



A U S T R A L I A N  
I N D U S T R I A L  
R E L A T I O N S  
C O M M I S S I O N

## REASONS FOR DECISION

*Workplace Relations Act 1996*  
s.170LW—Certified agreement

**The Association of Professional Engineers, Scientists and Managers,  
Australia,**  
(C2008/2773)

**CPSU, the Community and Public Sector Union**  
(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, 16 OCTOBER 2008

*Alleged dispute in relation to the failure to negotiate a new enterprise 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] On 8 September 2008 I heard an application by Telstra Corporation Limited (Telstra), effectively seeking a declaration that applications by The Association of Professional Engineers, Scientists and Managers, Australia (APESMA), Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), CPSU, the Community and Public Sector Union (CPSU) and the Australian Council of Trade Unions (ACTU) as intervener for orders in relation to a dispute over the application of the *Telstra Enterprise Agreement 2005-2008* (Agreement) were incompetent. On 9 September 2008 I published reasons for decision (my earlier decision)<sup>1</sup> in Telstra's jurisdictional challenge in which I found that under clause 26.8 of the Agreement the

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<sup>1</sup> [2008] AIRC 714 PR983142, dated 8 September 2008.

Commission has jurisdiction to deal with a dispute over the application of the Agreement. My finding in that regard was premised on the conclusion I had reached that, in circumstances where any party to the dispute exhibits a clear intention to withhold agreement to mediation under clause 26.6, clause 26.8 preserved the right of a party to the Agreement to resort to any other procedures that are available under the *Workplace Relations Act* 1996 (WR Act) for the settlement of a dispute over the application of the Agreement. I noted however, that the parties to the Agreement had not addressed the provisions of the relevant legislation that would enliven the jurisdiction of the Commission to exercise any powers in respect of the matters in dispute. Accordingly the matter was adjourned to a date to be fixed.

**[2]** Telstra has applied for leave to appeal my earlier decision. An application for a stay was refused by Justice Giudice, President, on 12 September 2008.<sup>2</sup> Meanwhile, at the request of the ACTU, the matter was listed for conciliation before Commissioner Foggo on Thursday 10 September 2008. At the conclusion of the conciliation the Commissioner issued the following Statement

“[1] Following a written request of the ACTU on 10 September 2008, a conciliation conference of APESMA, CPSU, CEPU and Telstra Corporation Ltd was convened before Commissioner Foggo on the same date. The conference sought to establish whether through a process of conciliation before the Commission, the dispute regarding the proposed enterprise agreement could be resolved.

[2] Representatives of the parties to the current dispute attended the conference but Telstra declined to participate in conciliation. The conciliation conference was therefore unable to proceed.

[3] The Commission has indicated to the parties that it will quickly convene a conciliation conference if such assistance is sought.”

**[3]** The matter was then listed for further jurisdictional hearing before me on Saturday, 13 September 2008. Mr Joel Fetter with Mr Chris Walton entered an appearance for the ACTU as intervener and on behalf of each of APESMA, CEPU and CPSU. I will refer to the union parties and the ACTU collectively as the Applicants. Mr Stuart Wood of Counsel appeared by leave for Telstra.

**[4]** Mr Fetter advanced three alternative sources of jurisdiction to deal with the dispute over the application of the Agreement. It was contended that the Commission:

- derived its jurisdiction from clause 26.8 of the Agreement;
- has jurisdiction to act independently of the terms of the Agreement;
- is at liberty to intervene in a dispute over the application of the Agreement where consent to conciliation under clause 26.6 is unreasonably or capriciously withheld in breach of an implied statutory duty of good faith.

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<sup>2</sup> [2008] AIRC 729.

[5] There was some degree of overlap between each of the alternative grounds upon which the Applicants relied.

### **Clause 26.8 Jurisdiction**

[6] Clause 26.8 of the Agreement reserves to the parties their rights under the WR Act. The ACTU's contention in relation to clause 26.8 was to the effect that:

- the Agreement is a pre-reform certified agreement as defined in Schedule 7, Part 2, Clause 2 of the WR Act, i.e. an agreement certified under the WR Act prior to its amendment by the *Workplace Relations Amendment (Work Choices) Act 2005*;
- clause 26.6 as a dispute avoidance/resolution clause allowing the Commission by consent of the parties to conciliate disputes over the application of the Agreement was approved by the Commission under s.170LW of the pre-reform Act;
- the WR Act preserves s.170LW of the pre-reform Act and any other provision relating to the operation of s.170LW;
- s.111 of the pre-reform Act is a provision relating to the operation of s.170LW;
- the Commission may exercise any of the powers conferred by s.111 in relation to an industrial dispute;
- s.111(2) of the pre-reform Act provides that a reference to an industrial dispute in s.111 is a reference to any other proceeding before the Commission;
- the Applicants' applications respectively caused to be commenced in the Commission a proceeding;
- the proceeding was an "industrial dispute" within the meaning given to that expression in s.111(2) of the pre-reform Act.

the Commission may exercise any of the powers conferred on it by s.111 in relation to the "industrial dispute".

[7] I am prepared to accept that the matter before me is a proceeding. The term "proceeding" is a term of very wide application<sup>3</sup> and in statutes it is frequently used both to describe an action or other cause or matter and to denote a step in an action, cause or matter.<sup>4</sup> The proceeding before me however, is not a proceeding under s.170LW of the pre-reform Act. The proceeding is brought under the Agreement and, more particularly, clause 26 of the Agreement. Section 170LW does not confer power on the Commission to settle disputes

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<sup>3</sup> *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees' Association* (1906) 4 CLR 488, 494.

<sup>4</sup> Halsbury's Laws of England, 4<sup>th</sup> Ed., vol. 37 para. 24.

generally or, more specifically, over the application of an agreement. It is a facilitative provision which gives the Commission discretion to approve provisions in an agreement for it to participate in a dispute settlement procedure to the extent that the parties empower it to do so and to the extent of the power so conferred. As s.170LW provides no jurisdictional foundation for the Applicants' claim, s.111 of the pre-reform Act does not come into play as a provision relating to s.170LW in its preserved form. The Applicants' first jurisdictional ground is not made out.

### **Jurisdiction independent of the Agreement**

[8] The Applicants contend that the Commission has jurisdiction under the WR Act independent of the Agreement to make orders in respect of their dispute. In this regard the Applicants rely on s.111 of the WR Act. Their contention in this regard must fail also. Section 111 confers on the Commission a raft of procedural powers that it may exercise in relation to a proceeding under the Act. The section does not confer jurisdiction as such and no other provision of the WR Act has been identified as a source of jurisdiction for a proceeding in respect of which the procedural powers may be exercised.

### **Implied statutory duty of good faith**

[9] The Applicants contended that there is an implied statutory duty of good faith in bargaining. Telstra, it was submitted, had shown bad faith in unreasonably and capriciously withholding its consent to mediation under clause 26.6 of the Agreement. In my earlier decision I observed that a fair reading of the documentation that had been filed by the ACTU<sup>5</sup> gave the impression that Telstra had adopted a strategy to make it appear that it was prepared to negotiate an agreement with the Applicants but without any real intention to do so. The Applicants relied on that observation in seeking to make a case for inquiry into whether Telstra was in breach of the statutory duty of good faith. In the conduct of such an inquiry the Commission, so the submission goes, could resort to its powers under s.111 to give such directions as may be necessary as to preserve the subject matter of the inquiry; in the instant case a direction that Telstra stay execution of its proposed ballot of its employees on the Telstra pay and conditions offer.

[10] The Applicants conceded that there is no express provision for good faith bargaining in the legislation. Furthermore the Applicants could not point to any provision in the legislation that gave rise to any implied statutory duty of good faith bargaining. Consequently, I was not satisfied that there was any basis upon which further inquiry into Telstra's conduct in its negotiations with the Applicants was justified. For those reasons I refused the Applicants' applications for interim orders.


[11] The Applicants requested a recommendation. Telstra opposed that course and, in response to my stated intention to make a statement on the conduct of the parties, it submitted that as there was no jurisdiction to deal with the applications the Commission was not at liberty to make any statement. While the minor premise can be accepted as a matter of fact I doubt that the major premise is a correct statement of law. The Commission must be at liberty

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<sup>5</sup> Exhibit ACTU-1.

to reflect on the conduct of parties to proceedings and their statutory rights and obligations in so far as those rights or obligations do or do not exist. That must be the case even in the absence of jurisdiction in the substantive issue or issues before the Commission. The fact is Telstra's conduct was within the broad legal parameters of the WR Act. It had no obligation under the legislation to treat with the Applicants in good faith. The fact that it was not legally bound to do so does not mean that it had no moral obligation in that regard. The Commission has no jurisdiction to rule on such matters, but I do note that, contrary to Telstra's submissions, it has provided no evidence to rebut the impressions I expressed in my earlier decision about its apparent duplicity in dealing with the Applicants.

**[12]** I find that I am without jurisdiction to give any relief in any of the applications before me. Accordingly those applications will be struck out. Orders to that effect will issue separately.

BY  COMMISSION:  
VICTORIA  
REGISTERED  
SENIOR DEPUTY PRESIDENT

*Appearances:*

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

*S Wood* of Counsel for Telstra Corporation Limited.

*Hearing details:*

2008.  
Melbourne:  
September 13.

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