



DECISION

Fair Work Act 2009

s739 - Application to deal with a dispute

Australian Rail, Tram and Bus Industry Union-New South Wales Branch

v

Asciano Services Pty Ltd t/as Pacific National

(C2016/5814)

Rail industry

DEPUTY PRESIDENT SAMS

SYDNEY, 5 JANUARY 2017

Application to deal with a dispute under a dispute settlement procedure (DSP) in an agreement – jurisdictional objection to the Commission issuing a recommendation – limitations on powers of the Commission to deal with a dispute under the Agreement – parties to dispute distinct to employees or their representatives – employees of Pacific National not identified in dispute application – reliance on Full Bench authority – the Union must be a representative of an employee/s to be able to lodge a dispute under the Agreement – the Union cannot lodge a s739 application in its own right – no evidence of Union acting as a representative of an employee/s – no jurisdiction of the Commission to make a recommendation under the DSP of the Agreement – application dismissed.

INTRODUCTION

[1] This decision will determine a jurisdictional objection (previously foreshadowed and now pressed) by Asciano Services Pty Ltd t/as Pacific National ('Pacific National'), which seeks to have the Fair Work Commission (the 'Commission') dismiss an application, pursuant to s739 of the *Fair Work Act 2009* (the 'Act'), to deal with a dispute under the Dispute Settlement Procedure ('DSP') of the *Pacific National Coal NSW Enterprise Agreement 2016* (PR538035). Details of the dispute are set out in paragraph 4 below.

[2] The s739 application was filed by the Australian Rail, Tram and Bus Industry Union-New South Wales Branch (the 'Union') on 27 September 2016 and was the subject of three conciliation conferences chaired by the Commission. Regrettably, these conferences did not

result in any final settlement of the many issues raised by the Union. Nevertheless, it must be noted that despite Pacific National's consistent objection to the dispute being before the Commission, representatives of Pacific National have actively engaged with the Union, both before and after the filing of the s739 application, by considering the Union's concerns, seeking requested information from relevant Pacific National management personnel and conveying the information to the Union.

[3] Nevertheless, the point has now been reached where the Union seeks a recommendation from the Commission, pursuant to clA30.2(i) of the Agreement (which would be 'highly influential') in respect to a range of matters relating to the pending redundancy of a number of Pacific National employees at Port Waratah and Illawarra Bulk Terminals. Given I was informed of the urgency of the dispute, and having regard to Pacific National's intention to press the Commission to dismiss the s739 application on the grounds the Commission has no power to make the recommendation sought, (or any at all), the parties were directed to file expedited submissions on the jurisdictional objection in the week commencing 19 December 2016.

The Dispute Notification (F10)

[4] In its F10 application, the Union identified the clauses in the Agreement it alleged the dispute related to and set out what the dispute is about as follows:

'1) On 2nd September 2016, Pacific National issued a notice of significant change to employees at Pacific National Live Run and planning sections at Hunter Bulk Terminal Port Waratah (HBT) and Illawarra Bulk Terminal, Wollongong (IBT) as required per clause 29 of the agreement.

2) The consultation letters were in regards to Pacific National's intentions to close the planning facilities at (HBT) and (IBT) and transferring the functions to newly created roles at the company's new planning section (IPS) at North Sydney. The result being a number of redundancies.

3) Pacific National has failed to meet its obligations under the enterprise agreement in relation to redeployment (Clause A17) and seeping of roles (Clause A3 and C1)

4) Pacific National have not advertised for voluntary redundancies from other employees as required under clause A17.4

5) Pacific National have refused to recognise employees as redundant until Pacific National advise the employee of a termination date, not upon when the company decided it no longer requires the employee, as outlined in A17.1 and A17.4 of the agreement. Consequently they have failed to look at options of redeployment for affected employees as required under clause A17.4 (b).

6) The company has been planning the situation for some 18 months, yet has failed to consider any of the affected employees and have continued to advertise other vacant roles and not hold or offer them to affected employees. An example being during the period of consultation the company has notified they intend to begin advertising for casual and third party train drivers for the grain harvest. Many of the affected employees are ex-Train Drivers yet have been told these roles are to be offered are casual roles and not available for redeployment.

7) As outlined in Paragraph 2, the company has moved the Live Run, operational and planning functions to their North Sydney headquarters where they have established the IPS. Pacific National are claiming the IPS is not covered by the *Pacific National Coal, NSW Enterprise Agreement 2013*. The enterprise agreement is not site specific and the roles fit within the description of the enterprise agreement classification structure clause C3.

8) Although most employees do not want to relocate, some do. All 176 new positions at the IPS were advertised. There were some incumbent employees who applied for a role there, yet were deemed unsuitable.

9) Clause C2.4 requires employees deemed to meet the selection criteria of a replacement role in a restructure to be directly appointed to that role.

10) Current employees have been required to teach the new employees their roles yet have been told they are not suitable for redeployment.

11) Pacific National to date have failed to align employee training to the National Qualification Framework as required under clause A9, Recruitment Selection and Induction thus leaving the displaced employees with no recognised formal qualifications.

12) Under clause A29.1 (e) of the agreement, Pacific National is required to genuinely consult and consider employees and their representative's views. Neither responses provided, addressed concerns raised such as, failure to meet requirements of the agreement

13) Pacific National has failed to provide all relevant information such as position descriptions for the roles that have taken over the functions of the current employees. A breach of clause A29.1 (c) (v)

[5] At Q 2.4 of the F10, the Union set out the steps it said had been taken to resolve the dispute by reference to exchanges of correspondence between the Union and Pacific National

following the issuance of a notice of significant change to employees at Port Waratah Bulk Terminal and Illawarra Bulk Terminal on 2 September 2016. The Union then set out the relief it sought as follows:

‘In order to provide certainty to the parties and to assist in resolving the dispute, we seek that the commission make a recommendation as allowed for in clause A30.2 (i) of the agreement. The recommendation to address:

1. Whether any of the new IPS positions at North Sydney are covered in the scope/support classification structure of the Pacific National Coal NSW Enterprise Agreement 2013.
2. Pacific National’s role in fulfilling their obligations to their current affected employees as outlined in Clauses:
 - a. A9, Recruitment Selection and Induction
 - b. A17, Redundancy
 - c. A29, Consultation and Change’

[6] As Pacific National observed in its submissions it cannot be doubted that:

- (a) despite the Dispute Notice stating that it is made on behalf of its members, no members’ names are mentioned;
- (b) there are no circumstances which identify any dispute between a particular member of the RTBU and Pacific National; and
- (c) the basis for giving the Dispute Notice is clA29.3(a) of the Coal EA.

Relevant Provisions of the Agreement

[7] Clauses A2 and A3 set out the parties to the Agreement and its scope. They read as follows:

A2 PARTIES

A2.1 The Parties to this Agreement are:

- a) Pacific National (NSW) Pty Ltd;
- b) Asciano Services Pty Ltd;

A2.2 (Collectively referred to in this Agreement as "Pacific National Coal, NSW");

- a) Australian Rail Tram and Bus Industry Union (ARTBIU);

- b) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU); and
- c) Employees employed by Pacific National Coal, NSW to perform work within the classifications contained within this Agreement.

A3 SCOPE

A3.1 This Agreement shall apply to:

- a) Each of the Parties; and
- b) Employees employed to perform work in positions within Pacific National within the Coal division that fall within the classification structures/s as set out in this Agreement.

A3.2 This Agreement shall comprise both this Section A, E & F and Classification Specific Sections (Either Section B, C, and D) which shall be read in conjunction with each other.

A3.3 No person engaged by Pacific National Coal, NSW under an Appointment Agreement to perform work equivalent to the classifications contained within this Agreement are to receive less than the applicable terms and conditions which apply to that classification, position or role.

[8] As mentioned in an earlier unrelated decision involving the application of the DSP in this Agreement; see: *Australian Rail, Tram and Bus Industry Union v Asciano Services Pty Ltd t/as Pacific National* [2016] FWC 4614, there are two separate processes for dealing with disputes in relation to Consultation and Change (clA29) and the Resolution of Disputes (clA30), although for present purposes there is an important link between clsA29.3 and A30 which I will come to shortly. I set out both clauses in full below:

A29 CONSULTATION AND CHANGE

A29.1 Consultation:

- (a) The Parties are committed to pursue all opportunities to adopt the world's best practices through modern technology and continuous improvement to all aspects of Pacific National Coal, NSW's operations.
- (b) Levels of manning, equipment and methods of operation may be varied from time to time by Pacific National Coal, NSW to reflect the need for safe work practices, improved technology and new types of machinery or systems, customer service needs or for any other reason.

(c) Pacific National Coal, NSW having made a definite decision that it intends to proceed with any significant change shall issue a notification, in writing, advising:

- (i) The affected Employees, or their representatives and their union;
- (ii) The nature of the change;
- (iii) The reason for it;
- (iv) The timing of it; and
- (v) Any other relevant information.

(d) Pacific National Coal, NSW shall allow the Employee, their representative and the union, an opportunity to express their view or concerns. Pacific National Coal, NSW will allow Employees, their representative and their union to actively participate in the consultative process. That is, allow for the reasonable release and payment of Employees to attend meetings and access to entitlements as provided for in this Agreement.

(e) Pacific National Coal, NSW shall genuinely consult and consider any views or advice from the Employees, their representative and their union in relation to the proposed change and provide written reasons addressing concerns raised by Employees and/or Employee representatives.

(f) This consultative process must be completed within a period of 14 days from the date of notification by Pacific National Coal, NSW as set out in clause (c) above. subject to the provisions of (d) being complied with. Failure to comply with the provisions of (d) will delay and or extend the 14 day period accordingly.

(g) Should Pacific National Coal, NSW fail to provide the notification as required in clause (c) above Pacific National Coal, NSW shall not implement any of the proposed changes until such time that the proper notification of change has been provided and the consultation process set out in sub clause (d) has been complied with.

(h) Further, where Pacific National Coal, NSW has failed to engage in any consultation whatsoever with the affected Employees, their representative or their Union may issue Pacific National Coal, NSW, within 7 days of the non compliance, with a notice of dispute, in writing, setting out the reasons for the dispute in the form set out in Section G of this Agreement. Upon receiving such notice of dispute Pacific National Coal, NSW will not implement the change and/or cease the change should it have been already implemented.

(i) It is agreed between the Parties that after the above notification and consultation process has satisfactorily taken place, Pacific National Coal, NSW may implement change after a further fourteen (14) days.

A29.2 Significant Change

(a) For the purposes of this clause and without limiting the generality thereof, significant change includes changes in the composition, operation or size of the workforce or in the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure, the alteration of hours of work, the need for retraining or transfer of Employees to other work or locations and the restructuring of jobs and significant changes to the Pacific National Coal, NSW Drug and Alcohol, Fatigue Management and Communications and Monitoring policies subject to clauses A40, A41 and A44.

A29.3 Right To Conciliation

(a) Notwithstanding the above, once the notification has been provided or consultation has commenced in accordance with this clause, a Party may notify FWC of a dispute **in accordance with clause A30** with respect of the proposed change. In such circumstances, Clause A30.2(a) to A30.2(e) need not be followed.

A29.4 Right to Arbitration

(a) A Party shall have the right to request that FWC arbitrate a dispute arising under this clause in circumstance(s) where a Party has failed to follow the notification and or the consultation process outlined in clause A29.1(c).

(b) The employees with their representatives shall have a further right to arbitrate a dispute where Pacific National Coal, NSW have introduced the change and the provisions of clause A29.1(h) have been enacted.

[9] The Agreement's DSP is set out as follows:

A30 Resolution of Disputes

A30.1 Employees may be represented at any stage of the resolution of disputes process by a representative of their choosing which representatives **may include a union**.

A30.2 Where a dispute or grievance arises between Pacific National Coal, NSW and its employees in relation to the application of this Agreement **or other workplace change**, the following will occur:

- (a) Where a person or their representative wish to lodge a dispute or grievance it **must be done so in writing in the form as set out in section G of this Agreement.**
- (b) Where the person or their representative who lodges the dispute / grievance elects to commence the dispute settling process with this step, the Employee(s) who is (are) affected by the decision will discuss the matter with their Local Superintendent or Area Manager. This may be appropriate, even where the local Superintendent or Area Manager was not the Pacific National Coal, NSW manager who made the decision which is subject of the dispute notice.
- (c) The issues raised will be considered and the Employee who lodged the notice will be given a response within 24 hours. This response will be in writing.
- (d) If the dispute/grievance remains unresolved, it will be referred to the Operations or Functional Manager and if the Employee(s) affected so request, a union representative for discussion.
- (e) The discussions must be concluded within 48 hours.
- (f) If the dispute/grievance remains unresolved, it may be referred to the General Manager Coal Operations NSW and if the Employee(s) affected so request, a representative which **may include a union**. Where an Employee chooses a union to represent them, the relevant State Secretary or National Secretary may choose to be involved in these discussions. These discussions must be completed within 48 hours.
- (g) If the dispute/grievance remains unresolved, a “cooling off period” of 48 hours (excluding weekends and public holidays) will occur at this stage of the process. During this period, the Parties may continue to have discussions at whichever level they regard as most likely to assist in resolving the dispute/grievance. The parties may agree, at this point to utilise mediation to resolve the dispute.
- (h) During, or at the conclusion of the cooling off period, a Party may decide to refer the matter to a mutually acceptable independent mediator or the FWA for the purpose of conciliation of the dispute. The conciliation must occur as soon as reasonably practicable.
- (i) Where a dispute/grievance is escalated to the point of either an independent mediator or the FWA in conciliation, the Parties acknowledge the significance of this point being reached. Therefore, any recommendation made by the independent mediator or FWA in an attempt to assist the Parties to resolve the dispute/grievance will be treated as highly influential.
- (j) Where both parties agree, they may empower the mediator or member of the FWA to resolve the matter by arbitration.

A30.3 Any of the steps in the process may be removed where the Parties agree. Likewise, the Parties may agree to extend the timeframes within which each of the steps are to be completed.

A30.4 At all times during this process work shall continue in the matter it was being performed immediately before the dispute or grievance. (*My emphasis*)

Statutory Provisions

[10] The Commission's jurisdiction to deal with disputes in relation to the DSP in enterprise agreements is found at ss595, 738 and 739 of the Act which I set out below:

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.

(2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:

(a) by mediation or conciliation;

(b) by making a recommendation or expressing an opinion.

(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)).

(4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

(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.

738 Application of this Division

This Division applies if:

(a) a modern award includes a term that provides a procedure for dealing with disputes, including a term in accordance with section 146; or

(b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6); or

(c) a contract of employment or other written agreement includes a term that provides a procedure for dealing with disputes between the employer and the employee, to the extent that the dispute is about any matters in relation to the National Employment Standards or a safety net contractual entitlement; or

(d) a determination under the Public Service Act 1999 includes a term that provides a procedure for dealing with disputes arising under the determination or in relation to the National Employment Standards.

739 Disputes dealt with by the FWC

(1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.

(2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:

(a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or

(b) a determination under the Public Service Act 1999 authorises the FWC to deal with the matter.

Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).

(3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

(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.

SUBMISSIONS

For Pacific National

[11] Mr P *Almond*, Solicitor, set out the background to the dispute and the relevant terms of the Agreement and the provisions of the Act. He claimed that even before the Union lodged the s739 notification of dispute, Pacific National had made known its jurisdictional objection to the application. He said that no notices of dispute were lodged by any employees of Pacific National, pursuant to clA30.2(a) of the Agreement. Moreover, the s739 application makes no reference to any particular dispute or circumstance giving rise to a dispute between an employee/s of Pacific National. The applicant is identified as the Union and no ‘representative’ is identified in the application. Mr *Almond* said that at no time, has any identifiable dispute been lodged by an employee of Pacific National. It follows that the Union has purported to lodge a dispute and make the s739 application in its own right. This was contrary to the provisions of the Agreement.

[12] Mr *Almond* dealt in detail with the express wording of clsA29 and A30 to submit that:

- While a ‘party’ may notify a dispute under clA29.3, such notification is limited to a dispute that falls within clA30;
- Clause A30.1 provides representation rights to an employee of Pacific National;
- Clause A30 only operates on the basis of a dispute or grievance between Pacific National Coal and its employees;
- Even if the right to a party (the Union) to notify the FWC of a dispute, this is not a substantive right, but is limited to a right to represent an employee for the purposes of the DSP;
- For the right to a ‘representative’ to lodge a dispute there must be a dispute between Pacific National and the employee who chooses a representative to have that role;
- The Union was not acting as a representative of any employee who had a dispute with Pacific National, but impermissibly notified a dispute in its own right.

[13] Mr *Almond* relied on the decision of the Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v North Goonyella Coal Mines Ltd* (PR943615) (‘*North Goonyella*’) which he submitted involved a DSP in substantively similar terms as the DSP in this case. The Full Bench said the DSP (clause 41):

‘did not contemplate that the dispute resolution procedure could have application to disputes between North Goonyella and the CFMEU in its own right - that is, as a party principal to a dispute and not as a representative of employees. For the reasons already stated, clause 41 only deals with disputes between current employees and North Goonyella, in relation to which the CFMEU may act as a representative.’

[14] Mr *Almond* noted that clA30 in the Agreement (which did not apply in *North Goonyella*) concerns a dispute between Pacific National, NSW and its employees. A distinction is also apparent in subclause (f) of A30.2, which discloses a representative may be other than the union, but ‘may include a union’. This means the Union’s role is limited to acting as a representative of employee/s, not in the role of a party principal to a dispute.

[15] Mr *Almond* contrasted the Agreement’s DSP and the DSP in *North Goonyella* with that considered by *Bissett C* in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Southcorp Wines Pty Limited* [2016] FWC 586 (*‘Southcorp Wines’*). In this latter case, the Commissioner concluded the wording of that Agreement’s DSP provided for the AMWU to initiate a dispute in its own right. There is no such right in this Agreement. Mr *Almond* concluded as follows:

- (a) The RTBU has purported to lodge a dispute and make the present Application in its own right and not as a representative of any employee of Pacific National who has a dispute or grievance with Pacific National. So much is so from the evidence.
- (b) There is no evidence of an actual dispute as characterised by the Coal EA between an employee of Pacific National and Pacific National currently before the FWC.
- (c) The RTBU’s role as a disputant or party principal to a dispute is not a position permitted by clauses A29.3(a) and A30 of the Coal EA.
- (d) Pacific National submits that the authorities support its position that the Coal EA fails to give any substantive rights to the RTBU as a disputant or party principal to a dispute.
- (a) In the absence of a dispute properly being brought before the FWC, the application should be dismissed.

For the Union

[16] Ms A *Rose*, Industrial Officer, rejected the submissions of Pacific National and submitted that there is a valid s739 application before the Commission and a recommendation was sought by the Union, pursuant to clA30.2(i) of the Agreement. Ms *Rose* put that the dispute concerned the correct interpretation of clA17- Redundancy and clA35 – Salary Maintenance in the Agreement, in circumstances where Pacific National is restructuring positions in the planning units at Port Waratah and Illawarra Bulk Terminals by abolishing all positions. She said the dispute was initially lodged on behalf of approximately 25 of 33 affected RTBU members. This number is now reduced to 13.

[17] Ms *Rose* said that the Union notified a dispute on 19 September 2016 under clA29.3(a) of the Agreement and then filed the s739 application in the Commission on 27 September 2016. The dispute was lodged by the Union on behalf of members affected by the restructure. In a letter notifying the dispute, the Union expressed dissatisfaction with the consultation process and alleged a number of breaches of the Agreement. Further exchanges of correspondence between the Union and Pacific National disclosed ongoing disagreement between them as to the approach of Pacific National and the application of the Agreement's terms.

[18] Ms *Rose* submitted that it was incorrect for Pacific National to allege the Union's s739 application makes no reference to a 'dispute or circumstances giving rise to a dispute'. She relied on the answers given at Q2 of the application; see: paragraph 4 above. While Ms *Rose* conceded the application did not name individual employees, the Union under its Rules has the right to notify a dispute on behalf of its members. Further, Pacific National was made aware of the employees during later conciliation proceedings and correspondence from the Union. 17 employees were listed in an email to Pacific National dated 28 October 2016 and later reduced to 13. Meetings were arranged where employees were represented by the Union.

[19] Ms *Rose* relied on clsA2, A3 and A29.3 as providing for the Union as a party to the Agreement to lodge a dispute under clA29.3(a). The plain meaning in clA29.3(a), of skipping the steps in sub-clauses A30.2(a)-(e) results in a dispute being progressed through (f) and (i) of clA30.2, where a significant workplace change is contemplated.

[20] Ms *Rose* submitted that the interaction of these clauses allows the Union, as a party to the Agreement, access to the disputes clause as a party, not as a representative. The dispute is not with the RTBU office and Pacific National, but is a dispute between employees of Pacific National who are members of the Union and Pacific National. Ms *Rose* said the employees have requested the Union to represent them, in addition to the Union's right as a party to lodge a dispute on their behalf. There is a change in the language from clA30.1 to cl30.2(f) to parties and not employees. Ms *Rose* contended that if clA29.3(a) only allows for the Union to notify a dispute and not be a party to the dispute, replicating clA30, then this would render clA29.3(a) with 'no work to do'. This was not the intention of the parties to the Agreement.

[21] Ms *Rose* further submitted that the authorities relied on by Pacific National were not relevant because of the unusual provisions of this Agreement, whose words were not ambiguous; see: *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426. In conclusion, Ms *Rose* put that:

- (a) The RTBU submits that it is a party to the current dispute which has been validly notified and progressed under clauses A29.3 and A30 of the Agreement.
- (b) We submit that accordingly, the FWC can deal with this dispute under sections 738 and 739 of the Act. 739(1) provides that clause 739 "applies if a term referred to in section 738 [that is, a term of an enterprise agreement] requires or allows the Fair Work Commission to deal with a dispute".
- (c) Further, section 595(1) of the Act provides that where the FWC is "expressly authorised" deal with a dispute "in accordance with another provision of this Act", then: 595(2) "The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways: (a) by mediation or conciliation; (b) by making a recommendation or expressing an opinion."
- (d) On this basis, the FWC has the jurisdiction and the power via the Agreement and the Act to hear this dispute and to make a Recommendation.
- (e) The Respondent's jurisdictional objection should be dismissed.

CONSIDERATION

[22] At the outset, I agree with Ms *Rose* that there is no ambiguity or uncertainty in the language used in clsA29 and A30 of the Agreement. The words used are plain and clear on

their face and are not subject to more than one meaning. Nevertheless, to a casual observer it might be seen, (contrary to s577(b) of the Act), that Pacific National's approach is overly technical and legalistic. What can be said with certainty, however, is that Pacific National – even before the filing of this application – has maintained a serious jurisdictional objection to the Union's dispute notification under s739 of the Act. I do not apprehend the Union to be surprised or to have a complaint of not having been on notice as to this objection; but in any event, in my view, and not without some practical reservations, Pacific National's submissions and argument are legally sound, consistent with the language of the relevant DSP clauses and supported by Full Bench authority. Let me elaborate.

[23] In order for the Commission to deal with a jurisdictional objection of the kind raised by Pacific National in this case, it is necessary to identify the characterisation of the dispute. In *Construction, Forestry, Mining and Energy Union v Mt Arthur Coal Pty Ltd* [2016] FWC 2959, Commissioner *Saunders* helpfully set out the relevant legal principles to be applied when undertaking this exercise. I respectfully adopt the Commissioner's approach which I outline hereunder;

[16] The test under s.739 of the FW Act is whether the dispute settlement procedure in the enterprise agreement "requires or allows" the Commission to deal with the dispute. It is therefore necessary to look at the text of the dispute settlement procedure, understood in light of its industrial context and purpose, to determine whether the dispute, properly characterised, falls within it.

[7] The scope of a dispute settlement procedure in an enterprise agreement should not be narrowly construed; "to do so would be contrary to the notion that certified agreements are intended to facilitate the harmonious working relationship of the parties during the operation of the agreement."

[8] In characterising the nature of a dispute the Commission is not confined to the application filed to deal with the dispute. The entire factual background is relevant, and may be ascertained from the submissions advanced by the parties on the question of jurisdiction. Further, a dispute may evolve during proceedings in the Commission. It may therefore be necessary in some cases when ascertaining the character of a dispute to have regard to both the nature of the dispute alleged in an originating application and the factual circumstances as they evolve.

[9] It is also important to note that the character of the dispute is distinguishable from any relief which may be sought, or granted, following an arbitration of the dispute. However, the relief sought may cast light on the true nature of the dispute in some cases.

[10] If the Commission has jurisdiction to deal with the dispute, the nature of the relief that the Commission may grant in such circumstances will depend on the limitation in s.739(5) of the FW Act and the agreement of the parties as recorded in their enterprise agreement, provided that such relief is reasonably incidental to the application of the Enterprise Agreement to which the dispute relates.’ (*Footnotes omitted*)

[24] In my view, for there to be a valid dispute application before the Commission, pursuant either to clA30 per se or notified by a ‘party’ via clA29, two characteristics must be apparent and disclosed. Firstly, there must be identified employee/s who have lodged a grievance or dispute with their employer, Pacific National (in this case due to a workplace change). Secondly, the nature of the employee/s grievance or dispute with Pacific National must be identified and described. (Obviously, the steps in the procedure must also be followed). Given that the s739 application filed by the Union on 27 September 2016, failed on both these counts, it is axiomatic that there is no valid dispute application before the Commission.

[25] Also significant to my determination of this matter is the decision of the Full Bench in *North Goonyella*. There, the Full Bench dealt with the powers of the Commission to deal with disputes under an enterprise agreement and said, uncontroversially at paragraph 34:

[34] The issue of jurisdiction was one capable of determination in a straightforward way by reference to the relevant provisions of the Agreement. The Commission’s powers under s.739 to deal with disputes derive, in the case of an enterprise agreement, from the terms of the disputes resolution procedure contained in the enterprise agreement. The Commission may deal with a dispute only on application by a party to the dispute (s.739(6)), is prohibited from exercising any powers limited by the disputes resolution procedure (s.739(3)), may arbitrate only if the agreed disputes resolution procedure permits it to do so (s.739(4)), and must not make a decision that is inconsistent with the FW Act, the enterprise agreement and any other applicable fair work instrument (s.739(5)).

[26] The Full Bench dealt with the provisions of the relevant enterprise agreement’s DSP at paragraphs 36 and 39 and concluded:

[36] Clause 41 of the Agreement does not in express terms identify who may be party to a dispute of the type referred to in clause 41.1 - that is, a dispute that arises as to the interpretation or application of the Agreement, is about matters in relation to the NES, or is one that another provision of the Agreement authorises to be dealt with under clause 41. However there are a number of indications in the language and structure of clause 41 which make it reasonably clear that what is contemplated is a

dispute between a current employee or employees covered by the Agreement and the employer, North Goonyella:

- (1) The first sentence of clause 41.2 refers to “[t]he employee” choosing representation.
- (2) Step 1 requires that the dispute be discussed in the first instance between the employee(s) and the immediate supervisor, and requires them to make every available effort to resolve the matter.
- (3) Steps 2 and 3 then require discussion between the employee(s) and/or the representative of the employee(s) and, respectively, the relevant Department Manager or his representative and senior Company representatives.
- (4) Clause 41.4 requires that while the steps in the procedure are being followed, work must proceed in accordance with North Goonyella’s reasonable and lawful directions and in accordance with the skills, competence and training of the employee(s) and safe work practices.

[39] There was therefore no capacity under clause 41 for a former employee, or a representative acting on a former employee’s behalf, to initiate a dispute resolution process under clause 41. Nor does clause 41 contemplate that the dispute resolution procedure could have application to disputes between North Goonyella and the CFMEU in its own right - that is, as a party principal to a dispute and not as a representative of employees. For the reasons already stated, clause 41 only deals with disputes between current employees and North Goonyella, in relation to which the CFMEU may act as a representative. The references in clause 41.3 to a “party” and “parties” are, we consider, to be understood as referring to the parties to the instant dispute - that is, North Goonyella and the relevant employee(s) - and not to the definition of “The parties” in clause 3 of the Agreement.

[27] In my view, the terms of the DSP considered by the Full Bench in *North Goonyella* are relevantly similar to that under this Agreement. Accordingly, the Full Bench’s conclusions there arising, must have resonance and application to this case.

[28] The Union’s recurring trope throughout its submissions is that it is simply representing the direct interests of its members adversely affected by the restructuring proposals of Pacific National. I would expect, of course, no less. After all, the ‘bread and butter’ of all Unions’ activities must be to represent their members’ interests. However, under an enterprise agreement, representation is conditional upon, and can only operate within the parameters set out in the dispute settlement procedures which the employees themselves have empowered their representative/s to act upon.

[29] In this case, the fact the Union filed a s739 application on behalf of unnamed members does not, in my opinion, satisfy the express requirements at clA30.1 and clA30.2 for the employees to lodge a dispute or grievance in writing with Pacific National and for them to be represented by a representative of their choosing, which may include a union. I shall develop my reasons for this finding shortly.

[30] The fact the Union subsequently represented individual Pacific National employees, having obtained their written or verbal authority to do so, cannot, in my view, cure the defect in the application by its lodgement without identifying the relevant employees, let alone setting out the Union's authority to represent one or more of them. This is a jurisdictional 'gateway' which must be satisfied in order for the s739 application to be competently before the Commission.

[31] In addition, the fact Pacific National actively engaged in conciliation, without at any time surrendering its jurisdictional objection, does not, as it were, demonstrate any waiver of its right to press its objection at any time.

[32] In my view, the Union's submissions ignore the link between clA29.3 and clA30. True it is, as Ms *Rose* contended, that the preliminary steps at clA30.2(a) to A30.2(e) can be 'skipped' in particular circumstances. But this does not mean the fundamental link to clA30 being a party's right to notify of a dispute in accordance with clA30, can be ignored. The skipping of preliminary steps in the process, still requires a jurisdictional foundation under clA30 to have been established; namely, the lodging of a dispute, in writing, by an employee/s of Pacific National. This conclusion is fortified by the dispute or grievance being about the application of this Agreement or '*other workplace change*'.

[33] Moreover, clA30.1 as a preamble to the full DSP process, appears to emphasise that the Union (if nominated by the employee/s) may be the representative of the employee/s throughout the entire DSP process, as it is expressed as providing for employees to be 'represented at any stage of the resolution of dispute process'... which is then set out in clA30.2.

[34] A number of salient features are evident from the language and structure of clA29 and clA30. These include:

- (1) Clause A29 provides a limited right to arbitration in respect to notification and/or consultation under the clause, whereas the DSP only provides for a mediator, or the Commission, to issue a recommendation, albeit such a recommendation being ‘highly influential’;
- (2) The right to request a recommendation under cl30.2(i) is predicated on a dispute or grievance arising between an employee/s and Pacific National;
- (3) The Union has a right to represent an employee/s under the DSP, but there must be a dispute or grievance between the employee/s who choose the Union as their representative and Pacific National.
- (4) The Union cannot notify a dispute ‘in accordance with Clause A30’ in its own right, but only as a representative of the employee/s. The fact its characterisation morphs at sub-clause (g) to a ‘party’ may be a quirk in drafting, but in any event, it is not materially relevant to the intent of the clause overall, which is to limit the Union’s right under the DSP to a representative role.

[35] It is not disputed that clA30.2(a) was not complied with and the ultimate dispute notification did not name any employee affected by the workplace change. Accordingly, this s739 application has not been properly made in accordance with the Act, pursuant to s587(1)(a). It follows that I am satisfied that Pacific National’s objection to this s739 application has been made out. That being so, I have no alternative but to dismiss the application. An order to that effect will accompany publication of this decision.

[36] I make one final observation. The Union has consistently alleged a number of breaches of the Agreement by Pacific National. If these allegations are seriously contended, then they should be tested in a court of competent jurisdiction. Reliance on a non-binding recommendation might sound industrially sensible and practical, but ultimately allegations of Agreement breaches are serious matters requiring deliberative determination.



DEPUTY PRESIDENT

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Final Written Submissions

For Asciano Services Pty Ltd t/as Pacific National
20 December 2016

For Australian Rail, Tram and Bus Industry Union-New South Wales Branch
23 December 2016