



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009
s.604—Appeal of decisions

J.J. Richards & Sons Pty Ltd

v

Transport Workers' Union of Australia
(C2011/90)

Australian Mines and Metals Association Inc.

v

Transport Workers' Union of Australia
(C2011/3563)

JUSTICE GIUDICE, PRESIDENT
SENIOR DEPUTY PRESIDENT HARRISON
COMMISSIONER ROBERTS

MELBOURNE, 1 JUNE 2011

[1] These are appeals, for which permission is required, by J.J. Richards & Sons Pty Ltd (the company) and the Australian Mines and Metals Association Inc. (AMMA) against a decision made by Commissioner Harrison on 16 February 2011.¹ In the decision the Commissioner granted an application by the Transport Workers' Union of Australia (TWU) for a protected action ballot under s.443 of the *Fair Work Act 2009* (the Act). The company is the employer of the employees concerned. AMMA is an association of employers in the resources and energy sector, using that term in a broad sense to include exploration, development, extraction and related transportation. AMMA claims, by reason of its representative status and coverage, to be aggrieved by the decision. AMMA appeared and made submissions in the proceedings before the Commissioner.

[2] Mr Follett of counsel appeared on behalf of the company and AMMA. Mr A Hatcher SC appeared on behalf of the TWU in both appeals. Mr Hatcher foreshadowed a submission that AMMA's appeal is not competent but indicated that his client did not oppose AMMA being granted leave to intervene and noted that there was at least one competent appeal which would serve as a vehicle for examination of the relevant issues.

[3] Mr Clarke appeared for the Australian Council of Trade Unions (ACTU), Mr Mammone for the Australian Chamber of Commerce and Industry (ACCI), Mr Smith for the Australian Industry Group (Ai Group) and Mr Wedgwood for the Australian Higher Education Industrial Association (AHEIA).

Background

[4] The company provides waste management services under contract and employs approximately 1600 people. It has a waste collection contract with Canterbury City Council in New South Wales. There are apparently 25 employees engaged in relation to that contract, which expires in February 2012. The application with which these appeals are concerned sought an order for a protected action ballot of the company's employees engaged in relation to the Canterbury City Council contract. It is the second such application made by the TWU in recent times. The first application was made on 4 November 2010. Commissioner Harrison granted the first application on 12 November 2010.² The company appealed. We shall refer to this as the first appeal. The first appeal was successful for reasons which are not germane to this appeal.³ The history of the earlier application is set out in the appeal decision.⁴ The day after the decision in the first appeal was handed down, the TWU wrote to the company seeking to commence bargaining. On 1 February 2011 the TWU lodged another application for a protected action ballot order.

[5] The relevant facts are succinctly set out in the Commissioner's decision:

“[3] This application follows an earlier decision by me on 12 November 2010 granting an order on application by the TWU. That decision and order was the subject of an appeal to the Full Bench in December 2010.

[4] On 23 December 2010, the Full Bench upheld the appeal and quashed the decision and order on jurisdictional grounds related to entities of the NSW and Federal branches of the TWU, a technicality not before me at first instance.

[5] On 24 December 2010, the TWU wrote to JJR again seeking to commence bargaining and attached a draft agreement. On 7 January 2011, JJR replied and requested the TWU to reconsider its request on the grounds that the contract with Canterbury City Council will expire in February 2012 and that the Council would not accept JJR passing on increased wage costs.

[6] On 17 January 2011, the TWU wrote to JJR and provided an amended version of a draft agreement. JJR replied on 24 January 2011 reiterating its position.”⁵

[6] An application for a protected action ballot order is made under s.437 of the Act. No issue arises in these appeals concerning the terms or the operation of that section. The application is to be determined under s.443 of the Act. Section 443 reads where relevant:

“443 When FWA must make a protected action ballot order

- (1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:
 - (a) an application has been made under section 437; and
 - (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

- (2) FWA must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).”

[7] The appellants, supported by a number of other parties, contend that a protected action ballot order cannot be made unless bargaining has commenced. Put another way, the satisfaction required under s.443(1)(b), that the applicant has been and is genuinely trying to reach an agreement, is conditioned by two related considerations. The first consideration is that bargaining has commenced with the employer. The second is that if the employer is unwilling to bargain the applicant has exhausted the steps available to it under the Act to force the employer to do so. The Commissioner rejected these submissions both in the earlier application and in the decision under present appeal. The following passage indicates his view:

“[24] In my opinion the Act does not require a bargaining agent to seek a majority support determination, good faith bargaining orders, or scope orders as a prerequisite to seeking a protected action ballot order where an employer refuses to commence bargaining.”

[8] The relevant appeal provision is s.604 of the Act. It reads:

“604 Appeal of decisions

- (1) A person who is aggrieved by a decision:
- (a) made by FWA (other than a decision of a Full Bench or the Minimum Wage Panel); or
 - (b) ...
- may appeal the decision, with the permission of FWA.
- (2) Without limiting when FWA may grant permission, FWA must grant permission if FWA is satisfied that it is in the public interest to do so.
- Note: ...
- (3) A person may appeal the decision by applying to FWA.”

The competence of AMMA’s appeal

[9] An objection is taken to the competence of AMMA’s appeal. The question is whether AMMA is a person aggrieved by the decision within the meaning of s.604(1)(a) of the Act. AMMA is not directly affected by the TWU’s application but is concerned that the decision in this case will deal with important issues concerning enterprise bargaining with the potential to affect many of its members. For broadly the reasons given by a Full Bench in *Re Australian Industry Group* we have decided that AMMA is a person aggrieved.⁶ Although AMMA is not a registered organisation and its representational role is not as wide as that of Ai Group, its members have a sufficient interest in the questions of construction which will arise. Its appeal is therefore competent.

Permission to appeal

[10] The construction advanced by the appellants was also advanced by them in the first appeal. That construction was not accepted by the majority who found that it is open to the tribunal to be satisfied that an applicant is genuinely trying to reach an agreement even though bargaining has not commenced and a majority support determination has not been made.⁷ The appellants submitted in this case that the construction adopted by the majority in the first appeal is inconsistent with the legislative scheme, inconsistent with the relevant extrinsic materials and leads to manifestly absurd and unreasonable results. We have no doubt that the views expressed by the majority in the first appeal were not strictly necessary for the decision and should not be regarded as binding and that we are at liberty to decide the matter for ourselves. Nevertheless the considered views of another Full Bench merit careful attention. In that connection the decision of the majority in the first appeal failed to adopt the reasoning of an earlier Full Bench in *Ford Motor Company of Australia Ltd v CEPU and Others*.⁸ Other decisions have dealt with related issues. It is clear that there is a conflict of authority and it is desirable that we provide some clarity in this area if we can. The questions raised by the appeals are of general importance for the operation of the protected action provisions. For these reasons we grant permission to appeal in both appeals.

Construction of s.443(1)(b)

[11] It is common ground that the question on which the appeals turn is whether the Commissioner's interpretation and application of s.443(1)(b) was wrong. That question raises issues of construction as well as issues of fact. We deal first with the issues of construction.

[12] We have set out s.443 earlier. The words to be construed are "genuinely trying to reach an agreement". As indicated, the appellants contend that a protected action ballot order cannot be granted unless bargaining has commenced or, if the employer is unwilling to bargain, the applicant has exhausted the steps available to it under the Act to force the employer to do so. Those steps include seeking a majority support determination under s.237 and, if necessary, good faith bargaining orders pursuant to s.230. If these submissions were upheld, when an employer declines to bargain and the applicant has not taken the other steps outlined it would never be open to the tribunal to grant a s.437 application. We deal now with the arguments advanced by the appellants and their supporters in this appeal.

[13] The appellants sought to rely on extracts from the relevant Parliamentary materials. It is appropriate to set those extracts out now. The Explanatory Memorandum for the *Fair Work Bill 2008* (the Bill) contains an introductory section entitled "Regulatory analysis". That section includes the following paragraphs:

r.283. Protected industrial action will continue to be available only during negotiations for an enterprise agreement.

r.284. A pre-condition for taking protected industrial action will be that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place."

[14] The following paragraphs from the body of the Explanatory Memorandum should also be set out:

“1629. It is intended that industrial action that is organised or taken in the context of legitimate collective bargaining and meets certain prerequisites is permissible and therefore protected action.

1630. The current WR Act regulates industrial action and allows for protected action to be taken during a bargaining period so long as certain requirements are met. Although the Bill no longer contains the concept of a bargaining period, protected industrial action is only available during bargaining for an enterprise agreement.

... ..

1708. The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.

1709. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.”

[15] The appellants, supported by a number of other parties, submitted that these paragraphs make it crystal clear that it was never intended that protected industrial action could be taken if bargaining had not commenced. Although it is conceded that this construction requires reading words into s.443(1)(b), they submitted that it is permissible to have resort to the extrinsic materials either because the plain meaning of the words of the section is unclear or because, seen in the context of other relevant statutory provisions, the words are ambiguous or obscure. Reference was made to what were said to be inconvenient or absurd results if the section were read so as to permit a ballot before bargaining had commenced or the other steps outlined had been taken. We deal with these arguments below.

[16] The orthodox approach to the construction of a statute is to commence with the words in question, paying regard to their context and such assistance as may be gained from other relevant parts of the enactment and then, possibly, to consider any extrinsic material. That is the approach we shall follow.

[17] Looking first at the critical words in s.443(1)(b), they direct attention to the conduct of the applicant. Significantly, there is no reference to the conduct of the employer. It follows that the conduct of the employer is only relevant to the extent that it might assist in a determination of whether the applicant is genuinely trying to reach an agreement with the employer. The appellants submitted that, until the employer agrees to bargain, agreement is not in contemplation, and all that can be said of the applicant’s endeavours to engage with the employer is that they are attempts to commence bargaining. No such implication arises from the words of the provision. The question posed by the ordinary and natural meaning of the words is whether the applicant’s own conduct indicates that it is attempting to reach an agreement and that it is genuine. It is not apparent from the immediate context that the words should be given a meaning other than their ordinary one. The appellants and other parties,

however, submitted that there are other provisions in the Act which support a contrary interpretation.

[18] When the other provisions to which our attention has been drawn are examined it appears that they do not deal directly with the commencement of bargaining. While the idea of bargaining commencing may be a useful shorthand expression, it is an inaccurate paraphrase of the statutory language. The Act does not use the expression “bargaining has commenced” or any similar expression. There are two relevant expressions used in the Act. The first expression is that of an employer agreeing to bargain. The second is of the employer initiating bargaining. The phrase “the employer agrees to bargain”, or its past tense equivalent “the employer agreed to bargain”, is used three times in the Act. The sections are ss.173(2)(a), 230(2)(a) and 237(2)(b).⁹

[19] Section 173 deals with the employer’s obligation to notify employees of their representational rights in relation to bargaining. Section 173(3) provides that the employer must notify employees of their representational rights within 14 days of the notification time. Section 173(2) prescribes what the notification time is. That section reads:

“173 Notice of employee representational rights

... ..

- (2) The *notification time* for a proposed enterprise agreement is the time when:
- (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
 - (b) a majority support determination in relation to the agreement comes into operation; or
 - (c) a scope order in relation to the agreement comes into operation; or
 - (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

Note: The employer cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).”

[20] We note that s.173(2)(a) uses these words: “the employer agrees to bargain, or initiates bargaining”. Section 230 deals with when bargaining orders may be made. Section 230(2) provides:

“230 When FWA may make a bargaining order

... ..

- (2) FWA must be satisfied in all cases that one of the following applies:
- (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;

- (b) a majority support determination in relation to the agreement is in operation;
- (c) a scope order in relation to the agreement is in operation;
- (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.”

[21] This section prescribes that the tribunal must be satisfied of at least one of four matters before a bargaining order can be made. It can be seen that ss.230(2)(a) to (d) repeat, with some grammatical changes, ss.173(2)(a) to (d). We note in particular the following words in s.230(2)(a): “the employer or employers have agreed to bargain, or have initiated bargaining”. Finally, on this point, we refer to s.237. That section deals with the making of majority support determinations. Section 237(2) sets out the matters of which the tribunal must be satisfied before making such a determination. It is only necessary to set out part of that section:

“237 When FWA must make a majority support determination

Matters of which FWA must be satisfied before making a majority support determination

- (2) FWA must be satisfied that:
 - (a) a majority of the employees:
 - (i) who are employed by the employer or employers at a time determined by FWA; and
 - (ii) who will be covered by the agreement;
want to bargain; and
 - (b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and...”

[22] We note in particular the language in s.237(2)(b). It uses the familiar words: “the employer or employers ... have not yet agreed to bargain, or initiated bargaining”. In common with ss.173(2)(a) and 230(2), s.237(2)(b) does not refer to the commencement of bargaining.

[23] Given the absence of direct references elsewhere in the Act to the commencement of bargaining, we think it is clear from these sections that it is more appropriate to refer to an employer’s agreement to bargain or an employer’s initiation of bargaining, as the case may be. Those expressions do not appear in s.443. We conclude that had the legislature intended that a protected action ballot order should not be available unless bargaining had commenced it would have employed the language of the provisions which the appellants have relied on – ss.173(2)(a), 230(2) and 237(2)(b) – in s.443. The fact that it did not do so is a strong indication that no such condition is to be implied. The contrast in language could not be

plainer. This conclusion is supported by the terms of s.413. It deals with the common requirements for protected industrial action. It is unnecessary to set the section out. Section 413(3) provides that the relevant bargaining representative must be genuinely trying to reach agreement for the industrial action to be protected, but the section does not require that the employer has agreed to bargain or has initiated bargaining.

[24] Equally we can see no basis in the language of s.443 or any of the other provisions referred to for an implication that if bargaining has not commenced an order cannot be made unless the applicant has successfully sought a majority support determination and, possibly, bargaining orders. An express condition of that sort is to be found in s.230(2)(b). Had the legislature intended that s.443 should operate subject to such a condition, language like that in s.230(2)(b) would have been used. We infer that the legislature had no such intention.

[25] The appellants submitted that the consequences of this interpretation indicate that it could not be correct. There were a number of arguments based on various provisions which regulate bargaining. First, attention was drawn to some obligations which only arise when “bargaining has commenced”. It was contended that the legislature could not have intended that protected industrial action could be taken before those obligations arose. The main obligations referred to were the obligation on an employer under s.173 to notify employees of their representational rights, the obligation on bargaining representatives in s.228 to meet the good faith bargaining requirements and the obligation to comply with possible bargaining orders under s.230.

[26] We deal first with the argument that the legislature could not have intended that protected action could be taken before the employer had notified employees of their representational rights under s.173. We see nothing inconsistent with the other parts of the legislative scheme in limiting the obligation imposed on the employer to notify employees of their representational rights to situations in which the employer has agreed to bargain or has initiated bargaining. It would be perverse to impose such an obligation on an employer which had not agreed to bargain. Perhaps more importantly, where a union is genuinely trying to reach an agreement, but the employer has not agreed to bargain, there would be no utility in requiring the employer to notify employees of their representational rights.

[27] We turn to the argument that protected action should not be available before the good faith bargaining requirements in s.228 apply. Accepting, but without deciding, that such is the effect of the provisions, it may be that the legislature intended that result. An important assumption which appears to underlie the argument is that an applicant for a bargaining order should not be permitted to organise protected industrial action to persuade an employer to come to the bargaining table. There is no basis for that assumption. Yet the effect of the interpretation advanced by the appellants is that an applicant which is genuinely trying to reach agreement with an employer is unable to exercise a right, which on any objective reading s.443(1) clearly confers, to obtain a protected action ballot order.

[28] The appellants and those supporting the appeals also contended that if the Commissioner’s construction is permitted to stand a default bargaining representative might obtain a ballot order, even though the bargaining representative had made an unsuccessful application for a majority support determination under s.237. It was submitted that the consequences of this could be very serious indeed. A small group of union members which does not have the support of the majority of the workforce could take protected action which would disrupt the work and affect the pay of other workers through stand downs. While it is

clear that such a situation could arise, it seems to us that the potential for a small group of union members to disrupt the work and affect the pay of other employees is equally present on the construction advanced by the appellants. It is not uncommon for bargaining to be confined to a particular group within a larger workforce. If the employer has agreed to bargain with such a group, any protected action taken by the group may well have repercussions for other employees. It is also relevant that, as we indicate below, there is a strong indication in the Explanatory Memorandum that the outcome of a majority support determination is irrelevant to whether an applicant is genuinely trying to reach an agreement for the purposes of s.443(1)(b).

[29] Another argument should be mentioned. It relates to the ability of the employer to take protected action, known as employer response action, in response to protected industrial action taken by employees. Employer response action is dealt with in s.411. Importantly s.411(a) provides that employer response action must meet the common requirements of protected action in s.413. Pursuant to s.413(3) employer response action is only available to an employer which is genuinely trying to reach agreement. It was argued that the construction adopted by the Commissioner would disadvantage an employer which did not wish to bargain but wished to take industrial action in response to protected industrial action. This is a submission of substance. On the one hand it may be thought that it would be unfair, and unintended, that the Act should permit protected industrial action in circumstances in which employer response action could not be taken. On the other hand such a result may be consistent with the emphasis which the legislation places on bargaining, reflected in the objects of the Act and the good faith bargaining requirements. Both interpretations are open and the legislative scheme does not make one more compelling than the other.

[30] Reference was made to a number of other provisions which, it was submitted, give rise to an implication that protected industrial action cannot be taken unless bargaining has commenced or the applicant has obtained a majority support determination and possibly bargaining orders. None of the provisions, alone or in combination with others, justifies such an implication, given our earlier findings based on the language of ss.173(2)(a), 230(2) and 237(2)(b).

[31] The appellants and those supporting them also relied upon underlying criteria of balance and fairness in the scheme of the bargaining provisions. The submission is to the following effect: because bargaining is compulsory for employers who do not wish to bargain once the prescribed steps have been taken, it cannot have been the intention of the legislature that employers who do not wish to bargain could be subject to protected industrial action before the bargaining representative has taken the steps available to it under the Act to obtain majority support and orders which will require the employer to bargain. These arguments reflect a policy view which, as we have attempted to show, does not find support in the terms of the legislation. As we indicated earlier, there is nothing in the legislative provisions to suggest that a bargaining representative should not be permitted to organise protected industrial action to persuade an employer to agree to bargain. Nor is there anything to suggest that a union which is genuinely trying to reach an agreement for its members, but cannot get the employer to agree to bargain, should not be able to organise protected action unless it has the support of the majority of employees.

[32] We have concluded that the ordinary meaning of the provision in question is clear, there is no basis in the text of other provisions for departing from that meaning, the application of that meaning does not lead to results that are “manifestly absurd or

unreasonable”¹⁰ and there is no sound reason to depart from the ordinary meaning. In those circumstances resort to the Explanatory Memorandum as an aid to a contrary construction is neither permissible nor appropriate. Nevertheless some comment about the Explanatory Memorandum is in order.

[33] Earlier in this decision we set out the extracts from the Explanatory Memorandum on which the appellants rely. The nub of their submission is that the extracts make it plain that protected action can only be taken during bargaining. Although, as counsel for the TWU submitted, the Act does not provide for a bargaining period as such, there is a deal of force in the submission. The appellants made no reference, however, to the paragraphs in the Explanatory Memorandum which deal with cl.443 of the Bill – which became s.443 of the Act. The only mention of bargaining in those paragraphs is in paragraph 1771. It reads:

“1771. For joint applications, each applicant must be and must have been, genuinely trying to reach an agreement with the relevant employer. A finding by FWA that there is no majority support for collective bargaining is not of itself intended to be determinative of the question of whether the applicant is genuinely trying to reach an agreement with the employer.”

[34] If it had been intended that a protected action ballot order could not be made unless bargaining had commenced one might have expected some reference to that intention in the part of the Explanatory Memorandum which deals with protected action ballot orders. There is no such reference. Furthermore, as counsel for the TWU pointed out, the second sentence of the paragraph suggests that a finding by Fair Work Australia that there is no majority support for collective bargaining is not intended to be determinative of whether the applicant is genuinely trying to reach an agreement. This is a strong indication that the outcome of an application for a majority support determination is irrelevant to the question of whether the applicant is genuinely trying to reach an agreement. Our conclusion is that when all of the relevant paragraphs are considered, support for the appellants’ construction in the Explanatory Memorandum is qualified at best.

[35] We mention also that other parts of the Explanatory Memorandum and parts of the Minister’s second reading speech in the House of Representatives were relied upon by parties supporting the appeal. Ai Group, for example, referred to paragraphs dealing with the use of the words “proposed enterprise agreement” in support of an argument that until the employer agreed to bargain there could be no proposed enterprise agreement for the purpose of s.443(2). ACCI referred to parts of the Minister’s second reading speech concerning important elements of the provisions dealing with bargaining and protected action. We have considered all of that material. While parts of it might provide some support for the appellants’ submissions, they are at best generalised statements which could not be relied upon against our conclusions reached on the basis of ordinary principles of statutory interpretation.

[36] For all of these reasons the Commissioner’s construction of s.443 was correct.

Application to the facts

[37] The appellants focused their submissions on the interpretation of the words in s.443(1)(b). They did not directly challenge the Commissioner’s application of the section to the circumstances before him. Some of the parties supporting the appeal, however, made

submissions which appear to challenge the Commissioner's finding that the TWU was genuinely trying to reach an agreement. It is therefore appropriate to consider the basis for that finding. In doing so we point out that the decision is a discretionary one and can only be challenged on appeal if it is affected by error.¹¹

[38] In the proceedings before the Commissioner the company initially submitted that it had not refused to bargain and then set out its own version of events. In response to the TWU's written proposal for an enterprise agreement, dated 24 December 2010, the company said, in a letter dated 7 January 2011, that its contract with Canterbury City Council would come to an end on 26 February 2012 and that the Council had indicated that it would not reimburse the company for any increased wage or other costs. The company told the TWU that those matters constituted major barriers to the commencement of negotiations. The TWU responded on 17 January 2011. It stated that it had considered the company's position but did not accept it and that bargaining should still commence. On 24 January the company replied and asked the TWU to reconsider. The application was filed shortly after that. The company's representative told the Commissioner that while it did not wish to engage in bargaining it had not refused to do so and believed that at the time the application was made the parties were discussing whether negotiations should or should not commence.

[39] At the hearing before the Commissioner the company's representative submitted that the TWU's genuineness should be judged in light of its declining to seek a majority support determination and, possibly, bargaining orders. Because those steps were available to the TWU, but it had not taken them, it could not be genuinely seeking an agreement. In this respect the company relied on indications arising from the first application that the TWU had only 14 members of the 25 engaged on the relevant contract and only nine of those 14 responded positively in the first protected action ballot. It was said that when other matters were considered, such as the company's generous employment practices and the size of its workforce Australia-wide, the TWU must have known that any attempt to force the company to bargain by taking protected industrial action would fail. The company argued that if the TWU genuinely wanted an agreement the course most likely to produce that result was an application for a majority support determination. It asked the Commissioner to conclude that the TWU's failure to make such an application indicated a lack of genuineness and suggested the TWU had an extraneous purpose in pursuing protected action, and that purpose could have been to attract publicity and recruit members. The Commissioner found, despite these submissions, that the TWU was genuinely trying to reach an agreement.

[40] Whether an applicant is genuinely trying to reach an agreement is a question of fact to be decided on the material before the tribunal. In this case the TWU served an outline of its main demands on the company and sought its agreement to bargain. The company said it did not wish to commence bargaining. The TWU repeated its request and the company again rejected it. In the circumstances it was open to the Commissioner to draw the conclusion that the TWU was genuine. The company's submissions sought to give a priority to the seeking and obtaining of a majority support determination. But those submissions ignore the right of a union, on compliance with the relevant requirements, to attempt to bring an employer to the bargaining table by resort to the protected industrial action provisions. Pursuing a majority support determination might be seen as equally effective or even more effective in getting the employer to agree to bargain than attempting to organise protected industrial action. But the fact that the TWU chose one approach rather than the other is not necessarily indicative of a lack of genuineness. It was open to the Commissioner to decide that the TWU was genuinely trying to reach an agreement.

[41] In a case in which a bargaining representative legitimately requests an employer to bargain and it is clear the employer does not agree to do so, it is likely that the representative will be found to be genuinely trying to reach an agreement, unless there is material from which it could be concluded that the request to bargain is a sham. Where the employer agrees to bargain other considerations are likely to be relevant. In either case all of the circumstances would need to be taken into account in deciding whether the bargaining representative is genuine.

Conclusion

[42] The Commissioner's construction of the legislation was correct and his conclusion on the facts was not affected by error. Accordingly, although we have granted permission to appeal, we have decided that the appeals cannot succeed. We dismiss both appeals.

PRESIDENT

Appearances:

M Follett of counsel for J.J. Richards & Sons Pty Ltd and the Australian Mines and Metals Association Inc.

A Hatcher SC for the Transport Workers' Union of Australia.

T Clarke for the Australian Council of Trade Unions.

D Mammone for the Australian Chamber of Commerce and Industry.

S Smith for Australian Industry Group.

D Wedgwood for the Australian Higher Education Industrial Association.

Hearing details:

2011.

Sydney.

April, 18.

¹ [2011] FWA 973.

² [2010] FWA 8766.

³ [2010] FWAFB 9963 at paras 98-101.

⁴ *Ibid.*, at paras 1-8.

⁵ [2011] FWA 973.

⁶ [2010] FWAFB 4337 at paras 9-12.

⁷ *ibid.*, at paras 52-70.

⁸ [2009] FWAFB 1240 at paras 32-48.

⁹ “[A]greed to bargain” also appears in s.249(1)(b)(i) but in a very different context and that section may be disregarded.

¹⁰ *Acts Interpretation Act 1901*, s.15AB(1)(b)(ii).

¹¹ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000), 203 CLR 194 at para 21.

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