA 1033

Citation:	Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union [2015] FCA 1033
Parties:	**TEYS AUSTRALIA BEENLEIGH PTY LTD v AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION and FAIR WORK COMMISSION**
File number:	QUD 847 of 2015
Judge:	**BROMBERG J**
Date of judgment:	16 September 2015
Catchwords:	**INDUSTRIAL LAW** – application for an interlocutory injunction in the nature of an anti-suit injunction – respondent made application to Fair Work Commission to arbitrate, pursuant to dispute resolution clause of enterprise agreement ("Commission proceeding") – applicant commenced proceeding in Federal Court in connection with same subject matter ("Court proceeding") – applicant sought interlocutory relief preventing FWC taking steps, or requiring applicant to take steps, in Commission proceeding, pending resolution of Court proceeding – whether Court has jurisdiction to grant final relief sought by applicant – whether Court empowered to give interlocutory relief sought by applicant – test to be applied in determining whether interlocutory relief ought to be given – nature of arbitration by FWC under *Fair Work Act 2009* (Cth) – factors to be considered in application of test – Court has jurisdiction to grant final relief – Court empowered to give interlocutory relief sought – test to be applied is that an injunction will only issue where the interests of justice so require – factors to consider include nature of relevant fora, complexity of issue, general importance or otherwise of issue, potential for inconsistent answers, potential for delay – in the interests of justice that Court proceeding be determined before Commission proceeding, but injunction not issued in exercise of discretion
Legislation:	*Commercial Arbitration Act 2013* (Qld) ss 5, 8, 16, 27J, 34, 34A *Fair Work Act 2009* (Cth) ss 50, 186(6), 562, 564, 608,

	738, 739(3), 739(4), 739(5) *Federal Court of Australia Act 1976* (Cth) ss 19, 21, 22, 23 *International Arbitration Act 1974* (Cth) *Workplace Relations Act 1996* (Cth) ss 170MT(2), 849
Cases cited:	*Teys Australia Beenleigh Pty Ltd Production Departments Enterprise Agreement 2013* [2013] FWCA 7447 *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 105 *NSW Nurses' Association v SOS Nursing and Homecare Service Pty Ltd* [2009] FCA 1147 *Woolworths Ltd v Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees* (2010) 183 FCR 214 *R v The Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 *Re McJannet; Ex parte the Australian Workers' Union of Employees, Queensland (No 2)* (1997) 189 CLR 654 *Transport Workers Union v Lee* (1998) 84 FCR 60 *Transport Workers Union of Australia v Lee* (1998) 80 IR 106 *Pegasus Leasing Limited v Cadoroll Pty Limited* (1996) 59 FCR 152 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533
Date of hearing:	15 September 2015
Place:	Melbourne (via video link to Brisbane)
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	46
Counsel for the Applicant:	Mr SJ Wood QC with Mr RW Haddrick
Solicitor for the Applicant:	FCB Workplace Law
Counsel for the First Respondent:	Mr E Dalgleish with Mr C Buckley
Counsel for the Second Respondent:	The Second Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
FAIR WORK DIVISION **QUD 847 of 2015**

BETWEEN:	**TEYS AUSTRALIA BEENLEIGH PTY LTD** **Applicant**
AND:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION** **First Respondent**
	FAIR WORK COMMISSION **Second Respondent**

JUDGE:	**BROMBERG J**
DATE OF ORDER:	**16 SEPTEMBER 2015**
WHERE MADE:	**MELBOURNE (VIA VIDEO LINK TO BRISBANE)**

THE COURT ORDERS THAT:

1. The matter, including the applicant's application for interlocutory relief, is adjourned to 9:30 am on Tuesday, 22 September 2015.
2. There be liberty to apply on one hour's written notice.

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

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
FAIR WORK DIVISION **QUD 847 of 2015**

BETWEEN:	**TEYS AUSTRALIA BEENLEIGH PTY LTD** **Applicant**
AND:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION** **First Respondent**
	FAIR WORK COMMISSION **Second Respondent**
JUDGE:	**BROMBERG J**
DATE:	**16 SEPTEMBER 2015**
PLACE:	**MELBOURNE (VIA VIDEO LINK TO BRISBANE)**

REASONS FOR JUDGMENT

1 These reasons address an interlocutory application which, for reasons which will become apparent, needs to be urgently determined. The application has raised some complicated questions including questions that have not had the benefit of prior judicial consideration. Despite the brief opportunity I have had to reflect upon the issues raised, this judgment should nevertheless be regarded as *ex tempore*.

2 At my request, I received written submissions in the afternoon of 16 September 2015. I am grateful to the parties for their efforts in that regard. Owing to the shortness of available time, I will not set those submissions out. But, I have read them and I have taken them into account in the following reasons for judgment.

Background

3 The applicant (**Teys**) is a member of a group of companies engaged in beef producing, including at a meat-processing plant at Beenleigh in Queensland. The first respondent (**AMIEU**) has representation rights in relation to certain of the employees of Teys.

4 An enterprise agreement that covered Teys and relevant employees, the *Teys Bros (Beenleigh) Pty Ltd/AMIEU Production Departments Enterprise Agreement 2010* (**2010 EA**),

commenced on 1 January 2010. Clause 3.10.1 of the 2010 EA included the following (emphasis added):

> **3.10.1 Conditions Associated with Schemes**
>
> *The parties may agree on terms and conditions to remunerate an Employee or group of Employees under an incentive payment system* (as an alternative to the time work payment system provided in this Agreement) and any such terms and conditions and/or associated or incidental terms and conditions entered into and signed by the Union and/or the Joint Consultative Committee and Teys Bros, shall be
>
> - binding on both parties, and
> - implemented in lieu of the time work payment system under this Agreement for the affected Employees, provided that the minimum level of remuneration that must be paid to Employees who are engaged under such incentive payment system must be at a rate which is no less than the relevant rate contained in paragraph 3. 1.1 of this Agreement, and
> - *all wages and other entitlements payable under such a system will constitute terms of this Agreement.*

5 A document called the *Teys Bros (Beenleigh) Pty Ltd Enterprise Agreement 2010 Remuneration Document October 2009* dealing with remuneration (**Remuneration Document**) was purportedly made under cl 3.10.1 of the 2010 EA.

6 In October 2013, the *Teys Australia Beenleigh Pty Ltd Production Department Enterprise Agreement 2013* (**2013 EA**) was purportedly made, and it purportedly commenced on 27 September 2013 pursuant to a decision of the Fair Work Commission in *Teys Australia Beenleigh Pty Ltd Production Departments Enterprise Agreement 2013* [2013] FWCA 7447. From that date Teys ceased to pay remuneration to the relevant employees in accordance with the 2010 EA and the Remuneration Document.

7 However, following litigation, a Full Court of this Court in *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 105 declined to quash decisions of the Full Bench of the Fair Work Commission refusing to approve the 2013 EA. The legal consequence was that the 2013 EA was not and had never been operative and that the 2010 EA had been operative all along.

8 That circumstance led to the AMIEU demanding that Teys remedy any underpayments to its employees resulting from Teys wrongly applying the 2013 EA, instead of the 2010 EA and the Remuneration Document. The AMIEU also demanded that Teys correct and amend its wages records. Those demands were made on the basis of the AMIEU's view (as expressed to Teys) that the Remuneration Document comprised an

agreement to remunerate employees under an incentive payment system for the purposes of cl 3.10.1 of the 2010 EA. In response to the AMIEU's demands, Teys denied that the Remuneration Document formed part of the 2010 EA. The correspondence between Teys and the AMIEU evidences a controversy between those two parties as to whether, from 27 September 2013, the appropriate rate of pay for the relevant employees was the rate set by the Remuneration Document and applicable as part of the 2010 EA.

9 The AMIEU sought to have that controversy dealt with by the second respondent (**FWC**). On 27 August 2015, the AMIEU filed an application with the FWC to have it deal with a dispute in accordance with the dispute resolution procedure in the 2010 EA (**FWC Application**). The 2010 EA contains the following dispute resolution clause:

> **2.1.14 Disputes Avoidance Procedures**
>
> In the event of an industrial dispute or claim arising concerning any aspect of the terms and conditions of employment or engagement under this agreement the dispute shall be dealt with in the following manner:
>
> **Step 1 -** As soon as practicable after the dispute or claim has arisen, the Employee concerned shall take the matter up with the relevant immediate supervisor, affording the opportunity to remedy the cause of the dispute or claim.
>
> **Step 2 -** Where any such attempts at settlement have failed, or where the dispute or claim is of such nature that a direct discussion between the Employee the immediate supervisor would be inappropriate, the Employee may notify their elected representative and/or the relevant Joint Consultative Committee member. If the representative or JCC member considers that there is some substance in the dispute or claim, it shall immediately be taken up with the Plant Shift Manager.
>
> **Step 3 -** If the matter is still unresolved, then the elected representative or JCC member, at his or her discretion may take the matter up with the plant General Manager Operations.
>
> **Step 4 -** If the matter is still unresolved, then the elected representative, at his or her discretion may take the matter up with the Union and either operational or Human Resources senior management at Head Office.
>
> **Step 5 -** *If a dispute about a matter or matters arising under this agreement is unable to be resolved at the workplace level, and all the agreed steps as outlined above for resolving the grievance or dispute have been taken, the matter(s) may be referred to FWA for conciliation and, if necessary, arbitration.*
>
> In accordance with the provisions of the Act, which prohibits any form of industrial action during the life of Enterprise Agreements and without prejudice to either party, work shall continue normally in accordance with this Agreement while the matters in dispute are being dealt with in accordance with this procedure.
> (emphasis added)

10 By the FWC Application, the AMIEU seeks the following relief:

(i) That Teys pays employees at the appropriate rate of pay according to the 2010 EA and the 2010 Remuneration Document;

(ii) That Teys amend its wage records; and

(iii) That Teys back pays each and every affected employee to October 2013.

11 The FWC Application is listed to be heard this Friday, 18 September 2015. The FWC has issued directions regarding the filing and exchange of submissions and evidence.

12 It is apparent from the matters that I will shortly mention, that Teys has taken a different view from the AMIEU as to the appropriate forum for resolving the controversy between it and the AMIEU. On 10 September 2015, Teys filed an Originating Application in this Court seeking the following final relief:

> A declaration that the *Teys Bros (Beenleigh) Pty Ltd Enterprise Agreement 2010 Remuneration Document October 2009* does not form part of, or vary, the *Teys Bros (Beenleigh) Pty Ltd/AMIEU Production Departments Enterprise Agreement 2010*, an enterprise agreement registered under the *Fair Work Act 2009* (Cth) ("the Act").

13 Teys also seeks the following interlocutory relief, which is the subject of these reasons:

> 1. The issuance of an interlocutory injunction:
>
> (a) prohibiting the Second Respondent from taking any further steps; and
> (b) requiring the Applicant to take any further steps,
>
> in relation to the determination of a dispute between the Applicant and First Respondent, which was commenced by the First Respondent making an application to the Second Respondent pursuant to s 739 of the *Fair Work Act 2009*, and filed on 27 August 2015 in matter C2015/5846 ("the dispute"), until such time as this Honourable Court so determines.

14 Also on 10 September 2015, solicitors for Teys wrote to the FWC requesting that the directions made by the FWC be vacated and the hearing listed for 18 September 2015 be adjourned. The basis of that application was that Teys had made the application to this Court and that the FWC application should be adjourned until such time as the application before this Court had been determined. In that correspondence, Teys also raised two matters as to why the FWC should decline to exercise its jurisdiction. The first was that the agreed

procedure under the dispute resolution clause had not been followed, and that private arbitration provided for in step 5 could not commence until preceding steps had been taken.

15 Second, the letter contended that the dispute raised by the AMIEU was not "a dispute about the matter or matters arising under this Agreement," within the meaning of the opening words to step 5 of the dispute resolution procedure. The letter identified what was said to be the underlying dispute between Teys and the AMIEU as being whether or not the 2010 EA had been validly varied so as to effectively incorporate the terms of the Remuneration Document. It was contended, in essence, that that involved a matter of construction of the FW Act and the terms of the 2010 EA and could not be characterised as a dispute "under this Agreement".

16 The material before me records that on 14 September 2015 the FWC advised Teys and the AMIEU that it had rejected Teys's application for the hearing to be vacated. The parties were informed that the matter would proceed as listed and that Teys could raise any of the matters contained in its correspondence at the hearing on 18 September 2015.

Consideration

17 Teys contended that this Court has jurisdiction to grant the final relief that it seeks. It relied upon ss 19 and 21 of the *Federal Court of Australia Act 1976* (Cth) (**FC Act**) and ss 562 and 564 of the *Fair Work Act 2009* (Cth) (**FW Act**). Section 562 of the FW Act confers jurisdiction on this Court "in relation to any matter (whether civil or criminal) arising under" the FW Act. Teys submitted that if (as the material suggested) the AMIEU contended that Teys had failed to pay the relevant employees in accordance with the Remuneration Document, then the AMIEU was alleging a breach by Teys of the 2010 EA and a breach of s 50 of the FW Act, "giving this Court jurisdiction under a law made by Parliament".

18 Under the *Workplace Relations Act 1996* (Cth) (**WR Act**), s 849 specifically conferred upon this Court the jurisdiction to interpret an industrial agreement made under that Act. Before exercising that power, the Court needed to be satisfied that there was a genuine dispute between the parties the resolution of which was necessary to quell an actual controversy: *NSW Nurses' Association v SOS Nursing and Homecare Service Pty Ltd* [2009] FCA 1147 at [14] (Perram J). As Gray J said in *Woolworths Ltd v Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees* (2010) 183 FCR 214 at [19], the FW Act has no specific counterpart to s 849 of the WR Act, "but s 562 of

Fair Work Act confers on the Court jurisdiction in relation to any matter (whether civil or criminal) arising under the Fair Work Act".

19 In so far as Gray J was thereby suggesting (albeit in passing and in obiter) that s 562 of the FW Act was broad enough to encompass the previously-specific conferral of power in s 849 of the WR Act, that observation seems to me to be correct. A genuine dispute as to the meaning and effect of a term of an enterprise agreement that confers rights or imposes obligations is a matter which may properly be said to arise under the FW Act. That is because the right or duty in question "owes its existence to Federal law or depends upon Federal law for its enforcement …" (*R v The Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ)), or, put alternatively, because the right claimed is conferred by or under the FW Act (*Barrett* at 154; see also *Re McJannet; Ex parte the Australian Workers' Union of Employees, Queensland (No 2)* (1997) 189 CLR 654 at 656–7, *Transport Workers Union v Lee* (1998) 84 FCR 60 at 64-67 ("*Lee Full Court*"). That conclusion is fortified by the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth). At [2213] the Explanatory Memorandum stated, "The Federal Court will, for example, be able to make declarations relating to the meaning of industrial instruments made under the Bill". That observation made about s 564 (which provides that nothing in the FW Act limits the Federal Court's powers under ss 21, 22 and 23 of the FC Act), is properly understood as an observation that the combination of s 562 and 564 now provides to the Federal Court its traditional jurisdiction of making declarations as to the meaning of industrial instruments made under federal industrial law. That explains why the FW Act no longer has a specific counterpart to s 849 of the WR Act.

20 It is evident on the material before me that a genuine dispute exists between the AMIEU and Teys as to whether Teys has breached its obligations under the 2010 EA and thus breached s 50 of the FW Act. The existence of such a dispute or the Court's jurisdiction to make the declaration sought by Teys were not in contest.

21 My satisfaction that this Court has jurisdiction to deal with Teys's claim is an important starting point for consideration of whether an interlocutory injunction should issue, restraining the FWC from taking any further step in relation to the determination of the FWC application until such time as this Court determines otherwise. Teys seeks that injunction so as to enable this Court, rather than the FWC, to first determine whether the terms of the

Remuneration Document were validly incorporated into the 2010 EA (**the substantive question**).

22 I accept, and it was not disputed, that the substantive question necessarily arises for determination in both this proceeding and the proceeding in the FWC. As such, Teys contended that there were a number of reasons why it was more efficient or efficacious for the substantive question to be first determined by this Court. *First*, the jurisdictional challenges to the FWC's jurisdiction to arbitrate that were raised in the letter to the FWC were said to be substantial issues, the determination of which would be avoided if this Court could determine the substantive question first. That contention, contained in Teys's initial written submissions, was not really pressed in the oral submissions made. In oral submissions, a somewhat conflicting submission was put to the effect that the jurisdictional challenges raised are best dealt with in this Court rather than by the FWC.

23 *Second*, it was said that the substantive question is a question of law which is more appropriately determined by a Court. That was so because in this Court (unlike in the FWC) there are no potential impediments to the parties being legally represented and because in this Court (unlike in the FWC) the right to appeal a first-instance decision is not restricted.

24 Late in its submission Teys also contended that it ought not be vexed by two sets of proceedings.

25 The AMIEU's submissions largely addressed Teys's contention that the jurisdictional challenges raised in relation to the FWC's jurisdiction should be dealt with by this Court. It contended that the FWC should be given the opportunity to determine the jurisdictional questions for itself and that, in any event, the jurisdictional questions involve factual issues not the subject of evidence before me. It was also contended that if Teys was being vexed by two sets of proceedings that was a circumstance of its own making: *Lee Full Court* at 69.

26 The application for an interlocutory injunction raises difficult issues in which there are competing considerations. On balance, I am persuaded that the interests of justice are best served by the substantive question being first determined in this Court.

27 That test, as to what the interests of justice require, was adopted as a guide by North J in *Transport Workers Union of Australia v Lee* (1998) 80 IR 106 ("*Lee First Instance*") by reference to principles developed to deal with anti-suit injunctions and in particular the

following passage in *Pegasus Leasing Limited v Cadoroll Pty Limited* (1996) 59 FCR 152 at 156

> Foreign proceedings may be restrained, not only when they are vexatious, in the sense of frivolous or useless, but also where they are oppressive. However, vexation or oppression should not be regarded as the only grounds on which the jurisdiction is to be exercised. See *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 894. … The fundamental requirement is that an injunction will be granted only where the interests of justice so require.

28 The facts in *TWU v Lee* were that a proceeding was instituted in the Queensland Magistrates Court in which complaints were raised that industrial action taken by the Transport Workers Union had contravened a Queensland Act. The Transport Workers Union asserted that the industrial action complained of was "protected action" and immune from suit by reason of s 170MT(2) of the WR Act. Proceedings were instituted in this Court by the Transport Workers Union for a declaration to that effect, and an interlocutory injunction was sought restraining the complainant in the Queensland proceeding from taking any further steps in that proceeding. North J considered a number of matters relevant to the interests of justice. As the Full Court in *TWU v Lee* observed at 63, North J examined the respective capacity of each court to resolve all the issues in dispute, the need for comity between courts within the Australian jurisdiction, the potential prejudice of delay in finalising the Queensland proceeding, the respective rights of appeal in each court, and the role of the Federal Court as a superior court of record. As the Full Court (Black CJ, Ryan and Goldberg JJ) recounted:

> … Finally, the primary judge was persuaded that the wider scope of appeals said to lie from a determination in the Federal Court was a relevant consideration and that as the Federal Court was a superior court of record charged with the function of determining controversies under the [WR Act], the matter should stay in this Court. His Honour observed that the Federal Court had a primary and specialist function in determining controversies under federal law and, as the case raised important issues of statutory construction of an important Commonwealth Act, the case was distinguishable from one in which the only controversy was a factual one.

29 Although the Full Court was ultimately persuaded that the discretion had miscarried, neither the test adopted by North J, nor the factors his Honour considered were relevant to determining what the interests of justice required, were the subject of any criticism.

30 I turn, then, to consider what the interests of justice require in the circumstances of this case. There are, I think, six matters that are relevant to the exercise of my discretion.

31 *First*, this Court's specialist function is the determination of controversies concerning existing rights and liabilities, including under the FW Act. Conversely, that is not the traditional function of the FWC. True it is that the FWC has been given some ability to address rights and liabilities through its capacity as a private arbitrator, but that is not its specialist function. I recognise that the FWC does deal with the interpretation of enterprise agreements and their consistency with provisions of the Act. But, that is different to the final determination of the legal rights of the parties under the FW Act, that being the specialist function of this Court. *Second*, and relatedly, the FWC is an inferior tribunal. It will be assisted by the reasons for judgment of superior courts of record such as this Court.

32 *Third*, this dispute is not without difficulty. It raises complex legal issues concerning the interpretation of the FW Act scheme for the making of enterprise agreements and their variation, and in particular the ability of the parties to modify the operation of enterprise agreements otherwise than through the process of approval and variation under the FW Act. Those issues of law deserve the attention of a superior court. It is noteworthy that, under s 608 of the FW Act, the FWC may refer a question of law to this Court. That suggests that, where complicated legal issues arise, consideration ought be given to their resolution by this Court rather than by the FWC.

33 *Fourth*, *a fortiori* where (as here) the issues raised are of general importance. The affidavit of Mr M Journeaux, sworn 14 September 2015, establishes that the mechanism in dispute—the incorporation into enterprise agreements of remuneration documents setting out systems of incentive payment—is common. He said, "the vast majority of meat processing establishments continue to remunerate a significant proportion of their employees in accordance with incentive systems of payment. … My understanding is that the method of incorporating incentive payment systems into the terms of the enterprise agreement reflects that found in the various federal meat industry awards." At paragraph [19], he said this:

> The entirety of the details of the incentive payment system is usually not included in the text of an enterprise agreement. Instead, the enterprise agreements contain timework provisions and/or minimum rates of pay for all classifications of employees. The enterprise agreements also contain a clause which allow for the parties to make agreements that, once made, form part of the terms of the enterprise agreement. …

34 He set out, by way of example, clause 11.9 of the *Oakey Beef Exports Pty Ltd Enterprise Agreement 2014*, and deposed that there were essentially-similar terms in many enterprise agreements in the meat processing industry. In the case of Teys Beenleigh in

particular, he referred to a previous instance of such a clause, being clause 1.8 of the *Teys Bros (Beenleigh) Pty Ltd Boning Room and Associated Departments Certified Agreement 2006.*

35 On the basis of Mr Journeaux's evidence, it seems that issues like those raised by the substantive question are likely to arise in regard to many enterprise agreements in the meat-processing industry. The determination of those issues may affect thousands of employees and a large number of employers. It is also possible that similar mechanisms are utilised in other industries (though the evidence did not extend that far).

36 *Fifth*, and most importantly, if the substantive question continues to determination in private arbitration and in this Court, there is the potential for the answers to be inconsistent. The FWC may determine that the Remuneration Document was not incorporated and that employees were not entitled to incentive wages, while the Court determines that it was and that they were. Or, the reverse inconsistency may result. That would not be an especially weighty consideration if there was a standard appeal mechanism to this Court for arbitration outcomes. Indeed, North J's view that there was no appeal from the Queensland Magistrates Court to the Federal Court was significant in his granting of an anti-suit injunction in *Lee First Instance* (at 110–111). The Full Court's finding (in *Lee Full Court*) that there was, in fact, an ability to so appeal was material in its determination that North J's discretion had miscarried (at 68). Here, there is no standard appeal mechanism. There is no appeal to the Full Bench of the FWC otherwise than with permission. There is no statutory appeal to this Court or to any other. It was held in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 at [85] that the Constitutional writs would not go to the Commission in its capacity as a private arbitrator (Dowsett, Tracey and Katzmann JJ). Rather, as the Court said at [39], review of arbitration decisions arose in this way (emphasis added):

> The law relating to private arbitration has, since 1854, been the subject of substantial legislative change, including changes in the extent to which judicial intervention may detract from the finality of an arbitrator's award. In Australia, such legislation has largely been that of the State parliaments. Neither party has suggested, in this case, that any legislation applies for present purposes. *Both parties have proceeded on the basis that an award by a private arbitrator is liable to be set aside for error of law on the face of the record. ALS denies any such error but also seeks to rely on the exception, submitting that in this case, if there was an error of law on the face of the record, the issue referred to FWC was a question of law.*

37 Assuming the correctness of the matters agreed by the parties in *ALS*, the scope for review of an arbitration decision is limited. Thus, in an appropriate case, it will be consistent with the interests of justice that the potential for inconsistency and the risk of the FWC exceeding its authority be diminished by the early determination of an issue by the Court. One can reasonably expect that the FWC will follow any such determination by this Court. If the Court first determines the issue, the potential for inconsistent results is minimised. Mainly for the reasons given above concerning the complexity of the substantive question and its significance as an issue of general importance, I consider that this is such an appropriate case.

38 The *sixth* consideration is the potential for delay in the FWC proceeding. The FWC is listed to hear the matter this on Friday, 18 September 2015. Any order that I made restraining that hearing would result in delay. But, if this Court can move quickly in determination of the substantive question, the delay would not be great. I expect that this Court will be able to move quickly. This is a question of construction; the factual issues that arise are limited.

39 There is a final matter that is necessary to address. Consistently with *ALS*, the conclusion is inevitable that an arbitration by the FWC under step 5 of clause 2.1.14 is a private arbitration (see, e.g., [35]). Neither party suggested to the contrary. That the nature of the FWC proceeding is private arbitration raises whether this Court's ability to make interlocutory orders of the kind Teys seeks is limited to a greater degree than would apply where the question was simply which of two tribunals ought be the forum for a dispute—i.e., in the case of a standard anti-suit injunction.

40 Some detail is required of the nature of arbitration under the FW Act scheme. Section 186(6) provides that, in order for the FWC to approve an enterprise agreement, it must be satisfied that it includes a term that provides a procedure that requires or allows the FWC, or another independent person, to settle disputes. Section 738 provides that Part 6-2 Division 2 applies if an enterprise agreement includes a term that provides a procedure for dealing with disputes, including one referred to in s 186(6). Where (as here) such a term requires or allows the FWC to deal with a dispute, it may arbitrate the dispute if the parties have agreed to that course in accordance with the term (s 739(4)). But, the FWC must not exercise any powers limited by the term (s 739(3)), and it must not make a decision that is inconsistent with the Act or the enterprise agreement (s 739(5)).

41 Many statutory schemes dealing with private arbitrations include provisions limiting courts' ability to supervise or intervene in the arbitration. For example, ss 5 and 8 of the *Commercial Arbitration Act 2013* (Qld) provide that no court may intervene except as provided for by the Act, and that a court (on application) must refer a matter to arbitration if the parties are bound by an arbitration agreement (see also ss 16, 27J, 34, and 34A). Most of those provisions and their correlates in other State acts (and in the *International Arbitration Act 1974* (Cth)) are adoptions of articles of the UNCITRAL Model Law on International Commercial Arbitration 1985. Such provisions may be seen as being in furtherance of a particular objective of arbitrations: that, where parties to an agreement have nominated that dispute resolution shall be by arbitration (including to have the advantage of its perceived finality or expediency), and have consciously excluded recourse to litigation in courts, that nomination and exclusion should ordinarily be binding, including because the parties' objectives in nominating arbitration for dispute resolution may otherwise be defeated.

42 But the FW Act scheme of arbitration is distinguishable. It contains no provisions expressly limiting the Court's jurisdiction or ability to intervene or supervise. That raises what the majority said in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [76]: "[a]n agreement to submit disputes to arbitration does not, apart from statute, take from a party the power to invoke the jurisdiction of the courts to enforce that party's rights by instituting an action to determine a dispute of a kind that the parties have agreed should be arbitrated." Further, by s 739(5) of the FW Act, the FWC's authority, in its arbitral capacity, is expressly limited: it cannot act inconsistently with the Act or with enterprise agreements.

43 Because of the distinguishability of the FW Act scheme from Model Law-style schemes, I do not consider that the nature of the dispute before the FWC being one of arbitration militates against an anti-suit (or anti-arbitration) injunction being issued.

44 Overall, I consider that the interests of justice favour the determination of the substantive question in this Court before the arbitration proceeds in the FWC. The first five of the six factors I have listed militate in favour of that conclusion, and while the sixth might potentially count against it, its weight is here limited in the circumstances of this case.

45 The FWC rejected Teys's earlier application for an adjournment but it did so without the benefit of these reasons and without foreclosing a further opportunity for an adjournment to be sought on 18 September 2015. While I think it better that the substantive question be

determined in this Court for reasons given above, I will not, at this time, make an order restraining the Commission. Rather, I think it appropriate to give the Commission an opportunity to consider these reasons on a renewed application for an adjournment.

46 Accordingly, I will adjourn this interlocutory question and the proceeding generally to a directions hearing at 9:30 am on Tuesday, 22 September 2015. The purpose of that directions hearing will be to address the steps required for trial on the substantive question, at an early date. I will also give the parties liberty to apply on one hour's written notice to my associate.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 16 September 2015