FEDERAL COURT OF AUSTRALIA

Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union
[2018] FCAFC 146

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| Appeal from: | *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union (No 2)* [2018] FCA 47 |
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| File numbers: | VID 1206 of 2017VID 181 of 2018 |
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| Judges: | **RARES, FLICK AND BARKER JJ** |
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| Date of judgment: | 31 August 2018 |
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| Catchwords: | **ESTOPPEL** – *res judicata* – competency of appeal –whether order setting aside originating application for want of jurisdiction interlocutory or final – where legal effect of primary judge’s order finally determined rights of parties – where primary judge held justiciable controversy between parties extinguished by Fair Work Commission decision in arbitration under ss 595 and 739 of *Fair Work Act 2009* (Cth) **INDUSTRIAL LAW** – statutory interpretation – construction of enterprise agreement – whether employee organisations noted by the Fair Work Commission as “covered” by enterprise agreement under *Fair Work Act 2009* (Cth) ss 54 and 201(2) have standing in own right as party to a dispute under dispute resolution procedure mandated by s 186 – consideration of meaning of “workplace right” under s 341 – where dispute as to interpretation by Fair Work Commission as arbitrator of enterprise agreement clause – where employee organisation when initiating dispute resolution process did not specifically identify affected employees – where employer in arbitration submitted that it accepted Fair Work Commission had jurisdiction to resolve dispute**COSTS** – *Fair Work Act 2009* (Cth) s 570(1) – whether proceeding “in relation to a matter arising under” the *Fair Work Act 2009* (Cth) – where primary judge set aside originating application claiming relief under *Fair Work Act 2009* (Cth) for want of jurisdiction and ordered applicantto pay respondent’s costs on basis no matter aroseunder Act |
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| Legislation: | *Constitution* s 75(v)*Commonwealth Conciliation and Arbitration Act 1911* (Cth)*Fair Work Act 2009* (Cth) Pt 6-2, Div 2 of Pt 4-1, ss 12, 50, 51, 52, 53, 54, 172, 182, 183, 185, 186, 187, 201, 323, 341, 539, 540, 562, 564, 570, 595, 735, 737, 739*Federal Court of Australia Act 1976* (Cth) ss 19, 21*Fair Work Regulations 2009* (Cth) Sch 6.1, reg 6.01*Federal Court Rules* *2011* r 13.01  |
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| Cases cited: | *Aldi Foods Pty Ltd (as general partner of Aldi Stores) (a limited partnership) v Shop Distributive and Allied Employees Association* (2017) 350 ALR 381 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241*Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246*Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2018] FCA 47*Federated Engine Drivers and Firemen’s Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 *Federated Engine Drivers and Firemen’s Association of Australasia v Broken Hill Proprietary Co Ltd* (1913) 16 CLR 245*Fountain v Alexander* (1980) 150 CLR 615*Kucks v CSR Ltd* (1996) 66 IR 182*Lemm v Mitchell* [1912] AC 400*Lloyd Werft Bremerhaven GmbH v Owners of Ship “Zoya Kosmodemyanskaya”* (1997) 79 FCR 71*Re Luck* (2003) 203 ALR 1*Re McJannet; Ex parte Australian Workers’ Union of Employees Queensland (No 2)* (1997) 189 CLR 654*Re McJannet; Ex parte Minister for Employment Training and Industrial Relations (Q)* (1995) 184 CLR 620*Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550*SZAJB v Minister for Immigration and Citizenship* (2008) 168 FCR 410*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165*Toyota Motor Corporation v Marmara* (2014) 222 FCR 152  |
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| Date of hearing: | 29 May 2018 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords  |
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| Number of paragraphs: | 139 |
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| Solicitor for theRespondents: | Australian Manufacturing Workers’ Union |

ORDERS

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|  | VID 1206 of 2017 |
|   |
| BETWEEN: | ENERGY AUSTRALIA YALLOURN PTY LTD (ABN 99 086 014 968)Appellant |
| AND: | AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU)First RespondentCONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONSecond RespondentCOMMUNICATION, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA (and others named in the Schedule)Third Respondent |

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| JUDGES: | RARES, FLICK AND BARKER JJ |
| DATE OF ORDER: | 31 AUGUST 2018 |

THE COURT ORDERS THAT:

1. Proceedings VID 1206 of 2017 and VID 181 of 2018 be consolidated.
2. The appeal be allowed in part as provided in order 3 and otherwise dismissed.
3. The order made on 6 February 2018 be set aside.

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

ORDERS

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|  | VID 181 of 2018 |
|  |
| BETWEEN: | ENERGY AUSTRALIA YALLOURN PTY LTD (ABN 99 086 014 968)Applicant |
| AND: | AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU)First RespondentCONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONSecond RespondentCOMMUNICATION, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA (and others named in the Schedule)Third Respondent |

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REASONS FOR JUDGMENT

# RARES AND BARKER JJ:

1. On 28 November 2013, Commissioner Bissett of the Fair Work **Commission** approved the Energy Australia Yallourn Enterprise Agreement 2013 (**the Yallourn agreement**)under s 185 of the *Fair Work Act 2009* (Cth). The Commissioner was satisfied that, relevantly, the requirements of s 186 of theAct had been met, including the requirement in s 186(6) that there be a dispute resolution procedure for all disputes arising under the Yallourn agreement.
2. The Yallourn agreement concerned the running of the Yallourn Power Station by Energy Australia Yallourn Pty Ltd (**Energy Australia**). It covered not only Energy Australia as employer and its employees who were members, or eligible to be members, of any of **five unions**, and also each of the five unions, namely Construction Forestry Mining and Energy Union (**CFMEU**), Automotive Food, Metals, Engineering, Printing and Kindred Industries Union, also known as Australian Manufacturing Workers’ Union (**AMWU**), Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**), Australian Municipal, Administrative, Clerical and Services Union (**ASU**), and Australian Workers’ Union (**AWU**).
3. Clause 2 of the Yallourn agreement provided that Energy Australia and the five unions “will collectively be described as “**the Parties**””. The clause provided that the enterprise agreement settled, for its duration, all claims of the Parties and employees in respect of terms and conditions of employment.
4. On 6 March 2017, Energy Australia commenced proceedings by filing an originating application against the five unions claiming a declaration that, under cl 5.3 of the Yallourn agreement, casual employees were to be remunerated in a particular way. The originating application referred to its having been made pursuant to ss 19 and 21 of the *Federal Court of Australia Act 1976* (Cth) and ss 562 and 564 of the *Fair Work Act*.
5. On 12 April 2017, the five unions filed an interlocutory application seeking that the originating application be set aside for want of jurisdiction. The primary judge heard evidence from witnesses called by the five unions and argument by the parties over two days.
6. On 23 October 2017, his Honour ordered that the originating application be set aside on the basis that the Court had no jurisdiction to hear the proceedings because the controversy between the parties had been resolved by a decision of the **Full Bench** of the Commission under s 739(4) of the *Fair Work Act*, acting as an arbitrator appointed pursuant to cl 28 of the Yallourn agreement. He found that the Commission’s arbitral award or decision of 24 January 2017 had determined how cl 5.3 of the Yallourn agreement operated in respect of casual employees’ entitlement to remuneration.
7. Subsequently, on 6 February 2018, the primary judge ordered Energy Australia to pay the five unions’ costs of the proceedings including of their interlocutory application. He found that s 570 of the *Fair Work Act* did not apply to the proceedings because of his finding that the Court did not have jurisdiction under that Act.
8. Energy Australia has appealed from both of the primary judge’s decisions to dismiss the proceedings for want of competence and that it pay costs.
9. For the reasons that follow, the appeal on the jurisdictional question must be dismissed but the appeal on the costs question must be allowed.

## The legislative and contractual context

1. In order to understand how the issues arose, it is important to set out the following provisions of the *Fair Work Act* and cl 28 of the Yallourn agreement. Under s 53(2) of the Act, an enterprise agreement will “cover” an employee organisation, such as a trade union, if the Commission has noted (as it did in respect of each of the five unions in [3] of its 28 November 2013 decision), that the agreement “covers” each organisation. Section 172(1) and (2) relevantly provides:

**Division 2—Employers and employees may make enterprise agreements**

**172 Making an enterprise agreement**

*Enterprise agreements may be made about permitted matters*

(1) An agreement (an ***enterprise agreement***) that is about one or more of the following matters (the ***permitted matters***) may be made in accordance with this Part:

(a) **matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement**;

(b) **matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement**;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

Note 1: For when an enterprise agreement ***covers*** an employer, employee or employee organisation, see section 53.

…

*Single-enterprise agreements*

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) **with one or more relevant employee organisations if**:

(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement. (bold non-italic emphasis added other than in headings)

1. An agreement referred to in s 172(2)(b) is a greenfields agreement (s 172(4)). None of the parties suggested, however, that the Yallourn agreement, was a greenfields agreement.
2. A single enterprise agreement that is not a greenfields agreement is “made” by force of s 182(1) relevantly, if a majority of employees of the employer vote to approve it after the employer has requested the employees who are to be “covered” by it to do so under s 181. Importantly, after an enterprise agreement is “made” under s 182(1), an employee organisation that was a bargaining representative for the proposed enterprise agreement may give the Commission a written notice pursuant to s 183(1) stating “that the organisation wants the enterprise agreement to cover it”.
3. Section 53 provides for when an enterprise agreement will “cover” an employer, employee or employee organisation; the agreement covers an employer or employee if it “is expressed to cover (however described) the employee or the employer” (s 53(1)) and, if it is not a greenfields agreement, it covers an employee organisation (by force of s 53(2)) if the Commission notes that the agreement covers the organisation in its decision to approve the agreement under s 201(2).
4. One requirement that must be satisfied for the Commission to approve an enterprise agreement is that in s 186(6), namely:

*Requirement for a term about settling disputes*

(6) The FWC must be satisfied that the agreement includes a term:

(a) that **provides a procedure** that requires or allows the FWC, or another person who **is independent of the employers, employees or employee organisations covered** by the agreement, t**o settle disputes**:

(i) **about any matters arising under the agreement**; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure. (bold emphasis added)

1. An enterprise agreement is an instrument made under the *Fair Work Act* and, as such, is a **workplace instrument** as defined in s 12. Relevantly, s 341(1) and (2) provide:

**341 Meaning of workplace right**

*Meaning of* ***workplace right***

(1) A person has a ***workplace right*** if the person:

(a) **is entitled to the benefit of, or has a role or responsibility under**, a workplace law, **workplace instrument** or order made by an industrial body; or

(b) **is able to initiate, or participate in, a process or proceedings under** a workplace law or **workplace instrument**; or

(c) **is able to make a complaint or inquiry:**

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

*Meaning of* ***process or proceedings under a workplace law or workplace instrument***

(2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:

(a) a conference conducted or **hearing held by the FWC**;

…

(j) **dispute settlement for which provision is made by, or under**, a workplace law or **workplace instrument**;

(k) **any other process or proceedings under a** workplace law or **workplace instrument**. (bold non-italic emphasis added other than in headings)

1. Next, s 595 provides:

**595 FWC’s power to deal with disputes**

(1) The FWC may deal with a dispute **only if the FWC is expressly authorised to do so** under or in accordance with another provision of this Act.

…

(3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

…

(5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section. (emphasis added than in headings)

1. Part 6-2 deals with disputes and the guide to that Part, in s 735, states that it is “about dealing with disputes between national system employees and their employers”. The *Fair Work Regulations 2009* had to prescribe a model term for dealing with disputes in enterprise agreements (s 737) and reg 6.01 did so in Sch 6.1. That model term relevantly prescribes:

**Model term**

(1) If a dispute relates to:

(a) **a matter arising under the agreement**; or

(b) the National Employment Standards;

this term sets out procedures to settle the dispute.

(2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

(3) **In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.**

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Commission. (emphasis added other than in headings)

1. Last, s 739 provides relevantly that, where an enterprise agreement has a term referred to in s 186(6):

…

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

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

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

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

1. Clause 28 of the Yallourn agreement is critical to the jurisdictional issue and it is necessary to set out its text in full:

**28 DISPUTE RESOLUTION PROCESS**

The DRP process is to be used to assist in **resolving any matter or dispute pertaining to the employment relationship**.

**For matters that are in dispute, that go to the application or interpretation of this Agreement** or with matters arising under the National Employment Standards (NES), this clause facilitates access to the Fair Work Commission for conciliation and, if necessary, arbitration (‘category 1 matters’).

For all other matters pertaining to the employment relationship that do not go to the application or interpretation of the Agreement or are not matters arising under the NES (‘category 2 matters’), the steps set out below shall apply, except that the Fair Work Commission shall only be empowered to exercise conciliation powers.

**28.1 INITIAL PROCESS**

(a) In the event of any dispute arising the following procedure will apply.

**STEP 1** The matter will, in the first instance, be discussed between the employee(s), and the Team Leader involved.

If the matter remains unresolved it shall be elevated to STEP 2 as soon as practicable;

**STEP 2** The matter may be referred in writing, by the employee(s) to the relevant Line Manager. The Line Manager will provide a written response to the issue within three working days.

If the matter remains unresolved;

**STEP 3** It will be referred for discussion between the appropriate Union Official or other employee representative and the Executive Manager Yallourn, or their nominated delegate. The Executive Manager Yallourn will provide a response to the issue as soon as practicable.

If the matter remains unresolved;

**STEP 4** It may be referred to the Fair Work Commission (FWC) for conciliation or arbitration (for ‘category 1 matters’) or conciliation only (for ‘category 2 matters’).

Employees may bring a support person or the appropriate union representative to any meeting held under this clause with ***the Parties*** being able to elect to bring representatives of their own choosing to any matter referred to conciliation or arbitration.

(b) **The dispute may be referred to FWC at any stage by agreement of *the parties* in the interest of speedy resolution of the dispute.**

(c) For ‘category 1 matters’, during the entire period, from the time when the dispute first arises until the time of its resolution (whether by discussion or negotiation, or by proceedings before the FWC), the status quo or ‘normal work’ shall continue, unless the maintenance of status quo or performance of normal work would place at risk the health or safety of the employee(s) concerned. No *party* to the dispute shall suffer any prejudice as to the resolution of the matter by reason only that normal work continues as required by this paragraph.

(d) In respect to category 2 matters, either *party* may notify the FWC of a dispute and seek to have the matter dealt with on an expedited basis, provided that the notifier has satisfied steps 1 and 2 of the initial process. The status-quo shall apply to category 2 matters in the same way as category 1 matters unless *one party* argues successfully before FWC that the status-quo should be altered or removed. Any such application shall not occur until at least 14 days has elapsed since the first conciliation hearing of the notified matter. The dispute and status-quo provision ends when the FWC determines that the conciliation process is concluded.

(e) ‘Normal work’ means the work normally performed by an employee and “status quo” means the circumstances existing immediately prior to the change or circumstance leading to the proposed change which resulted in the dispute arising.

**28.2 STEP 4 PROCESS**

(a) Upon referral of the matter, the FWC shall conciliate. **If the dispute remains unresolved after conciliation, the FWC may resolve category 1 matters by arbitration.** Either *party* may be legally represented during arbitration.

(b) **In exercising its role under this clause, the FWC shall exercise any of its powers under the Act.**

(c) It is a term of this Agreement that *the parties* to the dispute will be required under this dispute settlement procedure to:

i. Attend conciliation conferences and hearings;

ii. Produce relevant documents and other material (subject to appropriate safeguards for commercial-in-confidence documents); and

iii. Make available any witness that the FWC believes is reasonably necessary.

(d) Without limiting the generality of the foregoing, the FWC may exercise any powers reasonably incidental to the exercise of conciliation and/or arbitration functions under this clause, having regard to the category of the matter.

(e) **Where the FWC has issued a decision, determination or direction under this clause, it shall be final and binding on *the Parties*, subject to the appeal process in accordance with sub‑clause 28.3.**

**28.3 APPEAL PROCESS**

(a) A *party* may seek an appeal of the FWC’s decision within fourteen days of receipt of decision or the provision of reasons for decision which ever comes later.

(b) An application for an appeal of the FWC’s decision will be provided to *the Parties* and the FWC in writing detailing the grounds for appeal.

(c) Unless agreed otherwise by *the parties* to the dispute, the appeal will be conducted according to the principles applying to an appeal under the Act, including where a stay is sought.

(d) *The parties* to the dispute and the appeal panel of the FWC will use their best endeavours to ensure that the appeal process is expedited.

(e) **The decision of the appeal panel of the FWC is final, subject to any other legal right of appeal that might exist.**

**28.4 COSTS & EXPENSES**

Where a matter has been notified pursuant to this clause, the Company shall provide leave without loss of pay for any employee directly involved in the preparation of the case or required as a witness. In the event that *the parties* fail to agree on the identity or number of persons who qualify under this clause, the question shall be determined by the FWC as part of the dispute.

Each *party* to the dispute will meet their own costs.

(italic emphasis of the words “Parties” , “parties” and “party” and bold emphasis added other than in headings)

## The primary judge’s decision on jurisdiction

1. The primary judge found that on 5 May 2016 an organiser of the CFMEU, Toby **Thornton**, attended a meeting and had a discussion about cl 5.3 of the Yallourn agreement with PeterChapple of Energy Australia, and another Energy Australia employee, Paul **Koopmans**, at which an organiser of AMWU, Stephen **Dodd**, was also present. During the meeting Mr Thornton asked Mr Chapple:

Why are you employing our members as casuals under the agreement? … **Our members** are concerned mainly about the 25% loading. (emphasis added)

1. His Honour inferred from that evidence, that was not the subject of any restriction as to its admissibility or use, that as at 5 May 2016 CFMEU had members whom Energy Australia employed as casuals and who had informed CFMEU that they were concerned about the 25% loading not being paid on their overtime work. His Honour also accepted Mr Thornton’s evidence that members of CFMEU had requested him to have that union become involved in the dispute. While Mr Thornton’s evidence did not identify, by name, the individual members who made such a request, his Honour found that, in the context of the whole of Mr Thornton’s written and oral evidence, the members about whom he spoke to Mr Chapple included at least one casual employee who had expressed a concern to him about the 25% loading issue.
2. The primary judge also accepted Mr Dodd’s evidence that, at the meeting of 5 May 2016, he had said to Mr Chapple and Mr Koopmans words to the effect:

I’ve been getting a fair bit of heat from Energy Australia employees and potential employees about casual conditions – I’m getting phone calls every [expletive] day.

1. His Honour also accepted Mr Dodd’s evidence that:

I took these steps [the making of an application to the Commission] **on behalf of the AMWU’s members who had spoken with me about their concerns**. They asked me and the AMWU to take this up with Energy Australia. **It was because of their requests that I took this up with Energy Australia** and made **application to the Commission when discussions failed [to] resolve the matter**. From, then on, an AMWU industrial officer, Dave Vroland, took carriage of the matter. (emphasis added)

1. His Honour found that Mr Dodd had spoken to Energy Australia employees who were AMWU members about their concerns who had raised a “fair bit of heat” about casual conditions. His Honour found that, had it been necessary to draw the inference, he would have inferred that such employees included casual employees.
2. His Honour found that AMWU and CFMEU subsequently participated in the Commission before Commissioner Gregory in a process under cl 28 with Energy Australia, first, to conciliate, and then, to arbitrate, a dispute about the interpretation of cl 5.3 because employees, including casual employees, of Energy Australia who were aggrieved by its application of cl 5.3, had requested those two unions to do so on their behalf.
3. On 12 July 2016, Mr Chapple emailed the Registrar of the Commission and copied representatives of AMWU with Energy Australia’s outline of submissions. The outline was headed “s 739 Application to deal with a dispute” between AMWU and Energy Australia. Mr Chapple’s email attached a copy of cl 28 of the Yallourn agreement. The submissions dealt with the interpretation of cl 5.3 for which Energy Australia contended and, under the heading “Dispute Resolution Process”, the submissions stated:

2.3 **EA agrees that the current dispute involves a Category 1 Matter.** Therefore, subject to the normal limitations on the Commission’s arbitral powers, e.g. the requirement in s 739(5) of the FW Act not to make a decision that is inconsistent with a fair work instrument that applies to the parties, **EA accepts that the Commission has jurisdiction to arbitrate the dispute**. (emphasis added)

1. The primary judge dealt comprehensively in his reasons with Energy Australia’s arguments about the construction of the Yallourn agreement. He found that, although cl 2 had used the expression “the Parties” to refer collectively to Energy Australia and the five unions, the Yallourn agreement frequently used the word “parties” to refer to the same entities collectively with the other persons to whom it applied (i.e. employees, Energy Australia and the five unions).
2. His Honour’s reasons demonstrated that the Yallourn agreement should be construed having regard to its industrial purpose, in its contractual and legislative context. As can be seen from the italics that have been added to cl 28 as set out in [19] above, the words “Parties”, “parties” and “party” appear 14 times. His Honour found correctly that, contrary to Energy Australia’s argument (repeated on the appeal), the expression “the Parties”, as used in cl 28, included any of the five unions that was a party to a particular dispute (but, apart from the operation of cll 28.2(3) and 28.3(b), not any of the other five unions or other employees who had not so participated) so that only those persons in the dispute (including any union) were bound by any decisions of the Commission in an arbitration, as cll 28.2(e) and 28.3(b) contemplated.
3. His Honour also found that the use of “parties” and “party” in cl 28 did not exclude any or all of the five unions, but rather conveyed that, in its natural and ordinary meaning, it applied to each of the persons bound by the Yallourn agreement, who was involved in any particular dispute that was a category 1 matter.
4. His Honour rejected Energy Australia’s argument that none of the five unions could raise a dispute under cl 28. The primary judge found, correctly, that Energy Australia’s construction of cl 28 misconceived the purpose of the steps set out in cl 28.1(a). He held that cl 28 had the purpose of facilitating the restoration and maintenance of industrial harmony and that, it followed, steps 1 and 2 in cl 28.1(a) did not prescribe mandatory limitations on access to the processes of discussion, conciliation and arbitration. He also found that, having regard to the industrial context, there were practical reasons why one or more employees might wish to raise a dispute under an enterprise agreement, such as the Yallourn agreement, but want to remain anonymous to the employer. His Honour found that such anonymity could be provided by the capacity of a union to raise a dispute in a manner permitted by cl 28. He found that:

anonymity tends to facilitate the airing of employee grievances being resolved in line with the purpose of cl 28.

1. The primary judge also held that steps 1 and 2 in cl 28.1(a) had no practical application in the context of an enterprise-wide dispute, such as how the employer paid casuals or the construction of cl 5.3 as it applied to all casual employees. As his Honour observed, a team leader would not have authority to decide the policy of Energy Australia on such questions and their resolution would involve, in all likelihood, the employer’s senior management, as in fact had occurred when AMWU and CFMEU raised the dispute about the interpretation of cl 5.3 with senior management.
2. The primary judge found that cl 28 contemplated that one or more of the five unions could be a “party” or “parties” within the meaning of the clause and, so could validly engage the conciliation and arbitral processes that it provided.
3. Accordingly, his Honour found that the Commission and Full Bench had jurisdiction to arbitrate the dispute between Energy Australia and AMWU. He found that, in accordance with cl 28, before the Commission began the arbitration process, it had conducted a conciliation process in which each of AMWU, CFMEU and CEPU had participated as of right under cl 28. His Honour also found that AMWU had initiated the arbitration process, as of right, under cl 28 on its own behalf and on behalf of employees, and that Energy Australia (at that time) had understood that AMWU had done so. The primary judge found that because each of the other five unions had been served under cl 28.3(b), it was a party to AMWU’s appeal from the Commissioner’s decision in favour of Energy Australia.
4. The primary judge decided that the Full Bench’s decision in the private arbitration extinguished the justiciable controversy between Energy Australia and each of the five unions with the consequence that the Court lacked jurisdiction to entertain Energy Australia’s application.
5. His Honour then considered and decided the alternative arguments put by the parties. He found that, in any event, if it were necessary for an employee to have raised a dispute in order for the processes under cl 28 to be engaged (because as Energy Australia had contended a union could not), one or more members of AMWU and CFMEU who was or were casual employees had done so by complaining to Mr Thornton and Mr Dodd. His Honour also found that when Energy Australia stated in its submission of 12 July 2016 to the Commissioner that it “accepts that the Commission has jurisdiction to arbitrate the dispute”, it represented that each of the facts necessary to ground the Commission’s jurisdiction actually existed.
6. His Honour found that AMWU and CFMEU participated in the arbitration in reliance on that representation and so lost the opportunity to prove any of those facts and, in particular, the fact that one or more employees had raised the dispute. He also found that not only had AMWU and CFMEU suffered detriment by devoting resources in the two arbitral processes, but each had been exposed to detriment in being joined to, and having to contest, the proceedings in the Court. However, because none of CEPU, AWU or ASU had established that it had relied on any representation, none of them could assert an estoppel against Energy Australia.
7. The primary judge also found that, if his construction of cl 28.3(b) were incorrect, and none of the five unions other than AMWU were bound by the Full Bench’s decision (because only AMWU participated directly in the arbitration), the proceeding in the Court was an abuse of process to the extent that it sought to challenge the ability of CEPU, CFMEU, AWU and ASU to rely on the outcome of the arbitration.
8. In the event, his Honour ordered that the originating application be set aside.

## The primary judge’s costs decision

1. The primary judge held that by reason of his conclusion that the Full Bench’s decision had extinguished the controversy between Energy Australia and each of the five unions, s 570(1) of the *Fair Work Act* did not apply to the proceedings; in other words, his Honour held that the proceedings were not “in relation to a matter arising under this Act”. He distinguished *Re McJannet; Ex parte Australian Workers’ Union of Employees Queensland (No 2)* (1997) 189 CLR 654, holding that there the High Court had only found an absence of jurisdiction in this Court because statutory preconditions to its exercise did not exist, whereas his Honour found that there was no matter in the present proceeding. He held that his finding that no matter under the *Fair Work Act* existed entailed that s 570(1) did not apply. Accordingly, his Honour ordered Energy Australia to pay the costs of the five unions.

## The five unions’ objection as to competency of the appeal

1. The five unions asserted that Energy Australia’s appeal was incompetent because the order setting aside the originating application was interlocutory, relying on *SZAJB v Minister for Immigration and Citizenship* (2008) 168 FCR 410. Moreover, they argued that Energy Australia should be refused leave to appeal because of the weakness of its case and the lack of substantial injustice to it flowing from his Honour’s decision.

## The appeal is competent

1. An order that has the legal effect (as opposed to a practical effect) of finally determining the rights of the parties in a principal cause pending between them is a final order: *Re Luck* (2003) 203 ALR 1 at 3 [4] per McHugh ACJ, Gummow and Heydon JJ; *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246 at 248 per Gibbs CJ, 256 per Mason J, 258 per Murphy J. The legal effect of the primary judge’s order, and the *ratio decidendi* of his decision, was that the controversy that Energy Australia sought to raise could not be heard because it had ceased to exist as a result of the valid and binding decision of the Full Bench of the Commission. In other words, the order setting the originating application aside, as made, finally determined that no matter existed any longer between Energy Australia and the five unions in respect of the interpretation (or proper construction) of cl 5.3 of the Yallourn agreement, and that created a *res judicata* between them.
2. In *Federated Engine Drivers and Firemen’s Association of Australasia v Broken Hill Proprietary Co Ltd* (1913) 16 CLR 245, the majority (Griffith CJ, Barton and Isaacs JJ) explained that in the Court’s earlier decision in *Federated Engine Drivers and Firemen’s Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398, it had found that proceedings that a particular union had brought in respect of an alleged dispute under an Act were incompetent, because the union could not be registered under that Act to represent certain employees. Barton J summarised the result of the earlier case (16 CLR at 264) as follows:

The association was not entitled to file a plaint, as it had not become a competent litigant; **and its plaint was a nullity**.

**The Arbitration Court, then, had no jurisdiction to hear and determine the matter.**

… So matters rested from June 1911 until the following November. Obviously, if the respondents had moved the Arbitration Court to strike the plaint out for want of jurisdiction, judicially declared, the Court must have done so. (emphasis added)

1. After that result, the Parliament passed the *Commonwealth Conciliation and Arbitration Act 1911* (Cth). That amending Act validated the association’s registration *ab initio* so that it could represent the employees concerned and gave it capacity to file a plaint in the Commonwealth Court of Conciliation and Arbitration (16 CLR at 271). However, the amending Act did not operate to validate, from the time of its original filing, the still pending plaint that the association had filed earlier.
2. The majority held that the 1911 decision created a *res judicata* as to the lack of competence of the plaint prior to the amending Act: *Federated Engine Drivers* 16 CLR 245 per Griffith CJ at 257, 259, per Barton J at 269, 271 and see too per Isaacs J at 277. However, they held that the plaint was competent in respect of matters that arose after the commencement of the amending Act. They followed the decision of the Privy Council in *Lemm v Mitchell* [1912] AC 400. As Barton J said (16 CLR at 268) of the 1911 decision that the plaint then was a nullity because of the association’s legal incapacity to file it:

It is conclusive between and upon the parties in the sense that it is *res judicata*, and cannot be afterwards controverted by them …

1. In *Lloyd Werft Bremerhaven GmbH v Owners of Ship “Zoya Kosmodemyanskaya”* (1997) 79 FCR 71 at 80F and 93C-D, Beaumont, Burchett and Lindgren JJ held that an order setting aside a writ *in rem* and releasing a ship from arrest was final, not interlocutory. They said (at 80F):

The reality … is that, when considered in context, **the orders made finally disposed of the whole of the proceedings for want of jurisdiction**. (emphasis added)

1. The five unions’ argument that the primary judge’s order was not a finding of want of jurisdiction on the merits and was interlocutory because of *SZAJB* 168 FCR 410 must be rejected. *First*, his Honour held that the decision of the Full Bench extinguished the justiciable controversy between Energy Australia and the five unions. That was a finding on the merits that Energy Australia could not re-agitate, in any forum, the controversy that the Full Bench’s decision had quelled because, it no longer existed. *Secondly*, nothing in *SZAJB* 168 FCR 410 suggested that any different approach could apply to the primary judge’s decision. Rather, French J (168 FCR at 418-419 [23] with whom Tracey J at 437 [114] agreed and Allsop J also agreed on this issue at 429 [68]) observed that there may be cases where a dismissal for want of jurisdiction is interlocutory because the court making the order cannot entertain a matter but another court could entertain the same matter or other proceedings concerning it. He gave two examples, the *first*, of a proceeding that had been filed in the wrong court because of a legislative allocation of jurisdiction and that was justiciable in another court and the *second*, of a proceeding that could only be brought in the High Court on an application for a writ under s 75(v) of the *Constitution*.
2. However, the primary judge held that the proceeding was a nullity. He found that Energy Australia could not bring any proceeding in any court concerning the dispute because the Full Bench decision had extinguished any cause of action it had had.
3. Therefore, the legal effect of his Honour’s order setting aside Energy Australia’s originating application created a *res judicata* that prevented Energy Australia litigating in this, or any, Court the proper construction of cl 5.3 of the Yallourn agreement as it applied to casual employees. That is, the legal effect of his Honour’s order precluded Energy Australia contesting the construction of cl 5.3 at which the Full Bench of the Commission had arrived. That was because, as a necessary ingredient of that finding, his Honour had determined that the Commission’s decision was one authorised under the *Fair Work Act* and the Yallourn agreement.

## Energy Australia’s submissions

1. Energy Australia argued that under the *Fair Work Act* an enterprise agreement is made when the employer submits it to its employees and a valid majority of employees vote to approve it. It contended that third parties, such as unions, are not “parties principal to enterprise agreements” but could only become involved in enterprise bargaining in a representative capacity on behalf of employees. Energy Australia submitted that this followed from the Full Court’s decision in *Toyota Motor Corporation v Marmara* (2014) 222 FCR 152 at 179-180 [89]-[90].
2. It argued that only after the employees voted to approve an enterprise agreement, could a union give notice under s 183 that it sought to be covered by it. It referred to provisions of the *Fair Work Act* that the Commission then has a duty to note, under s 201(2), that the union is “covered” by the enterprise agreement and when the Commission does so, the union *first*, assumes obligations under the agreement (ss 50, 51(1), 52(1) and 53(2)) and, *secondly*, has standing to enforce it but, so the argument ran, only in a representative capacity in a proceeding for a civil penalty for a breach of it (s 539(2) item 4).
3. It contended that the steps in cl 28.1(a) dealt only with situations in which one or more employees had a grievance with their employer. Energy Australia relied on the structure of steps 1, 2 and 3 as distinguishing the persons who were capable of being “parties” or a “party” (as opposed to “Parties”) to a dispute from the role of a union or one of its officials whom, Energy Australia argued, could only act as a representative of the employee and not in the union’s own right to be a party to a dispute. Energy Australia submitted that result followed since cl 28.1(a) commenced by providing that in “the event of any dispute arising the following procedure will apply” and nothing in that procedure, as set out in steps 1 to 4, gave any express role to a union to initiate or be the subject of a dispute. Accordingly, it argued, none of the five unions could be a party to an arbitration under cl 28.
4. Energy Australia argued that, in substance, the dispute resolution process in cl 28 and under cl (3) of the model term in Sch 6.1 of the Regulations confined the capacity of a person covered by the Yallourn (or any enterprise) agreement to raise a dispute under it to employees and their employer(s) and gave no role to a union to participate in any dispute resolution process in the Commission or under the agreement, other than to act as a representative of an employee who had a dispute.
5. Energy Australia contended that the primary judge erred in construing cl 28, by finding an implication in it that the clause allowed a union to initiate a complaint, despite (as it argued) the four step process in cl 28.1(a) not providing for any role for a union or any of the “Parties”, other than Energy Australia, to initiate a complaint. Energy Australia submitted that the mere fact that it had participated, and made submissions accepting that the Commission had jurisdiction, in the arbitration, could not, by agreement confer that jurisdiction on it where, in fact, it did not exist.
6. Energy Australia submitted that cl 28 did not make any provision for any of the five unions to raise or initiate a dispute or to participate or be heard in its own right (as opposed to acting by an officer as a representative of one or more employees) in any part of the process provided in the clause, including in any arbitration. It contended that all that the five unions could do was to file an originating application in this Court, of the kind that Energy Australia brought the subject of this appeal, in order to seek a declaration or constitutional writ to overcome any decision in an arbitration that the union concerned to be wrong.
7. Energy Australia argued before the primary judge and on appeal that notwithstanding its submission on 12 July 2016, in which it agreed that that dispute involved a category 1 matter and its acceptance that the Commission had jurisdiction to arbitrate the dispute, in fact, there was no dispute within the meaning of cl 28 because none of the five unions had identified any casual employee who had engaged in any step under cl 28.1(a) or had raised the dispute directly. Energy Australia contended that the evidence that his Honour admitted was insufficient to justify his finding that the Commission had jurisdiction or power to arbitrate any dispute in relation to cl 5.3 and that, therefore, the primary judge had been incorrect to dismiss the proceeding for want of jurisdiction.

## Consideration – could any of the five unions raise a dispute under cl 28?

1. It is important to have regard to the industrial purpose of the Yallourn agreement and the commercial and legislative context in which it applies when construing it, including cl 28 itself as a whole: *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 249 [13] per Gleeson CJ and McHugh J, 270-271 [96] per Kirby J, 282-283 [129]-[131] per Callinan J, and see too at 253 [30] per Gummow, Hayne and Heydon JJ. Both Kirby J and Callinan J expressly approved (at [96], [129]-[130]) and Gleeson CJ and McHugh J applied (at [13]), what Madgwick J had said in *Kucks v CSR Ltd* (1996) 66 IR 182 at 184, namely:

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, **it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading**. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand. (emphasis added)

1. Although that decision concerned an award, Madgwick J’s observations have equal application to the construction of enterprise agreements made under the *Fair Work Act*.
2. An enterprise agreement must be construed in its industrial and legislative context as an agreement made between parties engaged in an employment relationship in which employee organisations, such as the five unions, can, and often will, have a workplace right under ss 341(1) and or 183(1) of the *Fair Work Act* to play a part, including as a party to it. Those persons may not have been assisted by lawyers in the precise framing and expression of its terms.
3. Here, when the Commission approved the Yallourn agreement it noted, pursuant to s 201(2), in its decision that the agreement once it came into operation under s 54(1) following the Commission’s approval, “covered” each of the five unions. That had the consequence that it provided the terms and conditions that governed the rights and obligations of each of the five unions in respect of both Energy Australia, as employer, and its employees who were, or were eligible to be, members of the respective union: cf. *Aldi Foods Pty Ltd (as general partner of Aldi Stores) (a limited partnership) v Shop Distributive and Allied Employees Association* (2017) 350 ALR 381 at 388-389 [26]-[34], 396 [78] per Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ.
4. An enterprise agreement is a statutory artefact made by persons specifically empowered by the *Fair Work Act* to do so: *Marmara* 222 FCR at 180 [90]. It has a legislative character, because it is a fair work instrument, as defined in s 12 of the *Fair Work Act*. The Act enables an enterprise agreement to be made between an employer and both its employees (by majority vote) and employee organisations, such as the five unions.
5. As noted above, an enterprise agreement is a “workplace instrument” made pursuant to the *Fair Work Act* for a particular statutory purpose, namely to regulate an employment relationship in which, often, as in the present case, employee organisations will be involved. An employee organisation has a right, under s 540(2), to seek a remedy under Div 2 of Pt 4-1 of the Act “in relation to a contravention … of a civil remedy provision … in relation to an employee only if” the employee is or will be affected by the contravention and the particular union is entitled to represent his or her industrial interests. Each of the five unions had a workplace right, within the meaning of s 341(1)(a), because it had a role or responsibility under the Yallourn agreement and under s 341(1)(b), because it could initiate or participate in a dispute settlement process (within the meaning of ss 341(2)(j) and 186(6)).
6. Each of the five unions, as an employee organisation, could apply to the Court for an order under s 540(2) in relation to a contravention of, among others, s 50 (that prohibits a person from contravening a term of an enterprise agreement) as Energy Australia noted in its written submissions on the appeal and in addition, s 323(1)(a) (that requires an employer to pay an employee in full the amounts due to him or her in relation to the performance of work) (see s 539(2) items 4 and 10). It follows that each of the five unions had a workplace right under ss 323(1)(a) and 540(2) to initiate proceedings relating to compliance with cl 5.3 of the Yallourn agreement under s 341(1)(b), and also had a role or responsibility to enforce compliance with it under s 341(1)(a).
7. Since each of the five unions had a right to initiate proceedings in the Court, s 186(6) required cl 28 to provide a procedure to resolve a dispute that would be litigated in such a matter, because that dispute would arise under the Yallourn agreement, even if no individual employee had initiated a complaint, provided that Energy Australia had contravened its obligations under cl 5.3 in respect of one or more casual employees (see s 540(2)).
8. Here, cll 28.2(e) and 28.3(b) provided that “the Parties” (being the persons defined as such in cl 2) would be bound by the decision of the Commission in an arbitration under that dispute resolution clause. Although the Yallourn agreement appears to have switched freely between referring to all persons who were in a legal sense parties to it (employees, Energy Australia and the five unions) as “parties” and the defined term “the Parties”, cl 28.2(e) could not operate to cause a decision of the Commission to bind “the Parties” if the five unions had no right to raise, or be a legal party to, the dispute. That consequence bespoke the importance of providing a dispute resolution process in which disputes involving any one of the five unions, including in disputes between them, could be resolved, as well as disputes involving employees who were members of or eligible to be members of the relevant unions.
9. As s 172(1) of the Act provides, an enterprise agreement can be “about” matters pertaining to the relationship “between the employer … and the employee organisation or employee organisations, that will be covered by the agreement”. A dispute about, or involving, that relationship is a subject-matter for which s 186(6) requires a dispute resolution process to be included in an enterprise agreement. However, neither cl 28.1(a) nor par (3) of the model term, in Sch 6.1 to the *Regulations*, expressly addresses whether a dispute that any of the five unions may have with Energy Australia, arising under the Yallourn agreement as to its interpretation or Energy Australia’s compliance with its terms, can be addressed only by discussions between the employer and one or more employees, without the involvement of the union(s) concerned.
10. Clearly enough, the literal phrasing of each of par (3) of the model term and steps 1 and 2 in cl 28.1(a) is apposite to cover a dispute that involves only the employer and one or more employees. However, both the model term and cl 28 are intended to provide, as s 186(6)(a)(i) requires, “a procedure that requires or allows [the Commission] … to settle disputes … about **any matters** arising under the agreement” (emphasis added). Therefore, a literal construction of cl 28 that precluded any of the five unions that are parties to the Yallourn agreement from initiating a dispute about a matter arising under it for which it has a workplace right, would defeat the purpose which the first three paragraphs of cl 28 (preceding cl 28.1) and ss 186(6) and 341(1) required the dispute resolution process in the clause to serve.
11. Energy Australia’s argument that the Yallourn agreement did not provide any basis for any of the five unions to raise a dispute under cl 28 must be rejected. That is because, if the five unions themselves could never raise or pursue a dispute about their workplace rights, as employee organisations, covered by the Yallourn agreement within the meaning of ss 53(2), 172(1)(b) and 186(6)(a)(i), then cl 28 would not provide a procedure to settle a class of category 1 matters that could arise under the enterprise agreement. Accordingly, cl 28 would not comply with s 186(6).
12. Clause 28 itself defines category 1 matters as ones “that are in dispute, that go to the application or interpretation of this Agreement” and it states that it “facilitates access to [the Commission] for conciliation and, if necessary, arbitration” for those matters. The clause should be construed to ensure that it achieves that stated objective, and the requirements of s 186(6), in respect of all category 1 matters.
13. The particular provisions of cl 28.1(a) should not be construed so as to read down the general provisions of the introductory part of cl 28 or the facultative operation of cl 28.1(b). The latter permits “the parties” to **agree** to refer a dispute to the Commission “at any stage” for “speedy resolution”. Clause 28.1(b) eschews the meretricious pedantry of Energy Australia’s argument, and permits achieving the industrial, commercial and statutory objective of a comprehensive process to resolve all disputes of category 1 matters. It follows that any of the parties (Energy Australia, any of its employees and any of the five unions) between whom a dispute exists in respect of such a matter, can agree that the Commission can resolve it in accordance with the procedure in cl 28.
14. Energy Australia’s submission, that it and the five unions would not be bound by any decision of the Commission in an arbitration under cl 28, and that each of it and they were free to commence proceedings in the original jurisdiction of this Court to seek declarations inconsistent with the arbitration decision, is self-evidently untenable and must be rejected. It would be recipe for industrial chaos if none of the five unions was bound by a resolution arrived at in the dispute resolution process even though cl 28 appeared, in its terms, to seek to achieve such a resolution.
15. The consequence of Energy Australia’s argument would be that, although the Commission had resolved a dispute between it and its employees in a binding decision given under s 739(4), somehow both it and any of the five unions could evade the result of that statutorily mandated dispute resolution process. Such an absurd outcome would represent the antithesis of a dispute resolution process of the kind required by s 186(6) of the *Fair Work Act*. Indeed, if Energy Australia’s argument were correct, then the Yallourn agreement could not comply with s 186(6) because it would not:

provide[] a procedure that requires or allows the [Commission], or another person who is independent of the employers, employees or employee organisations covered by [it] **to settle disputes … about any matters arising under the agreement**. (emphasis added)

1. Moreover, the dispute resolution process in cl 28 would be subverted if it were confined solely to matters covered by cl 28.1(a). That is because the introduction to cl 28 provided that category 1 matters included:

matters that are in dispute, that go to the application or interpretation of this Agreement …. this clause facilitates access to the [Commission] for conciliation and, if necessary, arbitration.

1. The evident purpose of the Yallourn agreement was to ensure industrial peace at a large power plant in which there were many employees and five unions, each of whom had, or could have, different industrial and workplace concerns in respect of its own members (or employees eligible to be its members) and the other unions. The dispute resolution process in cl 28 would be pointless if it did not operate so as to bind all of those parties in a way that was certain. Unless all were capable of being bound, the requirement in s 186(6) of the Act, and the object of the parties themselves in agreeing to cl 28, could not be achieved. Instead there would be a chaotic decision-making process in which, on the one hand, the Commission could make binding arbitral awards between employees and Energy Australia, and on the other hand (as Energy Australia argued), both it and the five unions would be free to challenge those awards collaterally by proceedings in the Court.
2. Moreover, cl 28.1(b) allowed “the parties” to agree “at any stage” to refer a dispute to the Commission “in the interest of speedy resolution of the dispute”. Although cl 28.1(a) provided a process to be followed that, in most cases, fitted the circumstances, the parties had the right to depart from it as provided in cl 28.1(b). Reading the Yallourn agreement as a whole, and giving cl 28 a construction in its industrial, contractual and statutory context, a reasonable person in the position of the parties would have understood that each of the five unions had a right to initiate a dispute about category 1 matters that the Commission could conciliate and arbitrate.
3. Energy Australia’s argument that a third party such as a union cannot be a “party principal” to an enterprise agreement must be rejected. As explained above, the five unions have workplace rights under the Yallourn agreement and can enforce them. The proposed enterprise agreement, on which the employees vote, necessarily includes clauses dealing with the role and status in which any party to (or covered by) it can raise a dispute and have it determined in accordance with s 186(6), if the employees or a majority of them vote to approve entry into it and the Commission approves it.
4. Thus, the provisions of the Yallourn agreement, dealing with the five unions and, as cl 2 provided, their status as parties (or “Parties”) to it, were voted on and approved by the majority of the employees. If the majority vote against approval of an enterprise agreement under s 182, then, of course, no union will be covered by, or a party to, an enterprise agreement. But that will be because there will not be any such agreement. Conversely, where the employees vote to approve an enterprise agreement that makes provision for a union to have a role as a party, then when the union (which is likely to have had a role as a bargaining representative under s 185(1) in formulating what was put to that vote) gives notice under s 201(2) to seek that it be covered, it will be acting, as both the employer and its approving employees contemplated, to become “covered” and so a party in its own right with all of the rights of a party.
5. Energy Australia argued that, somehow, a union is not a full party to an enterprise agreement that the Commission notes (under s 201(2)) is covered by that agreement. Energy Australia contended that such a union only has the right to bring proceedings in a court under s 539(2) to enforce it, but not to use the dispute resolution procedure (such as cl 28) that s 186(6) requires to be an essential feature of an enterprise agreement. That argument makes no sense. Once the employees (or a majority) have voted to approve an enterprise agreement that provides for a union to be a party (even on the assumption that it must give notice under s 201(2)), both those employees and their employer will have expressed agreement to the union becoming a party to the enterprise agreement, with all the rights of a party and subject to any limitation of those rights as the document provides.
6. As Jessup, Tracey and Perram JJ said in *Marmara* 222 FCR at 179-180 [89]-[90]:

… although the FW Act provides that an enterprise agreement is “made” otherwise than by the Commission, **the Act does more than merely impose conditions upon, and give additional legal effect to, an agreement made between private parties. The effect of the legislation is to empower the employer and the relevant majority of its employees to specify terms which will apply to the employment of all employees in the area of work concerned. The legal efficacy of those terms will arise under statute, not contract, and, as mentioned above, will be felt also by those who did not agree to them.** Someone, such as an employee subsequently taken on, who had nothing to do with the choice of the terms or the making of the agreement, will be exposed to penal consequences under s 50 if he or she should happen to contravene one of the terms. When viewed in this way, it is not difficult to share in the perception that an enterprise agreement approved under the FW Act has a legislative character.

**An enterprise agreement is a statutory artefact made by persons specifically empowered in that regard, and under conditions specifically set down, by the FW Act. It is enforceable under that Act, and not otherwise.** There is, in the circumstances, no reason to approach the question of legislative intent with a predisposition informed by notions of freedom of contract. (emphasis added)

1. The approval mechanism that the *Fair Work Act* prescribes in ss 186, 187 and 201 does not, and is not intended to, exclude the role of an employee organisation, such as a union, to be a party to an enterprise agreement with the rights of each other party to it. That role, necessarily, is created and defined by the terms of an enterprise agreement and the exercise of any election by the union to give notice under ss 53(2) and 183(1) of the *Fair Work Act* to seek the Commission’s notation in its decision under s 201(2) that it be covered and, so, to have a statutory status as a party to, and with full legal capacity to enforce, it under ss 50-53, 183(1) and 341(1) both in a judicial proceeding and also in accordance with its terms in a dispute resolution process under s 186(6), including in respect of matters referred to in ss 172(1), 341 and 540(2).
2. Although in the above passage, Jessup, Tracey and Perram JJ did not refer to the role of an employee organisation, that was because there no issue about such a role in that matter. The “statutory artefact” will “cover” an employee organisation because ss 182(4) and 201(2) so provide if the Commission makes a decision to note that fact. Indeed, the scheme of ss 50, 51, 52, 53, 172 and 182 is to ensure that an enterprise agreement will apply to or cover two or more of an employer, its employees and employee organisations. And s 183 gives an employee organisation that had been a bargaining representative for the proposed enterprise agreement that, as s 182(1) provided, was “made” when the majority of employees voted for it, the right to give the Commission a written notice that it “wants the enterprise agreement to cover it”. The enterprise agreement only becomes operative seven days (or if it so provides on a later date) after the Commission approves it (s 54(1)). Section 51(2) provides that an enterprise agreement “does not give a person an entitlement unless the agreement applies to the person”, being (as s 52(1) provides) an employer, employee or employee organisation covered by the agreement.

## Consideration – did a casual employee raise a dispute under cl 28?

1. Two things may be said of the submission that cl 28 did not permit a union to refer a complaint to the Commission. *First*, Energy Australia’s own conduct would lead a reasonable person in the position of the parties to understand that there was no question between them that, in fact, casual employees who were members of AMWU and CFMEU, had made a complaint about the way in which Energy Australia was applying cl 5.3 for the payment of their overtime and, *secondly*, his Honour’s findings of fact that casual employees, who were members of two of the five unions had raised complaints, through their representatives, about the disputed interpretation of cl 5.3.
2. Energy Australia’s argument that its agreement to refer the dispute to the Commission as a category 1 matter under cl 28.1(b) was incapable of conferring that jurisdiction on the Commission unless an aggrieved casual employee was identified as the source of a complaint never came to grips with the requirements for interfering with the findings of fact made by a judge who has seen and heard a witness give evidence. French CJ, Bell, Keane, Nettle and Gordon JJ restated those requirements in *Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550 at 558-559 [43], namely:

A court of appeal conducting an appeal by way of rehearing is bound to conduct a “real review” [*Fox* [*v Percy*] (2003) 214 CLR 118 at 126 [25] per Gleeson CJ, Gummow and Kirby JJ] of the evidence given at first instance and of the judge’s reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings [*Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479-481 per Deane and Dawson JJ; *Fox* (2003) 214 CLR 118 at 128 [29] per Gleeson CJ, Gummow and Kirby JJ; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 381 [76] per Heydon, Crennan and Bell JJ]. But **a court of appeal should not interfere with a judge’s findings of fact unless they are demonstrated to be wrong by “incontrovertible facts or uncontested testimony”** [*Fox* (2003) 214 CLR 118 at 128 [28]], **or they are “glaringly improbable” or “contrary to compelling inferences”** [*Fox* (2003) 214 CLR 118 at 128 [29]. See also *Miller & Associates* (2010) 241 CLR 357 at 381 [76]]. (emphasis added)

1. The primary judge found that at least so far as AMWU and CFMEU were concerned, Mr Dodd and Mr Thornton had each identified that at least one casual employee in his union had raised a concern about his or her overtime pay albeit that that person was not identified by name. Those findings were open on the evidence. Energy Australia could not, and did not, establish that those findings were glaringly improbable, contrary to compelling inference or that there were incontrovertible facts or untested testimony to the contrary.
2. Moreover, in its submission of 12 July 2016, Energy Australia agreed to the dispute being arbitrated pursuant to cl 28.1(b). As Mason A-CJ, Murphy and Deane JJ held in *Taylor v Johnson* (1983) 151 CLR 422 at 432-433, a party who seeks later to assert that it entered into a written contract under a serious mistake about its contents in relation to a fundamental term (such as here, its agreement that the Commission had jurisdiction to arbitrate because the dispute met the requirements of cl 28.1):

will be entitled in equity to an order rescinding the contract **if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension**. (emphasis added)

1. There was no suggestion in the evidence or in Energy Australia’s submissions that it was acting under any mistake or misapprehension at all about whether any casual employee had raised a complaint with either or both Mr Thornton or Mr Dodd. Mason A-CJ, Murphy and Deane JJ explained the significance of the difference between the subjective and objective theories of contractual assent and why the latter was the law of Australia (151 CLR at 429), as Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ affirmed in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40], where they said (see too at 179-181 [41]-[45]):

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. **What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.** References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. **The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction** (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]). (emphasis added)

1. They went on to say (219 CLR at 180-181 [45]) that:

It should not be overlooked that **to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be.** (emphasis added)

1. Here, the representation that Energy Australia conveyed by its written submission to the Commission, agreeing that the dispute was a category 1 matter, was that it knew the facts that supported the Commission having jurisdiction, including that all preconditions for its exercise existed. Energy Australia’s attempt to transform the question for the Court into a consideration of whether its consent was insufficient of itself to found the Commission’s jurisdiction, even though (so it asserted) no casual employee had raised a complaint, must be rejected. Energy Australia did not allege, far less prove, that it did not know, or made any, let alone a serious, mistake about the facts going to the Commission’s jurisdiction at the time that it made the submission of 12 July 2016. And it certainly did not prove that no casual or other employee had complained about its conduct in relation to making payments under cl 5.3. Indeed, as already noted, the five unions proved that employees had made such complaints.
2. Energy Australia’s 12 July 2016 submission, that the dispute was a category 1 matter, was a representation of an existing fact that it intended would affect legal relations. The submission was not a conferral of jurisdiction on the Commission by consent, as Energy Australia sought to characterise it. Rather, it was a serious and formal admission and agreement to arbitrate. Energy Australia failed to prove that admission or agreement was erroneous, let alone made in circumstances where a court would find that the Commission lacked jurisdiction because, despite the admission, there was, in truth, no dispute or category 1 matter for it to arbitrate. Moreover, the absence of any evidence that Energy Australia made a mistake or was under a misapprehension bespeaks a lack of commercial integrity in its conduct of the proceedings below and the appeal.
3. This is despite the fact that, as the primary judge found, cl. 28.2(e) provided that when the Commission had issued a decision, determination or direction by way of an arbitration award under cl 28 “it shall be final and binding on the Parties”, subject to an appeal process in which, under cl 28.3(b), an application to appeal from the Commission’s decision had to be provided in writing detailing the ground of appeal, to the Parties and the Commission.

## Energy Australia’s other arguments – consideration

1. Energy Australia’s challenge to the primary judge’s finding, that both its 12 July 2016 submission and its conduct by proceeding in the Commission created an estoppel on which AMWU and CFMEU could rely, must be rejected. His Honour was correct to find that Energy Australia was estopped from denying what Mr Chapple (who was a participant in the 5 May 2016 conversations with Mr Thornton (on behalf of CFMEU) and Mr Dodd (on behalf of AMWU)) conveyed on its behalf in his email of 12 July 2016 to AMWU and the Commission – namely that there really was a dispute within the meaning of cl 28, and if one of its preconditions so required, that one or more casual employees had raised that dispute. If anyone at Energy Australia knew whether it was unaware of, or in doubt about, whether any of its casual employees had a dispute about how they were being paid under cl 5.3, it was each of Mr Chapple and Mr Koopmans. Thus, Mr Chapple’s contemporaneous agreement, on behalf of Energy Australia, that a dispute giving the Commission jurisdiction existed, was sufficient evidence of the truth of that fact to justify the primary judge’s finding. That finding was correct.
2. It is not necessary to decide on Energy Australia’s other arguments.
3. The Commission had jurisdiction and the primary judge was correct to find that the Full Bench’s arbitral decision extinguished the controversy between Energy Australia, its employees and the five unions as to the dispute on the interpretation and application of cl 5.3 of the Yallourn agreement.

## Consideration – the costs issue

1. For the reasons above, Energy Australia did not require leave to appeal in respect of the decision to set aside its originating process, because that was a final judgment. The costs order that his Honour made in consequence was made as part of a proceeding that was finally determined and did not require a separate application for leave to appeal. In any event, had leave been required, the Full Court would have granted it. His Honour’s decision was erroneous, for the reasons that follow, and substantial injustice would be done were leave refused.
2. Section 570(1) the *Fair Work Act* provides that:

A party to proceedings (including an appeal) in a court (including a court of a State or a Territory) **in relation to a matter arising under this Act** may be ordered by the court to pay costs incurred by another party of the proceedings **only** in accordance with subsection (2) … (emphasis added)

1. The five unions did not seek any special order for costs under s 570(2). The question for decision is whether, despite the finding that the Court had no jurisdiction to hear and determine Energy Australia’s claim in its originating application for relief in respect of ss 562 and 564 of the *Fair Work Act*, the proceeding was one “in relation to a matter arising under this Act”. The five unions’ argument that the finding that the Court had no jurisdiction necessarily entailed that the proceedings were not “in relation to a matter arising under this Act” must be rejected. Until the Court exercised its jurisdiction to determine whether it had jurisdiction under ss 562 or 564 in the proceeding there was a controversy that Energy Australia claimed did arise under the Act.
2. Energy Australia submitted that the primary judge also erred in finding that that any accord and satisfaction that resulted from the decision of the Full Bench was confined to the parties to the dispute before it and not to other unions covered by the Yallourn agreement. In a sense, his Honour had to resolve the issue of jurisdiction by determining who were the persons bound by the decision of the Full Bench. By finding that each of the five unions was bound by force of the effect of cll 28.2(e) and 28.3(b), he was engaged in ascertaining what the subject matter of the proceedings was and whether that was “in relation to a matter arising under” the *Fair Work Act*.
3. Had the primary judge found that one or more of the five unions or Energy Australia was not bound by the Full Bench’s decision, then there would have been a justiciable controversy. In the end, the primary judge concluded, as has the Full Court, that the Act and the Yallourn agreement made under it operated to give final effect to the Full Bench’s decision as between all of the parties in respect of the interpretation of cl 5.3. The dispute resolution process that led to, and the decision that the Full Bench made, itself, were or involved matters arising under the Act. Although, the originating application did not raise a justiciable controversy under the *Fair Work Act*, it was still a proceeding “in relation to a matter arising under” that Act, namely the consequence of the Full Bench’s decision.
4. The expression “in relation to” is of wide and general import: *Fountain v Alexander* (1980) 150 CLR 615 at 629 per Mason J. The proceeding that Energy Australia filed in the Court did not, in itself, raise a justiciable controversy. However, it was a proceeding in relation to a matter arising under the Act, within the meaning of s 570(1). That is because it was a proceeding in relation to, *first*, the legal effect of the decision of the Full Bench given under s 739(4) and, *secondly*, which parties to the Yallourn agreement that decision bound.
5. In *McJannet [No 2]* 189 CLR at 655-656, Brennan CJ, McHugh and Gummow JJ noted that in *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations (Q)* (1995) 184 CLR 620, the Court had made an order absolute directed to the judges of this Court prohibiting them from acting upon, giving effect to, proceeding further upon or enforcing a decision purportedly made under the *Industrial Relations Act 1988* (Cth) because this Court had no jurisdiction to make the decision. Their Honours also noted that the successful prosecutor union had sought an order for costs of the constitutional writ proceedings in the High Court, which the unsuccessful party resisted on the basis of s 347(1) of the *Industrial Relations Act*. That section provided that:

A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party …

In s 570(1) of the *Fair Work Act*, the general prohibition is expressed more widely as applying “in relation to a matter arising under this Act”.

1. Chief Justice Brennan, McHugh and Gummow JJ held that s 347(1) did not apply to the proceedings in the original jurisdiction of the High Court, but critically they said (189 CLR at 657):

In the present case, **the proceeding before the Federal Court was in a matter arising under the Act because the respondents were claiming a right under the Act** against the prosecutors. **No order for costs could be made in respect of the proceeding in the Federal Court.** (emphasis added)

1. It follows that the proceeding before both the primary judge and the Full Court in this matter concerned a matter arising under the *Fair Work Act*. Accordingly, s 570(1) applied to restrict the primary judge’s power to order costs. The primary judge distinguished *McJannet [No 2]* 189 CLR at 657 by saying that in that case a “matter” existed whereas in the proceeding below it did not.
2. With respect, his Honour erred in that conclusion. In *McJannet [No 2]* 189 CLR 654 the High Court was dealing with a situation on all fours with that before the primary judge, namely proceedings in which the applicant asserted a right to relief under an Act when, in fact, this Court had no jurisdiction to hear or determine that claim. Brennan CJ, McHugh and Gummow JJ expressly held that, despite the finding that the proceeding in the Federal Court was outside its jurisdiction “and, in particular, **outside the scope of that Court’s jurisdiction arising either under s 253X or s 253ZC of the Act**” (189 CLR at 655-656), that proceeding in the Federal Court arose under the *Industrial Relations Act* “because the respondents were claiming a right under the Act” (at 657). So too here, Energy Australia claimed a right to relief under the *Fair Work Act* in respect of an enterprise agreement made pursuant to it.
3. The critical fact is that Energy Australia claimed relief under the *Fair Work Act*, not whether its claim was one that the Court had jurisdiction to determine. Indeed, the reason that this Court lacks jurisdiction is because s 739(4) authorised the Commission to make a decision in the arbitration that resolved the controversy. Therefore, the proceeding in this Court was both “in a proceeding arising under this Act” (*McJannet [No 2]* 189 CLR at 657) and “in relation to” such a proceeding.
4. Accordingly, the order for costs that the primary judge made must be set aside. Since s 570(1) applies, there should be no order for costs of the proceeding below and on appeal.

## Conclusion

1. The appeal must be dismissed on the jurisdictional issue and the order for costs below must be set aside.

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| I certify that the preceding one hundred and five (105) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Rares and Barker. |

Associate:

Dated: 31 August 2018

REASONS FOR JUDGMENT

# Flick J:

1. The Appellant, Energy Australia Yallourn Pty Ltd (“Energy Australia”) operates the Yallourn Power Station and an adjacent open cut coal mine.
2. At all relevant times, Energy Australia and its employees were subject to the *Energy Australia Yallourn Enterprise Agreement 2013* (the “*Agreement*”). That *Agreement* was expressed in cl 2 to cover Energy Australia (defined as the “*Company*”) and the following unions (which were collectively defined as “*the Unions*”):
* Construction, Forestry, Mining and Energy Union;
* Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, also known as Australian Manufacturing Workers’ Union;
* Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allies Services Union of Australia;
* Australian Municipal, Administrative, Clerical and Services Union; and
* Australian Workers’ Union.
1. Clause 2 further provided that: “*Hereinafter the Company and the Unions will collectively be described as ‘the Parties’*”. The clause goes on to further state:

This Agreement settles all the claims of the Parties and the employees in respect of terms and conditions of employment for the duration of this Agreement.

1. Clause 2 also relevantly provided that the agreement applied to all Energy Australia employees who were members of, or eligible to be members of, “*any of the organisations of employees party to this agreement*”.
2. In early 2016, Energy Australia commenced employing casual employees. “*Casual Employment*” was the subject of cl 5.3 of the *Agreement*. A question arose as to the manner in which the overtime rates payable to casual employees was to be calculated. The First Respondent in the present appeals, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, known as the Australian Manufacturing Workers’ Union (the “AMWU”) contended that the overtime rate of pay should be calculated on the basis of the ordinary time rate of pay plus the casual loading payable to casual employees. Energy Australia resisted such an entitlement, contending that the overtime rate should be calculated on the basis of the ordinary time rate of pay, exclusive of any loading or penalties.
3. In May 2016, the AMWU requested the Fair Work Commission (the “Commission”) to resolve the dispute in accordance with the “*Dispute Resolution Process*” in the *Agreement*. In October 2016, a Commissioner of the Commission found in favour of Energy Australia. The Union appealed. In January 2017, a Full Bench of the Commission concluded that the Commissioner had erred and that“*the casual loading should be included in the calculation of overtime for casual employees*”.
4. In March 2017, Energy Australia filed in this Court an *Originating Application* seeking declaratory relief as to the proper construction of cl 5.3 of the *Agreement*.
5. The forensic decision taken by Energy Australia to pursue such a course invited at the very least questions as to the appropriateness of its doing so, given that it had participated in a conciliation and arbitration process before both the Commission and the Full Bench of the Commission. It may be questioned whether such a course would have been taken by Energy Australia had the decision of the Commissioner prevailed on appeal to the Full Bench. But such musings can presently be left to one side.
6. In April 2017, the AMWU filed an *Interlocutory Application* in this Court seeking to set aside the *Originating Application* pursuant to r 13.01 of the *Federal Court Rules* *2011* (Cth). In summary form, the AMWU contended that the dispute as to the construction of cl 5.3 of the *Agreement* had been resolved and that there was, accordingly, no longer a “*matter*” that attracted the jurisdiction of this Court pursuant to s 562 of the *Fair Work Act 2009* (Cth). That section provides as follows:

**Conferring jurisdiction on the Federal Court**

Jurisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under this Act.

1. In October 2017, a judge of this Court set aside the *Originating Application*: *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245. The primary Judge concluded (*inter alia*) that “*the private arbitration by the* [*Commission*] *extinguished the justiciable controversy between Energy Australia and the Unions with the result that the Court lacks the jurisdiction to entertain Energy Australia’s Originating Application*”: [2017] FCA 1245 at [106]. In February 2018, the primary Judge delivered separate reasons in respect to an order that Energy Australia was to pay the costs of the Respondents to that proceeding, including the costs of the *Interlocutory Application* filed in April 2017: *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2018] FCA 47.
2. Now before the Full Court are *Applications for Leave to Appeal* filed by Energy Australia with respect to each of the decisions of the primary Judge.
3. Although it is considered that no leave to appeal is required, it would have been granted if it was necessary. The result is the same, the proceedings are to be dismissed – be it proceedings seeking leave to appeal or the appeal itself. All the issues were canvassed and the central conclusion of the primary Judge that the matter was finally resolved by the Commission is correct.

### Clause 28

1. Clause 28 of the *Agreement* provides (in part) as follows:

**DISPUTE RESOLUTION PROCESS**

The DRP process is to be used to assist in resolving any matter or dispute pertaining to the employment relationship.

For matters that are in dispute, that go to the application or interpretation of this Agreement or with matters arising under the National Employment Standards (NES), this clause facilitates access to the Fair Work Commission for conciliation and, if necessary, arbitration (‘category 1 matters’).

For all other matters pertaining to the employment relationship that do not go to the application or interpretation of the Agreement or are not matters arising under the NES (‘category 2 matters’), the steps set out below shall apply, except that the Fair Work Commission shall only be empowered to exercise conciliation powers.

**28.1 Initial Process**

(a) In the event of any dispute arising the following procedure will apply.

**STEP 1** The matter will, in the first instance, be discussed between the employee(s), and the Team Leader involved.

If the matter remains unresolved it shall be elevated to STEP 2 as soon as practicable;

**STEP 2** The matter may be referred in writing, by the employee(s) to the relevant Line Manager. The Line Manager will provide a written response to the issue within three working days.

If the matter remains unresolved;

**STEP 3** It will be referred for discussion between the appropriate Union Official or other employee representative and the Executive Manager Yallourn, or their nominated delegate. The Executive Manager Yallourn will provide a response to the issue as soon as practicable.

If the matter remains unresolved;

**STEP 4** It may be referred to the Fair Work Commission (FWC) for conciliation or arbitration (for ‘category 1 matters’) or conciliation only (for ‘category 2 matters’).

Employees may bring a support person or the appropriate union representative to any meeting held under this clause with the Parties being able to elect to bring representatives of their own choosing to any matter referred to conciliation or arbitration.

(b) The dispute may be referred to FWC at any stage by agreement of the parties in the interest of speedy resolution of the dispute.

(c) For ‘category 1 matters’, during the entire period, from the time when the dispute first arises until the time of its resolution (whether by discussion or negotiation, or by proceedings before the FWC), the status quo or ‘normal work’ shall continue, unless the maintenance of status quo or performance of normal work would place at risk the health or safety of the employee(s) concerned. No party to the dispute shall suffer any prejudice as to the resolution of the matter by reason only that normal work continues as required by this paragraph.

(d) In respect to category 2 matters, either party may notify the FWC of a dispute and seek to have the matter dealt with on an expedited basis, provided that the notifier has satisfied steps 1 and 2 of the initial process. The status-quo shall apply to category 2 matters in the same way as category 1 matters unless one party argues successfully before FWC that the status-quo should be altered or removed. Any such application shall not occur until at least 14 days has elapsed since the first conciliation hearing of the notified matter. The dispute and status-quo provision ends when the FWC determines that the conciliation process is concluded.

(e) ‘Normal work’ means the work normally performed by an employee and “status-quo” means the circumstances existing immediately prior to the change or circumstances leading to the proposed change which resulted in the dispute arising.

**28.2 Step 4 Process**

(a) Upon referral of the matter, the FWC shall conciliate. If the dispute remains unresolved after conciliation, the FWC may resolve category 1 matters by arbitration. Either party may be legally represented during arbitration.

(b) In exercising its role under this clause, the FWC shall exercise any of its powers under the Act.

…

(e) Where the FWC has issued a decision, determination or direction under this clause, it shall be final and binding on the Parties, subject to the appeal process in accordance with sub-clause 28.3.

1. The object and purpose of that clause, self-evidently, is to set up a “*Dispute Resolution Process*” that is “*to be used to assist in resolving any matter or dispute pertaining to the employment relationship*”.
2. The “*assist*[*ance*]” provided by that “*Process*”, it is considered, was available to:
* Energy Australia, as employer;
* the employees to which the *Agreement* applied; and
* the Unions covered by the *Agreement*.

Rejected is the submission advanced by Senior Counsel on behalf of Energy Australia that the Unions identified in cl 2 cannot avail themselves of the “*assist*[*ance*]” provided by the “*Dispute Resolution Process*”*.*  Energy Australia, it is concluded, was incorrect in submitting that any “*dispute*” that such a Union may have could not be a “*matter or dispute pertaining to the employment relationship*” for the purposes of cl 28. There is no reason to confine the natural width of meaning otherwise conveyed by that phrase – especially “*any matter or dispute*” – as referring only to a dispute between the employer and its employees.

1. The term “*dispute*” as used in cl 28 is only limited by the phrase “*pertaining to the employment relationship*”. A “*dispute*” of the present kind, being a “*dispute*” as to the manner of calculating rates of pay for casual employees, is unquestionably a “*dispute pertaining to the employment relationship*” between the employer and its casual employees.
2. Such a “*dispute*” is characterised for the purposes of cl 28 of the *Agreement* as a “*category 1 matter*”.
3. Irrespective of whether each of the four steps set forth in cl 28.1(a) need be followed, cl 28.1(b) provides that the dispute “*may be referred to* [*the Commission*] *at any stage by agreement of the parties in the interest of speedy resolution of the dispute*”.
4. On the facts of the present case:
* the AMWU in May 2016 filed with the Commission an *Application* seeking that the Commission deal with the dispute.

Clause 28.1(b) does not constrain which of the “*parties*” has the ability to “*refer*” a dispute to the Commission. In the absence of any such express constraint, there is no reason to construe cl 28.1(b) as precluding the AMWU, namely an entity that may invoke the “*assist*[*ance*]” provided by cl 28 and one of the “*Parties*” to the *Agreement*, from making such a reference.

1. In July 2016, Energy Australia filed with the Commission an *Outline of Submissions*, including submissions directed to the “*Dispute Resolution Process*”. Those submissions included the following statement:

2.3 EA agrees that the current dispute involves a Category 1 Matter. Therefore, subject to the normal limitations on the Commission’s arbitral powers, e.g. the requirement in s 739(5) of the FW Act not to make a decision that is inconsistent with a fair work instruments that applies to the parties, EA accepts that the Commission has jurisdiction to arbitrate the dispute.

(Footnote omitted.)

1. Irrespective of whether the statement made by Energy Australia constitutes an “*admission*” or a “*concession*” that the Commission had “*jurisdiction to arbitrate the dispute*”, the statement unquestionably evidenced its “*agreement*” that the Commission could proceed to hear the application made by the AMWU. It is immaterial whether the AMWU had already “*referred*” the dispute to the Commission before Energy Australia agreed to it.
2. The terms of cl 28.1(b), it is thus considered, were satisfied.
3. Again, and contrary to the submission advanced by Senior Counsel on behalf of Energy Australia, there is no reason to construe the term “*parties*” as used in cl 28.1(b) as limited to Energy Australia and one or other of its employees. Excluding the Unions from an ability to invoke the “*Dispute Resolution Process*” also sits uncomfortably with the acknowledgment in cl 2 that the *Agreement* “*settles all the claims of the Parties and the employees in respect of terms and conditions of employment*”. The uncapitalised use of the term “*parties*” in cl 28.1(b), it is considered, is not used in contradistinction to the definition of “*the Parties*” in cl 2. The term “*parties*” as used in cl 28.1(b) is used as a means of identifying the parties to a dispute the subject of the “*Dispute Resolution Process*” that may be referred to the Commission – in this case, the AMWU and Energy Australia.
4. Clause 28.2(e) of the *Agreement* then relevantly provides that where the Commission has issued a decision or determination, “*it shall be final and binding on the Parties, subject to the appeal process in accordance with sub-clause 28.3*”. Indeed, the reference in cl 28.2(e) to “*Parties*”, it is considered, is consistent with the reference to “*parties*” in cl 28.1(b) and identifies those who are “*parties*” to a dispute that may be referred to the Commission and those “*Parties*” who are to be bound by the outcome, being those who are “*cover*[*ed*]” by the *Agreement*.
5. This construction of cl 28 as to the “*parties*” that may avail themselves of the “*Dispute Resolution Process*” and the width of matters that may be referred to the Commission is not only dictated by the natural meaning of the terms employed by the clause but also by reference to such further matters as:
* the object and purpose of cl 28 being to “*assist in resolving any matter or dispute pertaining to the employment relationship*” and the frustration of that objective if a party to the “*Dispute Resolution Process*” can participate in the “*Process*”and thereafter shun the result if it proves unsatisfactory. In this case it is the employer who wishes to shun the end result of the “*Process*” – in different situations, it may be the Unions (or one or other of the Unions) or the employees who would be permitted to do so if the submissions of Energy Australia were to prevail;
* the desirability of the Commission discharging the tasks entrusted to it by the *Agreement* and the role envisaged by that *Agreement* that the Commission be the first “*port of call*” to resolve questions as to the interpretation of provisions of the *Agreement*, including questions as to the entitlements of casual employees;
* the fact that in many cases it may be the Union, rather than an individual employee, who may seek to have resolved a “*category 1 matter*”, including disputes as to “*the application or interpretation of this Agreement*”; and
* the fact that the decision or determination of the Commission is not only binding upon the “*parties*” to the dispute the subject of arbitration but also binding upon the “*Parties*”, including the other Unions “*cover*[*ed*]” by the *Enterprise Agreement*.
1. This construction of cl 28 is only further reinforced if reference is made to the industrial uncertainty which would be generated if, as Energy Australia would have it:
* an employee who wished to have the Commission resolve a question as to his entitlements under the *Agreement* could invoke the “*Dispute Resolution Process*” but that a Union who wished to have the same dispute (or any other dispute) resolved could not invoke that “*Process*” but would have to commence a proceeding in this Court; and
* a decision or determination of the Commission would only be “*final and binding*” upon the parties to the dispute before the Commission and would not be “*final and binding*” upon other Unions who may be “*Parties*” to the *Agreement* but not “*parties*” to the Commission proceedings.
1. On this approach to the resolution of the present proceeding in this Court, it has proved unnecessary to consider whether the statement made by Energy Australia in its *Outline of Submissions* before the Commission was an “*admission*” that the Commission had jurisdiction and, even if it were such an “*admission*”, whether jurisdiction could be conferred upon the Commission “*by consent*”.
2. The construction urged upon the Court by Senior Counsel for Energy Australia, it is respectfully concluded:
* is not supported by the plain meaning of the words employed in cl 28; and
* is not consistent with giving effect to the terms of the *Agreement* construed in a practical common-sense manner: cf. *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 per Madgwick J. The construction of industrial agreements, such as the present *Agreement,* “*should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement*”: *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10 at [96], (2005) 222 CLR 241 at 270 per Kirby J.

# AN ABUSE OF PROCESS?

1. To the extent that there may remain an outstanding question as to whether the pursuit of the present proceeding by Energy Australia in this Court constitutes an abuse of process, that question is again resolved in favour of the AMWU.
2. Energy Australia – and for that matter, the AMWU – accepted that the Commission had jurisdiction to resolve the dispute as to the correct construction of cl 5.3 of the *Agreement*. By cl 28.2(e), it was also agreed – subject only to the appeal process – that the Commission’s decision was “*final and binding*”.
3. Energy Australia and the AMWU had agreed (for the purposes of the *Agreement*) to submit the matter in dispute between them to the “*final and binding*” determination of the Commission. It is difficult to see why such an agreement did not prevent the later institution of the present proceeding in this Court: cf. *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652 to 653 per Rich, Dixon, Evatt and McTiernan JJ. Although the agreement between Energy Australia and the AMWU could not oust the jurisdiction of this Court, the agreement nevertheless “*has legal significance in respect of the parties’ dispute and their rights and liabilities*”: cf. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5 at [77], (2013) 251 CLR 533 at 567 per Hayne, Crennan, Kiefel and Bell JJ.
4. To now permit Energy Australia to seek a contrary decision to that given by the Full Bench in January 2017 would constitute an abuse of process. The primary Judge was correct in so concluding: [2017] FCA 1245 at [163].

# CONCLUSIONS

1. The proceedings should be dismissed. The decision of the primary Judge to set aside the *Originating Application* was, with respect, manifestly correct.
2. The *Application for Leave to Appeal* and the *Notice of Appeal* with respect to the primary Judge’s decision as to costs ([2018] FCA 47) should be resolved in the manner proposed by Rares and Barker JJ.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 31 August 2018

SCHEDULE OF PARTIES

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|  | VID 181 of 2018VID 1206 of 2017 |
| Respondents |  |
| Fourth Respondent: | AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION (ASU) |
| Fifth Respondent: | AUSTRALIAN WORKERS' UNION |