AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

DECISION

Workplace Relations Act 1996
s.170LW—Certified agreement

Association of Professional Engineers, Scientists and Managers, Australia, The

v

Telstra Corporation Limited
(C2008/2773)

CPSU, the Community and Public Sector Union

v

Telstra Corporation Limited
(C2008/2774)

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

v

Telstra Corporation Limited
(C2008/2775)

TELSTRA ENTERPRISE AGREEMENT 2005-2008

(ODN AG2005/5567) [AG842295]

Telecommunications services

SENIOR DEPUTY PRESIDENT LACY MELBOURNE, 8 SEPTEMBER 2008

Alleged dispute over the application of agreement - jurisdictional objections – third party intervention conditional on agreement of parties to agreement – Workplace Relations Act 1996 – statutory dispute settlement procedures - preservation of rights to access -Workplace Relations Amendment (Work Choices) Act 2005

[1] This decision deals with the jurisdiction of the Commission to resolve disputes over the application of the *Telstra Enterprise Agreement 2005-2008* (Agreement). The Association of Professional Engineers, Scientists and Managers, Australia (APESMA), Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and CPSU, the Community and Public Sector Union (CPSU) respectively applied to the Commission to have a dispute resolution process conducted in respect of the Agreement. I will refer to APESMA, CEPU and CPSU collectively as the unions. CEPU and

CPSU also applied to have a dispute resolution process conducted in respect of matters arising in the course of bargaining in relation to a proposed collective agreement, but those applications were not pressed and no more need be said about those applications.

[2] The unions contend that they are in dispute with Telstra Corporation Limited (Telstra) over the application of clauses 3.2, 27.4 and 27.5 of the Agreement. Telstra contends that there is no jurisdictional foundation upon which the applications can proceed. Clause 26, which prescribes the dispute settlement procedure for resolving disputes over the application of the Agreement, requires the parties to refer a matter to an agreed mediator for resolution by mediation/conciliation. The essence of Telstra's primary contention is that as a party to the Agreement it had not agreed to refer any matter to a mediator and it had not agreed to a mediator. It was further submitted that the unions, as the only other parties to the Agreement, have no standing to refer the matter to the Commission or anyone else in the absence of its agreement to do so.

[3] The Agreement was made under Division 2 of Part VIB and certified under Division 4 of Part VIB of the *Workplace Relations Act* 1996 on 6 September 2005; that is prior to its amendment by the *Workplace Relations Amendment (Work Choices) Act* 2005. I will refer to the Act as it stood at September 2005 as the pre-reform Act and the amended Act as the WR Act. The Agreement is a pre-reform certified agreement as defined in Schedule 7 of the WR Act. Schedule 7, Part 2, Clause 2 of the WR Act, preserves a number of provisions of the pre-reform Act as they apply to pre-reform agreements. It also preserves any other provision relating to the operation of the preserved provisions mentioned in Clause 2. One of the preserved provisions is s.170LW, which was in the following terms:

> **"170LW Procedures for preventing and settling disputes**
>
> Procedures in a certified agreement for preventing and settling disputes between the employer and employees whose employment will be subject to the agreement may, if the Commission so approves, empower the Commission to do either or both of the following:
>
> (a) to settle disputes over the application of the agreement;
>
> (b) to appoint a board of reference as described in section 131 for the purpose of settling such disputes."

[4] In certifying the Agreement the Commission approved the following clause which is said to be such a procedure empowering it to "settle disputes over the application of the agreement"

> **"26. Disputes avoidance/resolution**
>
> 26.1 The Parties are committed to avoiding industrial disputation.
>
> 26.2 Telstra aims to provide a productive, rewarding, safe and non-discriminatory work environment for its employees. This environment should be characterised by co-operation, mutual respect and open communication between employees and managers.

26.3 Where employees experience work-related problems, in the first instance the matter may be raised with their immediate supervisor who will attempt to resolve the problem within a reasonable time, ie. within two (2) working days. Telstra acknowledges the right of employees who are union members to raise the matter with their union's representative who may become involved in the discussion at any stage of the process.

26.4 If the matter cannot be resolved with the employees' supervisor, it may be taken to the supervisor's manager who will seek resolution within two (2) working days, failing which the assistance of a more senior manager may be sought.

26.5 If the matter has not been progressed to the satisfaction of the Parties within six (6) working days from the time it was first raised with the supervisor, it may be referred to the relevant Group Managing Director and the General Manager, Human Resources of the Business Unit and relevant union officials for resolution within five (5) working days. During the period referred to in clauses 26.1 to 26.5 inclusive, normal work will continue and Telstra will not implement the matters in dispute. After completion of these steps, Telstra may implement the matters in dispute without prejudice to the final resolution of the matter.

26.6 If the matter still remains unresolved, the Parties may refer it to an agreed mediator, which may be the Australian Industrial Relations Commission. The role of the mediator is limited to providing assistance to the Parties in an attempt to address and, if possible, resolve the matter in dispute by mediation/conciliation as quickly as possible.

26.7 The Parties agree that the General Manager, Human Resources of the Business Unit and the relevant union officials may agree to waive these time limits in whatever manner is necessary to aid dispute resolution. However, the importance of the nominated manager and union officials accepting responsibility for the issues within the agreed timeframes is also acknowledged by the Parties.

26.8 Nothing in these procedures will:

(a) prevent any party from exercising its rights under the *Workplace Relations Act* 1996; or

(b) prejudice the position of a party in a genuine health and safety situation."

[5] The "Parties" to the Agreement is defined by clause 2. It provides as follows:

"2. Who this Agreement applies to

2.5 This Agreement applies to (the "**Parties**"):

(a) Telstra Corporation Limited ("**Telstra**");

(b) The unions referred to in clause 2.2; and

(c) Employees who are employed by Telstra in the following classifications and are covered by a Relevant Award:

i. Customer Sales and Service Workstream ("CSSW");

ii. Support Workstream ("SW");

iii. Technology Professional Workstream ("TWP");

iv. Technical Workstream ("TW"); or

v. Customer Field Workstream ("CFW")

[6] Clause 2.2 defines the "unions" as CEPU, APESMA, POAV and CPSU. Clause 7 defines "workstreams".

[7] The path and circumstances by which this matter came before the Commission is deserving of some examination. The unions' applications were lodged in the Commission on 28 August 2008. The matter was listed for hearing on 1 September 2008, at which time APESMA, CEPU AND CPSU announced appearances and the Australian Council of Trade Unions was given leave to intervene. Although there was no appearance on behalf of Telstra, its Director Workplace Relations and People Services, Darren Fewster, wrote to the Commission on 28 August 2008 stating that Telstra had commenced discussions with the union, ended those discussions on 17 July 2008 and informed the unions of its intention to offer collective agreements to employees under clause 27 of the Agreement. According to the letter Telstra will not resume discussions with the unions for an enterprise agreement. Attached to its letter were two letters from different members of the Commission dealing with earlier applications from the CEPU and CPSU respectively in 2006 and 2008 in which the members of the Commission had not proceeded with a hearing because Telstra had indicated that it did not consent to mediation. Telstra was informed that the listing for 1 September 2008 would proceed in order that the parties would have an opportunity to be heard on the question of jurisdiction.

[8] At the hearing on 1 September 2008 the unions each outlined the history of their attempts to negotiate a new collective agreement with Telstra and reported Telstra's decision to end negotiations with the unions. The ACTU also reported the history of negotiations with Telstra for a Constructive Relationship Agreement or a Memorandum of Understanding (MOU) as a basis for a constructive and productive relationship between Telstra and its employees and the unions. Telstra refers to this document in its correspondence as a "side agreement". Telstra had rejected the proposed agreements ostensibly because it is not compliant with what it referred to as the construction code. Telstra nonetheless acted in its negotiations with the unions as if it would be prepared to accept the MOU if it were made code compliant. The MOU has been vetted by the Department of Education, Employment and Workplace Relations (DEEWR) and approved as code compliant. Telstra then provided its

own version of a constructive relationship agreement and terminated its negotiations with the unions.

[9] It is implicit in the ACTU's further submissions and in the documentation it provided,[1] that Telstra's strategy from the outset was to make it appear that it was prepared to negotiate an agreement with the unions but without any real intention to do so. A fair reading of the documentation certainly gives that impression. The documentation suggests that Telstra intended negotiations to proceed to a particular point in time before diverging on another course. In light of the ACTU submissions and the documentation it provided I determined that Telstra ought to have an opportunity to respond and directed that the transcript of the proceedings be provided to it with an invitation to attend and be heard at a further listing.

[10] By letter dated 3 September 2008, Telstra submitted that the Commission does not have jurisdiction to hear either of the matters raised by the unions in their initial applications. As mentioned earlier the unions do not press their applications for a dispute resolution process in respect of matters arising in the course of bargaining. Telstra also dealt in its correspondence with the MOA issue, reporting that the version that was approved by the DEEWR was not produced before it terminated its negotiations with the unions. It also asserted that it had negotiated with the unions in good faith.

[11] The matter was listed for jurisdiction hearing on 8 September 2008, at which time Mr S Wood of Counsel announced an appearance for Telstra in respect of the jurisdictional issue. No Telstra employee attended the hearing. Representatives for the unions and the ACTU continued their appearances. Mr Wood referred to the letters from members of the Commission to which reference is made in [7] above and suggested that was an appropriate way for the Commission to proceed in view of the terms of clause 26.5 of the Agreement. He submitted that for the limited purpose of the jurisdictional hearing now before me it could be accepted that the pre-requisites to clause 26.6 had been fulfilled. Mr Wood submitted that the parties to the Agreement are Telstra and the unions. The employees, he submitted, are not parties to the Agreement. The Agreement makes provision for the settlement of disputes between the employer and its employees. To the extent that it provides for a third party role in the settlement of any disputes under the provision for dispute settlement the power is limited. It is a condition precedent to any third party involvement that there is agreement between the parties for that involvement. Telstra as a party to the Agreement, Mr Wood submitted, has not agreed to a mediator.

[12] The ACTU submitted that the Commission's powers to deal with disputes over the application of an agreement are not limited to the powers contained within the Agreement itself. The Commission has independent powers arising from the operation of s.170LW and s.26 of the Agreement. Some of these powers are to be found in s.111 of the WR Act. It was submitted that the Commission can resort to those powers to resolve disputes over the application of an agreement and how a dispute resolution process might be conducted. The next part of the submission, as I understand it, suggests that clause 26.6 of the Agreement is designed to limit the choice of mediator. It does not preclude one of the parties from seeking the assistance of the Commission in the absence of agreement to mediate. In other words

[1] now marked as ACTU-1.

clause 26.6 is expressed in facilitative terms to allow the parties the opportunity to have their disputes mediated or conciliated by an agreed mediator. Clause 26.8, preserving as it does the rights of the parties under the WR Act, provides for an alternative course of dispute resolution in the absence of agreement as to a mediator. The Agreement was made under the pre-reform Act. At the time it was made the parties must have contemplated the operation and application of provisions such as s.111(1A) of the pre-reform Act, which provides that the Commission could exercise any of the powers under s.111 in relation to an industrial dispute under the pre-reform Act. Reference was also made to the conciliation powers of the Commission under s.170NA of the pre-reform Act.

[13] I accept, as Mr Wood submitted, the exercise of the Commission's powers under the Agreement, the pre-reform Act or the WR Act is contingent on establishment of jurisdiction. In relation to jurisdiction to deal with disputes over the application of an agreement the point is succinctly made by the Full Bench in *Charles Sturt University v National Tertiary Education Union:*[2]

> "The jurisdiction of the Commission, as a creature of statute, is limited to the jurisdiction conferred on it by the Parliament. The Parliament has authorised the Commission to accept appointment as a private arbitrator for the resolution of disputes over the application of certified agreements (s 170LW). When the Commission acts as private arbitrator under the dispute settlement procedure in a certified agreement it does so pursuant [to] s 89(a) and an approval given pursuant to s 170LW of the Act. In its capacity as private arbitrator, the jurisdiction of the Commission is limited to disputes over the application of the agreement – a limitation arising from the terms of s 170LW. However, the jurisdiction and power of the Commission as private arbitrator under a dispute settlement procedure is also subject to any limitations in the agreement conferring power on the Commission."
>
> (cited references omitted)

[14] Consequently, unless the dispute settlement provision in the Agreement confers jurisdiction on the Commission to deal with any dispute over its application the Commission can exercise no powers in respect of it. On its face clause 26.5 confers no jurisdiction for third party involvement in the absence of the agreement of the parties. I am not so sure that it is correct to say, as Mr Wood contended, that the employees are not parties to the Agreement, at least insofar as clause 26 is concerned, but for now I do not have to decide that issue. It seems to me that if clause 26.5 does not provide for a means of resolution of the dispute in the absence of agreement of any of the parties to a dispute over its terms the contentions of the ACTU have some force.

[15] It is important to recall the constitutional rationale for s.170LW of the pre-reform Act. The constitutional validity of its legislative predecessor was considered by the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations*

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[2] (2005) 145 IR 319, [10].

Commission.[3] The High Court held the provision was constitutionally valid reasoning as follows:

> "... As already indicated, it is incidental to the conciliation and arbitration power for the Parliament to permit parties to an industrial situation to agree on the terms on which they will settle the matters in issue between them conditional upon their agreement having the same legal effect as an award [*Victoria v The Commonwealth* (1996) 187 CLR 416 at 538]. So, too, it is incidental to that power for the Parliament to give legal effect to agreed procedures for maintaining a settlement of that kind and, also, for it to authorise the Commission to participate in those procedures."

The High Court went on to say that 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.[4] Thus to the extent that a dispute settlement provision in an agreement is made in contemplation of s.170LW of the pre-reform Act it is taken to be made for maintaining the agreement. It is not without significance that a substantive condition for certification of the Agreement was that it include procedures for preventing and *settling* disputes between the employer and the employees whose employment would be subject to the Agreement.[5]

[16] To the extent that any measure in the agreement obstructs the prevention or settlement of a dispute over its application it could hardly be a dispute settlement procedure of the requisite kind. In my view, clause 26.5 of the Agreement cannot be a dispute settlement procedure of the requisite kind for so long as it allows any one of the parties to a dispute over its application to withhold agreement to mediation in the face of a genuine dispute over its application. Moreover, if one of the parties to the dispute refuses to deal with the other party or parties to the dispute the prospect of agreement to third party mediation negligible. For that reason I am satisfied that the parties must have intended that clause 26.8 would be a circuit breaker in the event of intransigence by one party to the Agreement when it came to agreement as to a mediator. The question then arises as to the applicable legislation so far as clause 26.8 is concerned.

[17] In my view clause 26.8 must be a reference to the WR Act. It is clear from other provisions in the Agreement that where the parties intended to preserve the rights under any legislative instrument as it stood at the time the Agreement was made it is expressly stated in relation to the particular instrument. Clause 26.8 simply refers to the *Workplace Relations Act* 1996. The parties must be taken to have intended the *Workplace Relations Act* 1996 as it existed from time to time. Clause 26.8 preserves the right of any party to the Agreement to resort to any other procedures that are available under the WR Act for the settlement of the dispute over the application of the Agreement where any party to the dispute exhibits a clear intention to withhold agreement to mediation under clause 26.6.

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[3] (2001) 203 CLR 645, [29]

[4] Ibid, [32].

[5] Pre-reform Act, s.170LT(8).

[18] I am satisfied that under clause 26.8 of the Agreement the Commission has jurisdiction to deal with a dispute over the application of the Agreement. While it is arguable that the Commission could, for example, order a ballot under s.135 of the pre-reform Act to the extent that it is a provision relating to the operation of the preserved provisions mentioned in Schedule 7 of the WR Act, Part 2, clause 2, it is a matter that has not been addressed by the parties. Neither has any other provision of the WR Act or the preserved provisions of the pre-reform Act been fully addressed. I propose adjourning the proceedings to allow the parties an opportunity to address the further progress of this matter. The parties will be notified of the further hearing of this matter in due course.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

Appearances:

S Herrington for The Association of Professional Engineers, Scientists and Managers, Australia.

L Persse for CPSU, the Community and Public Sector Union

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

C Walton and *J Fettler* for the Australian Council of Trade Unions (intervening)

Hearing details:

2008.
Melbourne:
September 8.

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