The Ambit of Private Arbitration: Limits on Determination under Agreed Dispute Settlement Procedures in Federal Awards and Agreements

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In federal industrial law, the scope of a conciliated agreement, it seems, is not circumscribed by the notion, peculiar to arbitration, of the ambit of an industrial dispute. This paper presents a personal view about several questions, without offering what should be taken to be a considered answer to any of them. Those questions are:

- Does a notion akin to ambit impose limits on the permissible content of a "private arbitration" under section 170LW of the *Workplace Relations Act 1996* (the WR Act) between parties to an agreement over the application of it?
- Is there any significant difference in such ambit if the permissible content of the agreement being applied must pertain to the workplace relationship rather than a generic employment relationship?
- Is a procedure for discussion of disputes still a procedure for preventing and settling disputes arising under an agreement?
- Is provision for the empowerment of the Australian Industrial Relations Commission by certified agreement under section 170LW a matter of art?
- Should the requirement in section 170LW for the Commission to approve an empowerment of it be seen as requiring a substantive examination of whether an agreement does one, the other, both or none of the empowerments?
- Does private arbitration under an agreed section 170LW procedure allow adjudications upon legal rights and liabilities arising under the agreement in a manner not confined by board of reference case law precedents?
- Does the "new" province for private arbitration reflect a potential for recognising that industrial tribunals offer a cost effective alternative to court based litigation?

An idea floated by a seminal article in *The Irish Jurist* should be acknowledged as a germinal factor in the High Court's recent resuscitation of the dispute settling power in section 170MH of the *Industrial Relations Act 1988* (the IR Act). In a 1976 paper, McCormack discussed procedures for the settlement of disputes in primitive societies. He instanced approvingly a conciliator settling a dispute about a horse by an agreement about a cow[1]. In 1984 a majority of the High Court in *R v Bain; Ex parte Bain v Cadbury Schweppes*[2] accepted that, for purposes of the exercise of award making powers, the ambit of an industrial dispute may be enlarged or contracted as a result of interactions between the industrial disputants[3]. All judgments proceeded from the unassailable proposition that the notion of ambit is a

[1] See, e.g. G. McCormack, "Procedures For The Settlement of Disputes in 'Simple' Societies", *The Irish Jurist*, Vol. 11 (1976), 175.
[2] (1984) 159 CLR 163.
[3] Ibid *Bain v Cadbury Schweppes* at 168 per Murphy J with whom Brennan and Deane JJ agreed at 175.

foundational condition for exercise of arbitral function by adjudication upon the matter of a dispute submitted[4].

However, some members of the court ventured beyond the bounds of the doctrine of industrial dispute ambit. Brennan and Deane JJ, who with Murphy J constituted the majority, cited McCormack's article. They pointed to *the flexibility and sophistication exhibited even by the conciliation processes of primitive societies* demonstrated by McCormack. The reference reinforced a point against applying to conciliation the ambit of dispute doctrine derived from the nature of arbitration. That notion constitutes a parameter of industrial arbitration. But conciliation is not the same thing as arbitration. They suggested the constitutional head of power in relation to the prevention of industrial disputes by conciliation might be a more potent source for legislation than the corresponding power relating to arbitration[5]. That dicta encouraged beliefs that the Commission could be empowered to settle disputes under a process agreed by parties as an outcome of conciliation.

In 1993, a Full Bench of the Commission in *Co-operative Bulk Handling* pronounced upon the validity of an award dispute settlement procedure inserted many years earlier into the award by a consent variation[6]. The principle implied in dicta from *Bain v Cadbury Schweppes* was a major element in the Full Bench's analysis. The majority decision discussed the history and material jurisprudence of dispute settlement procedures in awards. The relevant award clause in issue contained a reference to "arbitration". The Full Bench read down that expression. Commission action to "arbitrate" a dispute referred to it under the provision could not go beyond giving a decision in circumstances where the Commission had

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[4] Ibid *Bain v Cadbury Schweppes* at 173 per Wilson and Dawson JJ citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and Company (No. 2)* (1910) 11 CLR 1. But see especially Issacs J at 61-62.

[5] Ibid *Bain v Cadbury Schweppes* at 176:

> *"... the ambit of the dispute determines the limits of the jurisdiction of an arbitrator to bind the parties by his award. Those limits are derived from the nature of arbitration; they do not circumscribe the functions of a conciliator who is at liberty to assist the parties themselves to avoid or settle a dispute by an agreement which ventures beyond the ambit of their prospective or actual dispute. If the functions of an industrial conciliator were circumscribed by the ambit of a prospective or actual dispute, they would lack the flexibility and sophistication exhibited even by the conciliation processes of primitive tribal societies (see, e.g. G. McCormack, "Procedures For the Settlement of Disputes in 'Simple' Societies",* The Irish Jurist, *vol. 11 (1976), 175; Roberts,* Order and Dispute *(1979), pp. 68-69). The decisions of this Court in which the limits of arbitral power have been stated by reference to the ambit of disputes may be given too wide a significance if they are assumed to state in the same way the scope of the legislative power with respect to conciliation under s. 51(xxxv) of the Constitution or the scope of the conciliation powers of the Commission under the Act ..."*

[6] *Co-Operative Bulk Handling Ltd v Australian Workers' Union* (1993) 47 IR 361.

been satisfied the decision would be accepted by each party[7]. That departure from the ordinary meaning of the words used in the relevant clause applied reasoning in *Portus*[8], to the effect that the Commission, a creature of statute, could not exercise a function in the absence of an express power in the Act[9].

The absence of an effective link between dispute settlement procedures and a statutory empowerment of the Commission was addressed by the *Industrial Relations Reform Act* of 1993. The relevant passage of the Explanatory Memorandum seemed to disclose diffidence about the innovation, noting that it would be for the Commission to approve whatever role was proposed for it in a dispute settling procedure as appropriate[10]. The policy appears to have been intended to allow the parties to an agreement to "propose" a role for the Commission, leaving the Commission with a discretion when certifying the agreement to approve, or not approve that role.

Be that as it may, with effect from March 1994, section 170MH of the IR Act provided in relation to dispute settlement provisions in certified agreements:

> "***170MH Procedures for preventing and settling disputes***
>
> *Procedures in an agreement for preventing and settling disputes between employers and employees covered by 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."*

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[7] Ibid *Co-Op Bulk Handling* at 382.
[8] *Re Portus; Ex parte ANZ Banking Group* (1972) 127 CLR 353 at 360.
[9] Ibid *Co-Op Bulk Handling* at 386.
[10] The introduction of the new provision in the *Explanatory Memorandum* circulated for the First Reading of the Industrial Relations Reform Bill 1993 was no model of coherence or the plain English promoted by that legislation:

> "***Section 170MG: Procedures for preventing and settling disputes:***
>
> *This section complements proposed paragraph 170MC(1)(c) which gives the Commission power to settle disputes over the application of the agreement or which allow the Commission to appoint a board of reference to settle such disputes (the establishment of boards of reference is covered by section 31 of the Principal Act).*
>
> *The Commission will have a discretion as to whether it will allow the inclusion of these terms in an agreement. The Commission might take the view that disputes settling procedures contained in the agreement propose a role for the Commission which was inappropriate."* [Industrial Relations Reform Bill 1993: Explanatory Memorandum Parliamentary Paper 51513 Cat. No. 93 4413.]

In 1996 section 170MH was re-enacted, with a minor change, as section 170LW of the *Workplace Relations Act*[11].

In mid 1997, in *CFMEU v Gordonstone Coal Management*[12] a Full Bench of the Commission construed and applied section 170MH of the IR Act[13]. An agreement certified under the former Act contained a Problem Resolution Procedure, (the PRP), which provided:

> "*21. PROBLEM RESOLUTION PROCEDURE*
>
> *(a) In the event of a safety or industrial issue arising, the parties agree to aim to resolve such conflict responsibly and harmoniously and as quickly as possible on site.*
> *(b) ...*
> *(c) ...*
> *(d) ...*
>
> *22. AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION*
>
> *(a) In the event of a dispute where resolution cannot be achieved without the assistance of the AIRC, the parties will exchange positions prior to any hearing taking place.*
> *(b) The parties to this Agreement agree to abide by any decision determined by the AIRC which relates to a dispute at Gordonstone Mine.*
> *(c) Where it is agreed by the parties to resolve the matter with a mediator of the AIRC, both parties agree to abide by the recommendation of the chairman.".*

The Full Bench relied upon the observations in *Bain v Cadbury Schweppes* as a basis for holding that section 170MH could validly empower the Commission to hear and determine

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[11] Section 170LW substitutes the words "*employees whose employment will be subject to the agreement*" for the words "*employees covered by the agreement*". A requirement in s.170LT(8) for all certified agreements to include procedures for preventing and settling disputes between the employer and such employees about matters *arising under the agreement* corresponds in much the same way to s.170MC(1)(c) of the IR Act. The Explanatory Memorandum for the 1996 Bill explained the revised provision as follows:

> "*New section 170LW - Procedures for preventing and settling disputes*
>
> 9.109. Agreements must contain procedures for preventing and settling disputes about matters arising under the agreement [new subsection 170LT(7)]. New section 170LW provides specified means by which this requirement may be satisfied.
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> 9.110. This provision provides that a certified agreement may, if the Commission approves, empower the Commission to settle disputes over the application of the agreement and/or appoint a board of reference for the purpose of settling such disputes. [Boards of reference are provided for by section 131 of the Act.]
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> 9.111. An agreement is not required to contain either mechanism, but may contain either or both." [The Parliament of the Commonwealth Australia, House of Representatives: Workplace Relations and Other Legislation Amendment Bill 1996, Explanatory Memorandum: 77708 Cat. No. 96 4511X ISBN 0644 445688 at 75.]

[12] *CFMEU v Gordonstone Coal Management Pty Ltd* [1997] 75 IR 249.

disputes over the application of the agreement. The substance of the AIRC Full Bench's reasoning on that point was set aside on judicial review by a Full Court of the Federal Court[14]. However, the Full Court's judgment did not address the contention that section 170MH had a distinct constitutional basis. Rather, the Full Court held that the PRP provisions served to enliven the power in section 170MH in a way that came within the principles applied in *Re Hegarty; Ex parte City of Salisbury*[15]. A key point in the Full Court's reasoning was to construe Part VIB of the former Act, in which section 170MH appeared in its statutory context. The Full Court read it, and its successor in the current Act, as subject to the restrictions in Part VI of the current Act on use of *arbitration powers*. Perhaps for that reason, no attention was given to the substantial judicial and legislative moss that had accumulated on the rolling stone set loose in *Bain v Cadbury Schweppes.* That line of authority and reasoning was not mentioned at all in the joint judgment of the Full Court.

On appeal, in a unanimous decision, the High Court addressed a primary question of whether section 170MH was validly made, held that it was, and reversed the Full Court decision. The *Industrial Relations Act Case*[16] was relied upon for the proposition that it is incidental to the conciliation and arbitration power for the Parliament to permit parties to an industrial dispute to agree on the terms on which they will settle the matters in issue conditional upon their agreement having the same legal effect as an award. *Bain v Cadbury Schweppes* was not directly cited, but a reference to it can be found in passages from the *Industrial Relations Act Case*[17] by the Court.

Three points relevant to this paper are established by the decision in *CFMEU v AIRC*[18]. The first is that section 170MH of the IR Act is a validly enacted *authorisation of the Commission to participate in procedures for the resolution of disputes over the application of an agreement.* Thus:

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[13] Ibid *CFMEU v Gordonstone* at 261.
[14] *Gordonstone Coal Management Pty Ltd v AIRC* (1999) FCA 298 per Black CJ, Heerey and Goldberg JJ.
[15] (1981) 147 CLR 617 at 629-630.
[16] *Victoria v Commonwealth* (1996) 187 CLR 416.
[17] Ibid *Victoria v Commonwealth* at 536 - 537, per Brennan CJ; Toohey, Gaudron McHugh & Gummow JJ; cited *CFMEU v AIRC* ibid at 68 - 69.
[18] *CFMEU v AIRC* (2001) 178 ALR 61. The decision also confirms that an award of costs will be made in respect of a proceeding for the constitutional writ of prohibition. Gageler SC in a recent address suggested that that aspect of the decision reflected the adoption of a principle that the duty of a member of the AIRC as an officer of the Commonwealth to act in conformity with the WR Act arises from Chapter III Section 75 of the Constitution, and rather than from the WR Act.

> "*To the extent that s 170MH of the IR Act* (or, presumably section 170LW of the 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."*[19]

The second is that empowerment of the Commission *to settle disputes over the application of the agreement* confers on the Commission a power of *private arbitration*. The Court's reasoning to that effect proceeded from the premise that a power to make a binding determination as to legal rights and liabilities arising under an award or agreement is, of its nature, judicial power. The Commission could not by arbitrated award give itself such power, or any other power that it is not authorised to exercise. The further premise was that different considerations apply:

> "*if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.*
>
> *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."*[20]

The third point was an acknowledgement of possible *general law* effects of a certified agreement collateral to its operation as an instrument akin to an award:

> "*The parties to an industrial situation are free to agree between themselves as to the terms on which they will conduct their affairs. Their agreement has effect according to the general law. If their agreement is certified, it also has effect as an award. To the extent that an agreement provides in a manner that exceeds what is permitted either by the Constitution or by the legislation which gives the agreement effect as an award, it cannot operate with that effect. But the underlying agreement remains and the validity of that agreement depends on the general law, not the legislative provisions which give it effect as an award.*

[19] Ibid *CFMEU v AIRC* at paragraph 32.
[20] Ibid *CFMEU v AIRC* at paragraphs 30-31.

It was not suggested that the general law operates to render cll 21 and 22 of the agreement wholly invalid. Nor does s 170MH proceed on the basis that an agreed dispute resolution procedure is valid only if it is confined to disputes over the application of an agreement. That being so, there is no reason why cll 21 and 22 should not operate so far as it is concerned with disputes of that kind. ..."[21]

On the reasoning of the Court as to the validity of section 170MH of the former Act, it follows that, so far as it relates to Part VIB Division 3 agreements made in settlement of industrial disputes, section 170LW of the WR Act would also be validly enacted. However, section 170LW is sustainable also as an authorisation of the Commission to participate in procedures for the resolution of disputes over the application of an agreement made under Part VIB Division 2. That distinct class of agreements is comprised of agreements between an eligible employer, including a constitutional corporation, and an organisation of employees or persons whose employment will be subject to the agreement[22].

Sections 170LJ, 170LK and 170LL stipulate the procedural conditions for making agreements of the nature described in section 170LI. The eligible *employer* for purposes of Part VIB Division 2 may be a constitutional corporation, the Commonwealth, an employer in Victoria and/or the Territories, a maritime or a flight crew employer[23]. In relation to the most prolific of the employers in that variegated class, constitutional corporations, a Full Court of the Federal Court has held that the provisions of Division 2:

"give binding effect to agreements made between such corporations and organisations of employees where such agreements are certified by the Commission. They also purport to bind by such agreements all persons whose employment is, at any time when the agreement is in operation, subject to the agreement. The laws create rights and liabilities between the constitutional corporations to which they apply, the organisations of employees with whom they conclude certified agreements and the employees to whom the agreements apply. The nature of the agreements is defined in s. 170LI which describes them as agreements:

> *'about matters pertaining to the relationship between ... an employer who is a constitutional corporation and ... all persons who, at any time when the agreement is in operation, are employed in a single business or a part of a single business of the employer and whose employment is subject to the agreement.'*

These elements, made essential by s. 170LI, are sufficient to indicate that the impugned laws apply directly to constitutional corporations in that character and to their employees. ... The fact that the subject of the law is not itself unique does not deprive it

[21] Ibid *CFMEU v AIRC* at paragraphs 34 and 35.
[22] Section 170LI, to the requirements of which in context are outlined in *Webforge Australia Pty Ltd and AMWU* Print PR914387.
[23] Sections 170LI, 5AA and 494.

of the character of a law with respect to constitutional corporations if it is specifically and uniquely directed to them. That direction is no mere peg or reference point. The constitutional corporation in Part VIB is a necessary party to the agreement for which that Part provides and a necessary repository of the rights and duties which they define. ...”[24]

I have pointed to the diversity of the group of employers associated with the plural constitutional bases for agreements certified under Part VIB Division 2. That difference in the legal character of the employer as a party to an agreement may be of some relevance in any determination of whether the *nature of the agreement* test implicit in the elements of section 170LI must be applied in an employer neutral manner. In other words, may the permissible content of a Division 2 agreement differ between the kinds of employers eligible to negotiate such an agreement; is permissible content for a Division 2 agreement effectively co-extensive with that of a Division 3 agreement? If so, why?

The answers may depend upon whether there is a legal significance in any difference that might seem to exist between the respective relationships of each type of employer and *the persons employed in a single business of the employer and whose employment is subject to the relevant agreement*. Is a generic employer *as such* indistinguishably the same as an employer who is a constitutional corporation, the Commonwealth, a waterside employer, a flight crew officer’s employer, or an employer carrying on a single business in a Territory or the State of Victoria? Are the *persons* who are employed as described indistinguishable from generic *employees*, as such? Could it be that the elements of section 170LI define the nature of certified agreements to be about matters pertaining to the workplace relationship? A workplace relationship is that which exists between an employer and all persons in the workplace, (the single business or part of the single business), subject to the agreement. That is the real relationship, not an abstract employment relationship founded upon status.

A question along those lines has been answered in a manner that poses it for further consideration and debate in relation to the recent series of decisions about payroll deduction of union dues or other authorised deductions[25]. Any eventual answer to it may also impinge

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[24] *Quickenden v Commissioner O’Connor of the Australian Industrial Relations Commission* (2001) FCA 303 [23 March 2001] per Black CJ and French J at paragraph 40; Carr J at paragraphs 114-115 described the laws as operating directly on a constitutional corporation in its day-to-day employment relationships.

[25] See *Webforge Australia Pty Ltd and AMWU*: PR914387, 18 February 2002 per Munro J; *Re Knox City Council Enterprise Agreement No. 4 2001*: PR914084 per Kaufman SDP; *Re Atlas Steels Metals Distribution Certified Agreement 2001-2003*: PR914084 per Ives DP; and *Re Cadbury Schweppes Pty Ltd Confectionary Division - NUW Enterprise Agreement 2001*: PR914087 per Ives DP.

upon the nature and content of subject matters that might qualify as being within the compass of *disputes over the application of the agreement* under section 170LW.

That is so if only because the participation of the Commission in dispute resolution procedures that is authorised by section 170LW is explicitly dependent upon the content of the particular agreement. The High Court in *CFMEU v AIRC* states that section 170LW operates *in conjunction with an agreed dispute resolution procedure.* Literally, an agreement may empower the Commission *to settle disputes over the application of the agreement*. In addition, or as an alternative, the agreement may empower the Commission to appoint a Board of Reference for the purpose of settling such disputes, namely disputes over the application of the agreement. I am not aware of any judicial or arbitral consideration of the *either or both* phraseology of section 170LW. Those words might be read as a limit on the ability of negotiating parties to authorise a role for the Commission that is not one, the other, or both of the options in section 170LW. If that were to happen, it might also be thought that the words *if the Commission so approves* in section 170LW connote a substantive discretion that may be exercised within the scheme of conditions and considerations governing the certification process in Part VIB Division 4.

In that respect, the function of subsection 170LT(8) also may be important. A necessary condition for the certification of an agreement under Division 2 or Division 3 is that:

> *"(8) The agreement must include procedures for preventing and settling disputes between:*
>
> *(a) the employer; and*
> *(b) the employees whose employment will be subject to the agreement;*
>
> *about matters arising under the agreement."*

In *Ampol Refineries*[26], a Full Bench concluded on appeal that such procedures need not be of a kind that guarantees the prevention and settlement of disputes. The Bench held it would be sufficient compliance with the requirement if an agreement provided for a procedure *based solely on discussion and agreement*. The Full Bench found no reason to conclude that arbitration is an indispensable element of the procedures referred to in subsection 170LT(8). It also held that the procedures described in that subsection should be construed to mean the

[26] *Ampol Refineries (NSW) Pty Ltd v AIMPE* Print P8620 per Giudice P, McIntyre VP and Raffaelli C; see also Print P6777 per Polites SDP; *Re University College (UNSW) Defence Force Academy Enterprise Agreement 1995* Print M9096 per Smith C; *The ABC Case* Print M3463 per Williams and Marsh DPP and Larkin C.

same thing as a dispute resolution procedure of the kind referred to in subsection 170VG(3), (embracing the model procedure prescribed for the purpose of subsection 170VG(3), and Schedule 9 of the Regulations and Regulation 30ZI(2), in default of an agreed provision in an Australian Workplace Agreement)[27].

That decision of course was made before *CFMEU v AIRC* and reached without the benefit of arguments opposing positions put by the appellant and the Minister intervening. Some aspects of the reasoning so far as it applies to the juxtaposition of subsection 170LT(8) and section 170LW may need to be revisited. It must now be accepted that agreed procedures for the settlement of disputes may empower the Commission to determine legal rights and liabilities by private arbitration between the parties who agreed the procedure. That acceptance may justify or necessitate another look at the meaning of various expressions in the WR Act about procedures for preventing and settling disputes. Perhaps the word "settlement" in section 51(xxxv) of the Constitution could have some bearing upon the meaning of declensions of that word in the WR Act. That possibility, and the reasoning of the Court in *CFMEU v AIRC* could provide ice upon which to skate a proposition that the conjunction between discussion and agreement in section 91 of the WR Act could now be pregnant with meaning:

> *"**91 Commission to encourage agreement on procedures for preventing and settling disputes***
>
> *In dealing with an industrial dispute, the Commission shall, where it appears practicable and appropriate, encourage the parties to agree on procedures for preventing and settling, by discussion **and** agreement, further disputes between the parties or any of them, with a view to the agreed procedures being included in an award."* (Emphasis supplied).

Consideration of all those questions is unlikely to be avoided, but will not be much advanced by discussion in the abstract. For present purposes, it may be worthwhile to focus upon what may be necessary to effectively agree to enliven section 170LW by a dispute settlement procedure. An election by negotiating parties for either or both of the section 170LW options would not usually free the negotiating parties from the task of spelling out details of the procedure and the Commission's role in it. That point may be supported by analogy.

[27] Ibid *Ampol* at pages 5 and 7.

A glance at section 131 is sufficient to demonstrate that appointment of a Board of Reference is not likely to be effective unless the appointer, or the agreement authorising the appointment, descends to details:

> "***131 Boards of reference***
>
> *(1) The Commission may, by an award, or an order made on the application of an organisation or person bound by an award:*
>
> > *(a) appoint, or give power to appoint, for the purposes of the award, a board of reference consisting of a person or 2 or more persons; and*
> > *(b) assign to the board of reference the function of allowing, approving, fixing, determining or dealing with, in the manner and subject to the conditions specified in the award or order, a matter or thing that, under the award, may from time to time be required to be allowed, approved, fixed, determined or dealt with.*
>
> *(2) The board of reference may consist of or include a Commissioner."*

In *Re Hegarty; Ex parte City of Salisbury*[28], Mason J enunciated what has since been taken to be a guiding principle for the effective implementation of that provision through an award. In short, the thing allowed, approved, fixed, determined, or dealt with by the Board of Reference provides the "*factum* upon which the provisions of the award then operate". An effective Board of Reference provision in an award therefore identifies the matter or thing that may be the subject of that *datum* establishing process. Several recent arbitrated Board of Reference provisions for awards illustrate the relative precision with which the linkage between subject matters, operative award provisions, Board of Reference procedure and determination is articulated[29].

In theory, there is no sound reason why a provision in a certified agreement should not be framed with care and precision to allow it to operate in conjunction with sections 170LW and 131. Much the same care and precision might seem to be appropriate in relation to the framing of provisions for dispute settlement procedures for purposes of paragraph 170LW(a). A careful framing of the procedure to stipulate the matters on which arbitration may be conducted, the mutual commitment to abide the determination, and the form of declaration of any such determination might be thought to be prudent.

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[28] (1981) 147 CLR 617 at 627.

[29] *WAGHI v ANF*, decisions PR912571 and PR914192, and order PR914193; *AEU v Minister for Education Victoria* Prints L8274 at 29; M2054 at 15-16 and Attachment A Clause 8; M3409 at 18 ff; see also the discussion of principles in relation to the correspondence between an arbitrated dispute settlement procedure and a board of reference procedure in *NTEU v AHEIA* Print Q0702 at 46-53.

However, if the agreements that I see on a regular basis are any guide, such care in the drafting of dispute settlement procedures empowering the Commission under section 170LW is relatively exceptional. Moreover it is a matter for conjecture whether the rigour of the *R v Hegarty* template needs to be followed at all. The principle stated in that case countenanced the permissible extended operation of an award around the subsequently established *datum*. For purposes of an agreement empowering the Commission under section 170LW, it seems there may need to be only an adequate general submission of disputes over the application of the agreement to determination by arbitration. That is because the decision in *CFMEU v AIRC* did not turn upon a mere re-statement of the principles explained in *R v Hegarty*. Rather, it turns upon an acceptance that, *by agreement*, the parties may through section 170LW establish a procedure for private arbitration giving rise to binding determinations of legal rights and liabilities in relation to disputes over the application of an agreement.

It would seem to follow that provisions that submit such disputes in broad terms for arbitration if necessary may be sufficiently specific to empower the Commission under section 170LW. However, an express, or necessarily implied stipulation in the agreed procedure that the parties have agreed to accept the decision of the Commission on such disputes as binding on them would appear to be a necessary element of any such submission[30].

Acceptance of a relatively broad approach along those lines is evidenced in the most recent decisions involving submission of disputes under agreements operating in conjunction with section 170LW. Thus in *Ansett*[31], Ross VP considered the terms of the particular dispute settlement procedure provision before him in its overall context, and characterised the nature of the dispute:

> "***[25]*** *Clause 10 of the* Agreement *sets down a procedure for resolving disputes between the parties. Clause 10 does not apply to* any *dispute which arises during the life of the* Agreement *but rather the scope of clause 10 is limited by the clause itself. The introductory words to clause 10 are in the following terms:*
>
> > '*Any dispute <u>arising from this Agreement</u> shall be determined pursuant to the following procedure …'* (emphasis added)
>
> ***[26]*** *In my view the dispute currently before the Commission is not a dispute "arising from [the] Agreement".*

[30] See paragraph 10 above.
[31] Print R8525 at paragraphs 25-35.

...

[32] *Clause 10 needs to be construed in the context of the* Agreement *as a whole* [Metropolitan Gas Co. v Federated Gas Employees' Industrial Union *(1924) 35 CLR 449 per Isaacs and Rich JJ at 455]. As a specific provision clause 24 would operate to impliedly limit the scope of the more general clause 10* [*See* Anthony Horden and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia *(1932) 47 CLR 1 per Gavan Duffy CJ and Dixon J at 7; in* R v Wallis; Ex parte Employers Association of Wool Selling Brokers *(1949) 78 CLR 529 at 550 Dixon J said:* "an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course."].

[33] *In my view the claim before me seeks to change the existing classification structure by adding a new rate for pilots operating B747-400 aircraft. Hence the claim falls within the ambit of clause 24 and may only be implemented by agreement.*

[34] *Even in the absence of clause 24 I do not think that the dispute can properly be said to be a dispute* "arising from [the] Agreement". *No term of the* Agreement *is in dispute between the parties. The dispute is not about the application of a particular term. Rather it seeks to establish a new term. In my view the APA's claim is different in character to that contemplated by clause 10 of the* Agreement.

[35] *I have decided that clause 10 of the* Agreement *does not provide the Commission with jurisdiction to set an actual rate of pay for pilots operating B747-400 aircraft. This conclusion is based on the construction of clause 10 of the* Agreement *and the characterisation of the dispute before me as set out above."*

That approach was endorsed on appeal[32]. It has been adopted in several more recent first instance decisions[33]. To similar effect, Lacy SDP in *MUA v Australian Plant Services*[34] observed*:*

"***[57]*** *An important limitation on the Commission's powers under s 170LW is the kind of disputes that may be subject to resolution by the Commission. Parliament has authorised the Commission to exercise powers under an agreement* "to settle disputes over the application of the agreement" *and, accordingly, its powers are limited to disputes of that kind. Therefore it is necessary for the Commission, in each case where it is asked to deal with a matter arising under the dispute settling procedure in an agreement, to ascertain the character of the dispute that is before it in order determine whether the matter is a dispute over the application of the agreement.* [Qantas Airways Limited v Australian Municipal, Administrative, Clerical and Services Union, *Print T0301, [24].*]. *And, importantly, the character of the dispute is distinguishable from the orders that may be made in settlement of the dispute* [*ibid, [25]; see also* CFMEU v AIRC *ibid at par 36.*].

...

[32] *Ansett Pilots Association v Ansett Australia Pty Ltd* Print S1467 at paragraphs 9 and 10.
[33] *MUA v Broome Port Authority* PR914136 per Raffaelli C at paragraphs 25-63; *CPSU v Air Services Australia* PR903214 per Smith C at paragraphs 8, 13, 18, 62-68.
[34] PR908236 at paragraphs 57 and 61.

> ***[61]*** *In the present matter the dispute relates to the conduct of the management under the grievance procedure and disciplinary action taken against two employees at East Swanson dock. The question is whether the agreement was applied according to its terms with respect to those matters. The resolution of the dispute will have no application beyond the narrow scope of the management and employees directly concerned with the incident at East Swanson dock. The resolution of the dispute does not involve any variation of the terms of the agreement so as to affect other sites that are bound by the agreement. ..."*

Those propositions and passages appear to me to provide a possible answer to the question I posed about the continuing relevance of the notion of ambit to private arbitration pursuant to section 170LW. The notion of ambit is inherent to the concept of arbitration[35]. In private arbitration, the content for the notion is supplied by the terms of the submission in the agreed dispute settlement procedure, subject to the restraint that the matters submitted cannot travel beyond disputes over the application of the agreement, including Board of Reference matters or things in dispute. On that analysis, the settlement of a dispute over the application of the award about a horse by a determination about a cow would probably only be available if the agreement not only made provisions applying to horses but included some reference to cows or other livestock in the dispute settlement procedure. Justice Giudice in a recent paper stressed the need for clarity in the drafting of dispute resolution procedures. He also observed that the High Court has smoothed the way for the exercise of powers about the application of collective agreements promptly and free of the jurisdictional arguments that have been barriers to simplicity and clarity[36].

However, I should not want to overstate the legal administrative simplicity of the likely operation of agreed dispute settlement procedures in conjunction with section 170LW. The third of the propositions from *CFMEU v AIRC,* summarised at paragraph 12 above, imports the possible *general law* effect of a certified agreement. As yet, that seems to be a rather vague province. The effect it may have on the operation of a particular certified agreement as a collective agreement is not clearly delineated. Nor can the items of content that must depend for their force upon general law be readily established. Some of the more mystifyingly abstract and visionary provisions of certified agreements may quality in that respect. Other provisions agreed might also possibly be incorporated in industrial contracts of employment; the gap that often exists between the agreed date from which entitlements commence, and the date of operation tied to date of certification by section 170LX may open

[35] Ibid *Bain v Cadbury Schweppes* at 176; and footnote 4 above.

another field for general law effect. Moreover, the field from which such provisions may be selected would seem to have been expanded by the acceptance in several recent decisions that an agreement may be certified with provisions that are considered by the Commission Member certifying the agreement to be unenforceable[37].

The presence in certified agreements of provisions of uncertain character and effect opens interesting prospects for much litigation in future. The principles formulated by *O'Toole v Charles David*[38] for testing the validity of awards can presumably be applied to the agreement making and certification process. They could well prove a fecund stimulus for a revisitation of the privative clause in the WR Act. That possibility will not be diminished if the belief that members of the Commission are bound to follow first instance decisions of any "superior court" prevails[39].

The application of the various propositions to particular cases will of course depend upon the terms of the particular agreement, and the nature of the subject matter of any dispute that arises. Perhaps it should not be forgotten that in *CFMEU v AIRC*, the Court may have intended to encourage an industrially simplified approach when it stated that the relevant disputes at *Gordonstone* were *disputes over the application of the agreement*[40]. But despite hopes that complexity will be avoided, I expect that there will be a steady growth in the frequency and variety of the resort to the Commission's power to arbitrate determinations about matters at issue in such disputes. About 4000 section 170LW notifications were recorded as lodged in calendar 2000[41]

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[36] Justice Giudice: The Industrial Relations Commission Power of Private Arbitration: Australian Labour Law Association, 14 November 2001 at paragraph 22.

[37] See footnote 24 above.

[38] (1991) 171 CLR 232 at 275, 289-291.

[39] See PR914084; PR914087 referred to at footnote 25, citing *Commissioner of Taxation v Salenger* (1988) 19 FCR 378 at 387-388 per French J commenting upon a decision of a senior member of the AAT sitting in the jurisdiction taken over from the Taxation Board of Review. The correlation of that analysis with "the pragmatic considerations which demand conformity to the opinion of a court superior in the hierarchy" by the tribunal established under the WR Act could be a bit more labyrinthine than may have been the case for the successor to the Board of Review. Part XIV of the WR Act, section 49A of the *Judiciary Act* and Brennan J's analysis in *O'Toole v Charles David* at 256-269 of the essential difference between the doctrine of estoppel *per rem judicam* and the doctrine of precedent occlude an easy passage to substantiating a belief that a judicial opinion expressed at first instance level of any court, including the Federal Court represents law made by that court by which a member of the Commission, especially a Presidential Member, is bound.

[40] Ibid *Gordonstone* at paragraph 38.

[41] Ibid *Giudice* at paragraphs 23 and 27:

> *"**[27]** Certified agreements are now the primary determinant of wages and salaries for a very large part of the workforce. In 1994 there were about 1500 applications lodged relating to agreements. In 2001 there were over 10,000 applications and over 7000 agreements were certified. Increasingly parties are exercising their rights to private arbitration provisions in the agreements."*

It should not be overlooked that that power may be augmented by occasional resort in appropriate cases to the power vested in the Commission by paragraph 170MD(6)(a) to vary a certified agreement "*for the purpose of removing ambiguity or uncertainty*". North J in *AFMEPKIU v Qantas*[42] on 11 May 2001, dismissed an application for a penalty under section 178 based on breach of a certified agreement, observing that:

> "*Certified agreement are subject to the special statutory regime of the Act. It allows the Commission to impose terms on the parties in limited circumstances. In this respect certified agreements differ from other contracts governed by the general law. In the case of a certified agreement which has a provision which is ambiguous, the Commission has power to vary the agreement* 'for the purpose of removing ambiguity or uncertainty'*: S170MD(6)(a). In a case such as the present an application to the Commission is likely to provide a more constructive resolution to the problem of ambiguity. While the Court can identify the ambiguity, it cannot remove it. The Commission is empowered to remove the ambiguity."*[43]

North J's observation points to what may be a cogent reinforcement of the Commission's capacity. In that respect, for more reasons than one, the exercise of Commission power pursuant to section 170LW and generally in respect of particular agreements, will need to be cautious and principled.

There might almost be a tripartite consensus that a resourceful, suitably qualified and accessible adjunct to a dispute resolution process is inescapably intrinsic to any binding instrument declaring legal rights and duties. The extracts from the Explanatory Memoranda for the 1993 and 1996 Bills, set out at footnotes 10 and 11, almost imply a degree of consensus about such a need. Most of the partisan issues are about the ambit of operation, rather than about that need itself. Implicit in the developments to which I have referred is a recognition of what has long been one of the strengths of the industrial tribunal system: capacity and industrial know-how being applied through informal processes to resolve conflicting interests[44].

I suspect that unfamiliarity with those strengths and the pluralist practical sources may have prevented policy makers from recognising that it is not always necessary to throw out the baby with the bathwater. I consider that a compelling series of points were made in 1972 by

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[42] [2001] FCA 547.
[43] Ibid [2001] FCA 547 at paragraph 69.
[44] For references supporting a view that the daily tasks of industrial tribunals establish a capacity to make value judgments about what is fair, within a broad discretion exercised with flexibility and the application of good sense: see *TWU v Wagner* Print K8216 at page 58 and notes pages 100 to 102.

Hal Wootten as the Dean of Faculty of Law at University of New South Wales. In an introduction to a monograph by G.D. Woods and Paul Stein, he wrote:

> *"... The system of compulsory arbitration which has dominated Australian labour relations for well over half a century was born in the embryonic predecessors of the Industrial Commission of New South Wales and other State industrial tribunals, before the Australian colonies federated into the Commonwealth in 1901. The apparently modest power given to the new Commonwealth to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" has blossomed into a major piece of machinery for regulating part of the economic life of Australia.*
>
> *In the latter half of last century English legislation seeking to enlist the participation of the judiciary in determining the reasonableness of railway and canal rates led Lord Bramwell to exclaim in the House of Lords -*
>
> > *'It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not.'*
> >
> > Manchester, Sheffield & Lincolnshire Railway v. Brown *(1883) L.R. 8 A.C. 703, 716.*
>
> *For seventy years Australian judges, State and Federal, have determined the reasonableness of rates of wages paid by or to, not only carriers and fishmongers, but almost every employer and employee in the country.*
>
> *Although (for reasons which it is not appropriate to discuss here) their decisions do not always solve industrial disputes, there are large areas of industrial relations, particularly on less contentious topics than rates of pay, where a reasonably workable body of industrial regulation has been developed largely at the (jurisdictionally speaking) unfettered discretion of industrial judges. They have no inhibitions about saying what is just and what is unjust, and what is fair and what is unfair, because this is their daily task.*
>
> *Perhaps it is this background that has given the judges of the Industrial Commission the courage to exercise in its full amplitude the discretion which section 88F confers on them, and to exercise it with a regard for the social realities. If the legislature is minded to follow a similar pattern of legislative protection in relation to other problems - unfair practices against the consumer, for example - it has in the Industrial Commission a ready made tribunal. ...*
>
> *The great challenge however is, as with most processes in which the legal profession participates today, to ensure that the appropriate remedies are available to everyone who needs them, and that no one is excluded by lack of means."*[45]

[45] G.D. Woods and Paul Stein "*Harsh and Unconscionable Contracts of Work in New South Wales"* at pages vi-vii, The Law Book Company Limited.

I accept that there may be a widespread view that the counterpart unfair contracts jurisdiction, now found in section 106 of the current New South Wales Act, may have become over litigated and legally complex. However, even if that be so, the fact only reinforces the need for priority to be given to fostering a tribunal system with the operative characteristics identified by Wooten. But such characteristics are not self sustaining: they are a product of sound institutional policies, bi-partisan support, and an acceptance that whatever excellence is able to be achieved is essentially a compound of the quality of the personnel and the depth of their experience in the role of settling disputes pertaining to workplace relations across Australian industries.