DECISION

Fair Work Act 2009
s.604—Appeal of decision

J.J. Richards & Sons Pty Ltd
v
Transport Workers' Union of Australia
(C2010/730)

VICE PRESIDENT LAWLER
SENIOR DEPUTY PRESIDENT O'CALLAGHAN
COMMISSIONER BISSETT MELBOURNE, 23 DECEMBER 2010

Appeal - application for a protected action ballot order - requirement in s.443(1)(b) - whether "genuinely trying to reach an agreement" - whether available when employer refuses to bargain or whether only remedy is a majority support determination.

DECISION OF VICE PRESIDENT LAWLER AND COMMISSIONER BISSETT

[1] This is an application pursuant to s.604 of the *Fair Work Act 2009* (**FW Act**) by J.J. Richards & Sons Pty Ltd (**JJR**) for permission to appeal and, if permission is granted, an appeal against a decision of Commissioner Harrison[1] to make an order[2] for a protected action ballot in relation to certain employees of JJR who perform subcontract garbage collection for the Canterbury City Council. That order was granted on the application of the Transport Workers' Union of Australia (**Federal TWU**).

Background

[2] It is not in dispute that the primary business of JJR is as a garbage collection contractor and that JJR undertakes contract garbage collection for a number of NSW councils, including the Canterbury City Council.

[3] On 24 February 2010 the Transport Workers' Union of NSW (**NSW TWU**) wrote to the Sydney Operations Manager of JJR stating:

> "Employees of JJ Richards & Sons P/L, members of the Transport Workers Union of NSW, have requested the Union to initiate negotiations with your company for an enterprise agreement <u>for New South Wales</u>.
>
> Could you please advise, by Wednesday 3 March, your company's willingness or otherwise to enter into discussions with the Transport Workers' Union."
>
> (emphasis added)

[4] On 3 March 2010 JJR replied as follows:

> "We refer to your written request on the 24th February 2010 that J.J. Richards & Sons Pty Ltd engage in negotiations for an Enterprise Agreement for New South Wales.
>
> We hereby advise that at this stage, the Company declines to enter into discussions with the Transport Workers Union to negotiate and Enterprise Agreement for New South Wales. At this time the Company is of the belief that the Award, legislative protections and individual benefits afforded by the Company are sufficient."
>
> (emphasis added)

[5] It is clear from the evidence before the Commissioner that the NSW TWU successfully lobbied the Canterbury City Council for a resolution by Council urging JJR to enter into negotiations for an enterprise agreement. A resolution to that effect was passed by the Council on 23 September 2010 and conveyed to JJR by letter dated 6 October 2010.

[6] On 11 October 2010 JJR wrote to the General Manager of the Council. That letter includes the following:

> "...
>
> With reference to the second dot point resolving we enter into meaningful negotiations for an EBA, I find it extraordinary Council would do so without knowledge of the current arrangements we have in place or whether there is support for an EBA by the majority of the employees that would be covered by such an Agreement.
>
> We have had preliminary discussions with some of the staff as to whether there is merit or support for an EBA at this late stage of the contract. I personally attended one meeting and it was decided both parties would think about it and return with suggestions if they could think of any. I have not been approached since.
>
> ..."

[7] On 4 November 2010 the Federal TWU made application to Fair Work Australia (**FWA**) for protected action ballot order. That application identifies the group of employees to be balloted as:

> "Employees of [JJR] who perform work in connection with [JJR's] contract with Canterbury City Council and for whom the TWU is a bargaining representative."

[8] Before the Commissioner, and on this appeal, JJR contended that protected industrial action is only available to the parties during the bargaining process. There was no dispute that the criterion in s.443(1)(a) was met in this case. Argument before the Commissioner focussed on whether the requirement in s.443(1)(b) was met. The Commissioner found that it was and made a protected action ballot order accordingly.

Key provision, leave to intervene and permission to appeal

[9] Each of the Australian Chamber of Commerce and Industry (**ACCI**), the Australian Mines and Metals Association (**AMMA**), the Australian Council of Trade Unions (**ACTU**) and the Australian Higher Education Industrial Association (**AHEIA**) sought leave to intervene in the appeal. There is no provision of the FW Act expressly dealing with intervention. Nevertheless, we are satisfied that the broad procedural power in s.589(1) is sufficient to empower FWA to permit intervention in an appropriate case.

[10] This appeal concerns the proper interpretation of s. 443(1)(b) of the FW Act. Section 443 relevantly provides:

> **"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)."

[11] The central issue raised by the appeal is whether FWA has power under s.443 to make a protected action ballot order in circumstances where the employer to whom the order relates has refused to bargain and where there has been no majority support determination in relation to the employees covered by the proposed ballot order. This is an issue of considerable practical importance.

[12] Given the practical importance of that issue we granted each of the applications for leave to intervene. For the same reason, we are satisfied that there is a public interest in granting permission to appeal. Accordingly, we are obliged by s.604(2) to grant permission to appeal and do so.

[13] Having granted permission to appeal, the appeal proceeds as a rehearing.[3] Nevertheless, we are constrained from allowing the appeal and exercising any of the powers in s.607(3) unless the decision the subject of the appeal is affected by error.[4]

The Commissioner's decision

[14] The Commissioner noted:

> "[7] JJR submitted that protected industrial action is only available to the parties during the bargaining process. By virtue of its refusal to enter into discussions with the TWU it was said bargaining had not commenced."

[15] The Commissioner noted JJR's reliance on the decision and reasoning in *Ford Motor Company of Australia Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[5] *(**Ford**)* and the fact

that employees had not been issued with a notice of representation rights. He then noted JJR's reliance on Para [32] of and *Total Marine Services Pty Ltd v Maritime Union of Australia*[6] (***Total Marine Services***) and its submission that:

> "... JJR has not engaged in, nor been directed by FWA to engage in negotiations to reach an Enterprise Agreement. As such the Applicant cannot demonstrate that it has "clearly articulated the major items it is seeking for inclusion in the Agreement." JJR has not been provided with any information on what the Applicant may or may not want to include in a proposed Enterprise Agreement. We submit that this application has been brought prematurely."

[16] Finally the Commissioner noted a submission of JJR that:

> "Section 409(1)(a) prescribes that an employee claim action for a proposed agreement is industrial action that is organised or engaged in for the purposes of supporting or advancing claims in relation to the agreement that are only about, or are reasonably about, permitted matters.
>
> The question posed by the TWU in its application does not refer to a claim per se, the subject of bargaining negotiations, and certainly does not advance or support any type of claim. J.J. Richards has never been served notice of any claims made by the TWU and we have not engaged in the process of bargaining. We respectfully submit to the court that the TWU may be misusing this process, as outlined at Division 8 of Part 3-3 of the Act, to initiate negotiations with J.J. Richards, and as such that this is the incorrect mechanism with which to achieve their intentions. The Fair Work Act does not authorise or provide for the use of industrial action to force an employer to engage in enterprise bargaining with an employee representative body such as the TWU."

[17] The Commissioner continued:

> "[12] The TWU submitted that the majority reasoning in Ford had been overtaken by subsequent Full Bench decisions in *Stuartholme School and others v Independent Education Union of Australia* and *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union*.
>
> [13] It was submitted that scope orders, majority support determinations, notification of representational rights or employer agreement to bargain are not pre-requisites for the granting of a protected action ballot.
>
> [14] It was said that the Objects of **Division 8 - Protected action ballots** are simply about allowing employees to determine whether they wish to take protected action.
>
>> "... The idea that employees' capacity to take protected action depends in some way on some level of employer compliance, whether through agreeing to bargain or through some other mechanism, issuing the notice or anything else, simply has no foundation in the text of the Act. Simply as a matter of commonsense the proposition fails. To say that employees can't take protected action until the employer agrees to bargain or agrees to issue a notice of representational rights. It is simply antithetical to the scheme of the Act.

> If we want to force the employer to meet us or to give us information, or otherwise bargain in good faith, then we have to go through the process of forcing them to agree to bargain. But the path of protected industrial action is quite a separate one and that all is required is a genuine attempt or genuine attempts to reach agreement. There is absolutely nothing in the Act that would suggest anything to the contrary, and of course the text of section 443(1) is simple. It might also be useful to consider the objects of the division set out at section 436. The object is:
>
> *... to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action...*"

> [15] I agree with the submissions of the TWU above.
>
> [16] In this matter it is clear that bargaining has not commenced because JJR has refused to engage with the TWU, but the question for decision, having regard to the ordinary meaning of the words of s.443 is whether the applicant, not the respondent, is genuinely trying to reach an agreement.
>
> [17] The object of s.436, referred to above, is not only predicated on a simple notion but is also a facilitative provision to ascertain employee support or otherwise for engaging in protected action.
>
> [18] In my view the preconditions JJR assert as necessary to the granting of an order for protected action are not supported by the Act or by the Explanatory Memorandum's text at paragraph 1755, paraphrased above.
>
> [19] JJR's reliance on the TMS decision is of little relevance in this matter. The Bench in TMS stated that the concept of genuinely trying to reach an agreement will be determined by the circumstances of particular negotiations. The Bench stated: "It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s.443 which must be applied."
>
> (footnotes omitted)

[18] The Commissioner then concluded that the "TWU" has been and is genuinely trying to reach an agreement with JJR and granted the application for a protected action ballot order.

Relevant principles of interpretation

[19] A central issue on the appeal was whether resort could properly be had to the Explanatory Memorandum in construing s.443(1)(b).

[20] Section 15AA of the *Acts Interpretation Act 1901 (Cth)* makes it clear that when a Commonwealth Act falls to be interpreted regard must always be had to the purpose of object underlying the Act and that a construction that would promote that purpose of object is to be preferred:

"15AA Regard to be had to purpose or object of Act

(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

[21] In *Project Blue Sky v Australian Broadcasting Authority*[7] McHugh, Gummow, Kirby and Hayne JJ held:[8]

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."

(footnotes omitted)

[22] The use of extrinsic material in the interpretation of a Commonwealth Act is governed by s.15AB of the *Acts Interpretation Act 1901 (Cth)* which provides:

"15AB Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:
(i) the provision is ambiguous or obscure; or
(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.”

[23] In *CIC Insurance Ltd v Bankstown Football Club Ltd*[9] Brennan CJ and Dawson, Toohey and Gummow JJ observed:[10]

“It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901 (Cth)*, the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as

McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."

(footnotes omitted, underline emphasis added)

[24] In *Re Australian Federation of Construction Contractors; Ex parte Billing*[11] (***AFCC***) a six member bench of the High Court unanimously observed:

"Reliance is also placed on a sentence in the second-reading speech of the Minister when introducing the Consequential Provisions Act, but that reliance is misplaced. Section 15AB of the *Acts Interpretation Act 1901 (Cth)*, as amended, does not permit recourse to that speech for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable. In our view neither of those conditions is satisfied in the present case."

[25] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[12] Hayne, Heydon, Crennan and Kiefel JJ gave the following short summary of the relevant principles:[13]

"47. This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

(footnotes omitted)

[26] In *Residual Assco Group v Spalvins*[14] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ noted:[15]

"In construing a statutory provision, we should always keep in mind what Learned Hand J said in *Cabell v Markham*:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." "

[27] In a recent decision of the High Court of Australia in *Saeed v Minister for Immigration and Citizenship*[16], French CJ, Gummow, Hayne, Crennan and Kiefel JJ held:

"31. ...[I]t is necessary to keep in mind that when it is said the legislative "intention" is to be ascertained, "what is involved is the 'intention *manifested*' by the legislation." Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

32. In *R v Bolton; Ex Parte Beane* the question was whether a statutory provision concerned with "visiting forces" applied to deserters from the armed forces of the United States. Mason CJ, Wilson and Dawson JJ said:

> [T]he second reading speech of the Minister … quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.

33. Regard was had by the Full Court in this case to what was said in *Re Bolton; Ex Parte Beane*. Nevertheless, it is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident Compensation Commission* it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.

34. It may be accepted that the context for the enactment of s 51A was provided by the decision in *Ex parte Miah* and that s 51A was an attempt to address the shortcomings identified in that decision. Resort to the extrinsic materials may be warranted to ascertain that context and that objective, although it is hardly necessary to do so. But that objective cannot be equated with the statutory intention as revealed by the terms of the subdivision. The question whether s 51A in its operation has the effect contended for, of excluding the natural justice hearing rule, is to be answered by having regard, in the first place, to the text of s 51A and the provisions with which it interacts. The questions which, in turn, are raised about the operation of s 51A, it will be seen, are not answered by anything said in the extrinsic materials. This is explicable. The decision in *Ex parte Miah*, which s 51A addressed, was not concerned with the application of s 57 of the subdivision to offshore visa applicants."

(footnotes omitted, underline emphasis added)

[28] The observations in *AFCC* and *Re Bolton; Ex Parte Beane*[17] were directed at reliance on a second reading speech. However, given the terms of s.15AB, they are equally applicable to reliance on an Explanatory Memorandum.

[29] Drawing these principles together, the task of statutory interpretation is concerned with ascertaining the intention of the legislature as manifested by the text of the legislation.

Context (using that word in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means, one may discern the statute was intended to remedy) and the purpose or object underlying the legislation must always be considered. These must be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise. The text of a provision, read in context and having regard to the object and purpose of the provision, is always the surest guide. Moreover, the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed. Resort to explanatory memoranda and other extrinsic material may only be had for the purposes stated in s.15AB(1)(a) and (b) of the *Acts Interpretation Act 1901*.

[30] It is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory interpretation. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning. Section 15AB does not permit recourse to explanatory memoranda or other extrinsic material for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable.

[31] One may observe in the decisions of this and other tribunals a tendency when interpreting statutory provisions to have resort to the relevant explanatory memorandum without observing the full rigour of these principles. Nevertheless, when, as occurred in this appeal, objection is taken to resort to the explanatory memorandum there is no excuse for not giving full effect to these principles.

The proper interpretation of s.443(1)(b)

Purpose or object

[32] Section 4 contains a "guide" to the FW Act. It notes that the FW Act "is about workplace relations". There is no need to speculate or hypothesize about the objects and purpose of the FW Act as a whole. Its objects are specified expressly in s.3:

> **"3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium sized businesses."

[33] Obviously, the object in s.3(f) is the object that bears most directly on the interpretation question in this case.

[34] Part 2-4 of the FW Act deals with "Enterprise Agreements". Section 171 specifies the objects of Part 2-4

"171 Objects of this Part

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and
(ii) dealing with disputes where the bargaining representatives request assistance; and
(iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay."

[35] There is no separate statement of objects for Part 3-3. Section 406 contains a guide to Part 3-3. It includes the following:

"This Part deals mainly with industrial action by national system employees and national system employers.

Division 2 sets out when industrial action for a proposed enterprise agreement is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

...

Division 8 establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

... ”

[36] Division 8 of Part 3-3, in which s.443 appears, deals with “Protected Action Ballots”. Section 435 is a “Guide” to Division 8. It relevantly states:

“This Division establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

Subdivision B provides for FWA to make a protected action ballot order, on application by a bargaining representative of an employee who will be covered by a proposed enterprise agreement, requiring a protected action ballot to be conducted.

...”

[37] Section 436 specifies the object of Division 8:

“436 Object of this Division

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot.”

[38] We adopt the following observations of the Full Bench in *CFMEU v Woodside Burrup Pty Ltd*[18] (***Woodside Burrup***):

“[25] Turning to the context of the Act as a whole, we note first that for many decades prior to the WorkChoices amendments to the *Workplace Relations Act 1996* (WR Act), the Australian Industrial Relations Commission and its predecessors had the power to settle (interstate) industrial disputes through compulsory arbitration. Where a dispute over terms and conditions of employment was resolved by arbitration this occurred through the making of an award, binding the disputants, that had statutory effect. That long standing power to settle disputes by compulsory arbitration was essentially removed by the WorkChoices amendments to the WR Act and has not been restored by the FW Act. Rather, enterprise bargaining may now be seen as a central component of the industrial relations regime provided for in the FW Act by which

employees may act collectively to secure improvements in their terms and conditions of employment.

[26] Industrial action is defined broadly in s.19 of the FW Act. Section 408 defines "protected industrial action". Subject to various requirements, industrial action taken for the purpose of advancing claims for a proposed enterprise agreement is "protected industrial action". FW Act which confers immunity from civil action in relation to protected industrial action (s.415). The taking of industrial action that is not protected industrial action is effectively proscribed. Once an enterprise agreement has been made and approved, any industrial action taken by employees covered by the agreement before the nominal expiry date of the agreement will be unprotected (s.417). A person affected by unprotected industrial action that is happening, threatened pending, probable or being organised can apply to FWA for an order that the industrial action stop, not occur or not be organised. If FWA is satisfied that industrial action, that is not, or would not be, protected industrial action, is that happening, threatened pending, probable or being organised then FWA must make an order that the industrial action stop, not occur or not be organised (s.418). Contravention of such an order is prohibited and both civil remedies and injunctive relief are available for such a contravention (s.421) and, in the case of injunctive relief, with all the consequences that flow from breaching an injunction."

[39] The FW Act creates a right to take industrial action. As was noted by the Full Bench in *Woodside Burrup*[19], it "may properly be seen as the means by which Australia has given effect to its important obligations under the International Labour Organisation Conventions particularly Convention No. 87 Freedom of Association and Protection of the Right to Organise 1948 and Convention No. 98 Right to Organise and Collective Bargaining 1949, both ratified by Australia in 1973."

Context

[40] We turn to consider the context in which s.443 is placed. Part 2-4 of the FW Act is entitled "Enterprise Agreements" and contains a series of provisions regulating the content of enterprise agreements, bargaining for enterprise agreements and the facilitation of such bargaining, the making of enterprise agreements and the approval of enterprise agreements by FWA.

[41] Once bargaining has commenced, the FW Act imposes a duty on the bargaining representatives to bargain in good faith:

"228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;
(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
(f) recognising and bargaining with the other bargaining representatives for the agreement."

[42] It may be noted that s.228(2) imposes important limitations on the duty to bargain in good faith:

"(2) The good faith bargaining requirements do not require:
(a) a bargaining representative to make concessions during bargaining for the agreement; or
(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement."

[43] The FW Act does not expressly impose a duty to bargain in good faith on an employer in relation to whom a majority support determination has been made. Rather, the imposition of that duty is necessarily implied from the general scheme of the FW Act and, in particular, from the obligation to give a notice of representational rights. Section 173 relevantly provides.

"173 Notice of employee representational rights

Employer to notify each employee of representational rights

(1) An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:
(a) will be covered by the agreement; and
(b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

Notification time

(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.

..."

(underline emphasis added)

[44] Part 2-4 makes provision for applications to Fair Work Australia for determinations or orders that can facilitate bargaining. These include applications for:

- a majority support determination (where an employer refuses to bargain - s.236-s.237);
- a scope order (to settle a dispute over the scope of a proposed enterprise agreement - s.238);
- a low-paid authorisation (which enables access to special provisions of the FW Act that are applicable only in relation to the low-paid - s.242-s.243);
- a single- interest authorisations (where employees with sufficiently similar interests may seek to bargain together - s.248-s.250);
- good faith bargaining orders (where a bargaining representative is no observing the good faith bargaining requirements - s.229-230); and
- a serious breach declaration (where there are serious and persistent breaches of a good faith bargaining order - s.234).

[45] An application for a majority support determination is made by "a bargaining representative of an employee who will be covered by a proposed single enterprise agreement". A majority support determination is a determination "that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement" (s.236(1)).

[46] The matters of which FWA must be satisfied before making a majority support determination are specified in s.237(2):

"(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

(c) that the group of employees who will be covered by the agreement was fairly chosen; and

(d) it is reasonable in all the circumstances to make the determination."

[47] An enterprise agreement made under the FW Act cannot operate until it has been approved by FWA pursuant to an application made under s.185 of the FW Act: s.54(1). A protected action ballot order is made "in relation to a proposed enterprise agreement." The expression "enterprise agreement" is defined in s.172(1). The FW Act contains a number of requirements, both positive and negative, as to content that must be satisfied before an enterprise agreement can be approved by FWA.

[48] Protected industrial action is defined in s.408 and relevantly includes: “(a) employee claim action for the agreement (see section 409)”. In relation to “employee claim action”, s.409 relevantly provides:

“409 Employee claim action

Employee claim action

(1) Employee claim action for a proposed enterprise agreement is industrial action that:

(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and

(b) is organised or engaged in, against an employer that will be covered by the agreement, by:
(i) a bargaining representative of an employee who will be covered by the agreement; or
(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Protected action ballot is necessary

(2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).

Unlawful terms

(3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

(4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

(5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWA order that relates to a significant extent to a demarcation dispute.

...”

[49] Section 413 specifies the "common requirements" that must be met for industrial action to be protected industrial action:

> **"413 Common requirements that apply for industrial action to be protected industrial action**
>
> *Common requirements*
>
> (1) This section sets out the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement.
> Type of proposed enterprise agreement
>
> ...
>
> *Genuinely trying to reach an agreement*
>
> (3) The following persons must be genuinely trying to reach an agreement:
>
> (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;
> (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the bargaining representative of the employee."

[50] Section 437 authorises a bargaining representative to apply for a protected action ballot order. Section 437(1) provides:

> "(1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to FWA for an order (a ***protected action ballot order***) requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement."

[51] Other requirements are specified in s.437, both directly and indirectly.

Section 443(1)(b)

[52] We now turn to consider the text of s.443 which, as noted, relevantly provides:

> **"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)."

[53] Once an application for a protected action ballot order has been made in accordance with s.437 the only criteria in s.443 of which FWA must be satisfied before it "must" make the order, is the criterion in s.443(1)(b).

[54] Plainly, the "agreement" referred to in s.443(1)(b), which the applicant for a protected action ballot order must be "genuinely trying to reach" is an enterprise agreement that meets the requirements of the FW Act[20], being the "proposed enterprise agreement" referred to in the opening words of s.443.

[55] When a bargaining representative attempts to initiate bargaining, the proposed [enterprise] agreement may be "inchoate" to use the language of French J in *Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering, Printing and Kindred Industries Union (No 2)*[21] (***Wesfarmers***). In other words, a bargaining representative may propose that there be an enterprise agreement covering an employer and employees without identifying the terms of that agreement.

[56] It may be noted that the opening words of s.437 are identical to the opening words of s.236, the provision authorising a bargaining representative to apply for a majority support determination. Each specifies that "[a] bargaining representative of an employee who will be covered by a proposed enterprise agreement ... may apply". There is no obvious reason why the "proposed enterprise agreement" referred to in s.443(1) needs to be any more developed than a "proposed enterprise agreement" referred to in s.236.

[57] The word "genuine" is defined in the Macquarie Dictionary as follows:

> "*adjective* **1.** being truly such; real; authentic: genuine regret; genuine worth.
> **2.** properly so called: *genuine leprosy.*
> **3.** sincere; free from pretence or affectation: *a genuine person*.
> *–phrase* **4.** the genuine article,
> a. a thing whose authenticity is beyond doubt.
> b. a person who is truly what they purport to be. [Latin *genuīnus* native, natural, authentic, genuine]
> –genuinely, *adverb*
> –genuineness, *noun"*

[58] The expression "genuinely trying" in s.443(1)(b) is, clearly enough, concerned with the genuineness of the "trying", the efforts, to reach the stated goal, namely an enterprise agreement that meets the requirements of the FW Act. It is directed at the *authenticity* of the applicant's efforts to reach that goal. The genuineness or authenticity of an applicant's efforts to reach that goal will turn on its motivation - the intention, object or purpose.

[59] The evident purpose of section 443 is to ensure that a bargaining representative has no access to a protected action ballot, and therefore to protected industrial action, unless that bargaining representative "has been, and is, genuinely trying to reach an [enterprise agreement]".

[60] The expression "genuinely trying to reach an agreement" appears in three sections in the FW Act: s.412, s.413 and s.443. As was held by the Full Bench in *John Holland Pty Ltd v AMWU*[22] (***John Holland***), it is clear from s.412(5) that the legislature intended that expression to have a particular meaning in s.412 that should not affect the proper construction

of the expression as it appears in other provisions of the Act. The requirement that an employee bargaining representative (union) be "genuinely trying to reach agreement" is imposed not only as a precondition to obtaining a protected action ballot, it is also a precondition to actually taking protected industrial action: this is one of the "common requirements" specified in s.413.

[61] As was noted by the Full Bench in *Woodside Burrup*, "[p]rotected industrial action in support of claims for an enterprise agreement, as authorised by the FW Act, is the only lawful mechanism available to employees to achieve improvements to wages and conditions that an employer is not otherwise prepared to agree to."[23] Price inflation, to a greater or lesser extent, is part of the usual state of affairs in the economy (that is, inflation is the norm and deflation the exception). The effects of inflation mean that employees need to obtain wage increases periodically if they are to avoid a decrease in the real value of their wages. It follows that a union acting as an employee bargaining representative will almost invariably have a genuine reason for seeking an enterprise agreement to cover members who have not had the benefit of a wage increase for some time.

[62] In the ordinary course of events where an applicant for a protected ballot order calls (acceptable) evidence that their intention, object or purpose is to reach an enterprise agreement under the FW Act, what may be described as an evidentiary onus shifts to the party or parties opposing the application to demonstrate why that evidence ought not be accepted sufficient to shift the evidentiary onus back to the applicant.

[63] In circumstances where an applicant for a protected ballot order calls (acceptable) evidence that their intention, object or purpose is to reach an enterprise agreement under the FW Act a finding that the applicant was not "genuinely trying to reach an [enterprise] agreement" within the meaning of s.443(1)(b) will necessarily involve accepting evidence establishing that the applicant had some other, extraneous purpose in seeking the ballot. Indeed, when there is evidence from an applicant for a protected action ballot order that they have been and are "genuinely trying to reach an [enterprise] agreement" under the FW Act, it is difficult to conceive of circumstances where it could properly be found they were not, unless there is cross-examination or other evidence establishing that the applicant in truth has some other, extraneous intention, object or purpose or is seeking something other than an enterprise agreement under the FW Act. For example, the evidence may demonstrate that the applicant is pursuing an agreement that it knows or ought reasonably knows would not be an enterprise agreement within the meaning of the FW Act because it contains non-permitted matters contrary to s.172(1) or that the true motivation is to apply pressure in pursuit of political or environmental goals or simply to punish the employer for some perceived wrong doing.

[64] FWA has responsibility under the FW Act for dealing with all applications for approval of enterprise agreements and for dealing with all applications for protected action ballot orders. It is a matter of the direct experience of the Tribunal that the overwhelming majority of enterprise agreements are concluded without any application for a protected action ballot order being made, let alone protected action being taken. Typically, in many if not most cases, bargaining commences consensually at the invitation of either an employee bargaining representative or the employer and proceeds for a time in good faith on both sides before the terms of an agreement are concluded, which agreement is then put to a vote of employees. In the typical case both parties have bargained in good faith at all times and have been "genuinely trying to reach an agreement" from the outset of their involvement in the

bargaining. In such a case, where bargaining is initiated by an employee bargaining representative, this will be from the time that such representative requested the employer to bargain for an agreement. The first thing that an employee bargaining representative needs to do if it is to achieve an enterprise agreement is to secure the participation of the employer in bargaining. When the employer has not yet agreed to bargain, its efforts in that regard can properly be seen as part of genuinely trying to reach an enterprise agreement in accordance with the ordinary meaning of that expression.

[65] Does the provision made in s.236 and s.237 for a majority support determination in circumstances when an employer refuses to bargain necessarily imply that the legislature intended that a majority support determination is the only mechanism by which an employer who refuses to bargain can be compelled to bargain and that protected industrial action ought not be available as an alternative mechanism to compel such an employer to bargain? We think not. We observe that the practical capacity and inclination of employees to take industrial action in support of an enterprise agreement varies from workplace to workplace. At one end of the spectrum are workplaces where there is a high density of union membership and a preparedness on the part of the overwhelming majority of employees to act collectively and take industrial action to advance wages and conditions. At the other end of the spectrum are workplaces with a low density of union membership or no union membership at all and or a disinclination on the part of most employees to participate in industrial action (because, for example, of a fear of retribution which becomes practical if only a small number of employees take action or out of a concern over the adverse impact of such action on others). For cases that fall at that latter end of the spectrum, a mechanism such as a majority support determination is necessary if bargaining is to occur. It is not necessarily required in cases at the former end of the spectrum.

[66] We have also considered whether the language of s.409(1)(a) requires or suggests that a narrower construction be given to the expression “genuinely trying to reach agreement” in s.443(1)(b) and concluded that it does not. In this regard it should be noted that there will invariably be a delay, typically in the order of at least several weeks, between the making of a protected action ballot order and the taking of any protected industrial action consequent upon an affirmative vote in the ballot conducted pursuant to such an order. To the extent that a narrow construction of s.409(1)(a) were adopted (and we expressly refrain from making any conclusion in that regard), that period is one in which specific claims could be advanced. In other words, it cannot be assumed in a case such as the present that the requirement in s.409(1)(a), even on a narrow construction of that provision, will not be met by the time the hypothesised industrial action is taken.

[67] In our view there is nothing in the context of the FW Act within which s.443 appears that requires that the expression “genuinely trying to reach an [enterprise] agreement” should be given anything other than its ordinary English meaning. We respectfully endorse the conclusion of the Full Bench in *John Holland* that “the expression ‘genuinely trying to reach agreement’ in s.443(1)(b) should be given its ordinary meaning”.[24]

[68] In our view, the ordinary meaning of the expression does not lead to a result that is manifestly absurd or is unreasonable. In this context it must be remembered that there is nothing intrinsically immoral about the taking of industrial action to secure improved terms and conditions. On the contrary, the taking of industrial action for that purpose is a ‘right’ recognised under international law and, in particular, under Conventions to which Australia is a signatory. The use of industrial action to induce an employer who has refused to bargain for

an enterprise agreement to commence bargaining may properly be seen as a perfectly legitimate exercise of those 'rights'.

[69] In our view, the ordinary meaning of the expression is entirely consistent with the purpose or object of the FW Act as a whole (including the most obviously relevant object in s.3(f)) and of Division 8 of Part 3-3 in particular.

[70] We consider that the meaning of s.443 and, in particular, the expression, "genuinely trying to reach agreement" in s.443(1)(b), considered in the context of the FW Act and having regard to the object and purpose of s.443 viewed in context, is clear and unambiguous. It follows that must give effect to that meaning without resort to the explanatory memorandum.

[71] Senior Counsel for JJR, supported by the advocates for AMMA and ACCI, placed significant reliance on a number of paragraphs in the Explanatory Memorandum which we accept convey a relatively clear intention on the part of the authors of the Explanatory Memorandum that a protected action ballot should only be available after bargaining has commenced.[25] He called these references in aid of a construction of the expression "genuinely trying to reach an agreement" in s.443(1)(b) that would require bargaining to have commenced before a bargaining representative could be found to be "genuinely trying to reach an agreement". There is another single reference which tends to support the position advanced by the NSW TWU[26], albeit that this reference may only relate to the situation when there are joint applications for a protected action ballot order.

[72] If, consistent with the principles we have outlined, it was permissible to have resort to the Explanatory Memorandum in interpreting s.443(1)(b), we accept that this would likely lead to the adoption of the construction for which the appellant contends. However, when we apply the relevant principles to the present case we are driven to the conclusion that after s.443(1)(b) has been construed in the context of the FW Act as a whole, and having regard to the relevant object and purpose, it has a meaning - its ordinary meaning - that is clear and that is neither ambiguous nor obscure. Further, that meaning does not lead to a result that is manifestly absurd or unreasonable. It follows that neither of the conditions in s.15AB(2) is made out and, accordingly, resort to extrinsic evidence in the form of the Explanatory Memorandum is not permissible.

[73] Senior Counsel for JJR, again supported by the advocates for AMMA and ACCI, relied on several Full Bench decisions of FWA in support of his contentions on the proper construction of s.443(1)(b). In the circumstances, we think it desirable to deal with those decisions in some detail.

[74] The decision in *Ford*[27] concerned an appeal against a decision granting the applications of five unions for protected action ballot orders of certain employees of Ford.

[75] Bargaining between Ford and the five unions had been proceeding for a single enterprise agreement to replace three existing workplace agreements that together covered some 3,284 employees. Ford had issued a notice of representational rights to all of those employees. One of three existing workplace agreements covered powertrain employees, of whom there were some 420 (**Powertrain Agreement**). The Powertrain Agreement had not passed its nominal expiry date and, accordingly, it was not open to the unions to obtain protected action ballot orders in relation to the proposed enterprise agreement while ever its coverage extended to the powertrain employees. The unions adopted a position that they no

longer sought an enterprise agreement with coverage extending to the powertrain employees, but rather now sought an enterprise agreement covering employees other than powertrain employees. It is clear that the unions recognised that it would be unlikely that they would be able to conclude a satisfactory agreement without resort to industrial action and so, in order to advance the interests of the majority of employees, it was necessary to abandon their claim for an agreement that extended to the powertrain employees with a view to securing a separate agreement for those employees after the Powertrain Agreement passed its nominal expiry date. The member at first instance made ballot orders in respect of that reduced group of employees.

[76] The majority concluded[28] that

> "... bargaining had not taken, and was not taking, place for an enterprise agreement under the Act that covers only the non-powertrain employees because Ford had refused to bargain, and was not bargaining, for an agreement with that scope. The discussions that took place between Ford and the unions from 2 October until the date of the hearing at first instance cannot, in our view, be construed as bargaining for a proposed agreement that was not to cover powertrain employees, because Ford had categorically stated that it would not bargain, and was not bargaining, on that basis. As bargaining for such an agreement had not commenced the unions had not been, and were not, genuinely trying to reach an agreement with Ford to cover the employees who were sought to be balloted."

[77] The majority considered the operation of Part 2-4 of the FW Act which deals with enterprise agreements and observed, inter alia:

> "[20] An employer that will be covered by a proposed agreement must give notice of the right to be represented by a bargaining representative to each of its employees who will be covered by the agreement when the employer agrees to bargain or initiates bargaining, or when a majority support determination or a scope order in relation to the agreement comes into operation, or when a low-paid authorisation in relation to the agreement that specifies the employer comes into operation. [s.173(1) &(2)]
>
> [21] Because the agreement is made between the employer and its employees it follows that the unions are bargaining with Ford on behalf of, and for, their members who will be covered by the proposed agreement. Ford is bargaining with its employees who will be covered by the agreement through their bargaining representative. As the bargaining representatives on each side are bargaining in respect of the employees who will be covered by the agreement it follows, as a matter of logic, that during bargaining for a particular agreement the employees to be so covered must be ascertainable.
>
> [22] In order that each employee who will be covered by a proposed enterprise agreement may be represented during the bargaining, s.173(1) requires that those employees be given notice of their right to be represented by a bargaining representative within 14 days of the notification time for the proposed agreement. The notification time is one of the circumstances set out in s.173(2). It seems to us to follow that bargaining under the Act commences, at the earliest at the notification time, but more probably when the employer is required to give, or perhaps when it gives, to its employees who will be covered by the agreement the notice of their

representational rights. It is not until then that they can decide whether, and if so by whom, they wish to be represented in the bargaining for the agreement that will cover them. It would be odd if bargaining for an enterprise agreement under the Act could commence before such time."

[78] The majority then considered the scheme of Part 3-3 which deals with industrial action, referred to the decision in *Project Blue Sky*, and continued:

"[35] It seems to us that inherent in the entire bargaining process is the notion that the employer is bargaining for an agreement that will cover it and an identified group of its employees. The scheme of the Act, especially Parts 2-4 and 3-3, strongly supports this conclusion.

[36] Although it is apparent that the protected action provisions are in a different chapter of the Act from the chapter in which the enterprise agreements provisions are to be found they should not be considered in isolation. Our analysis of Parts 2-4 and 3-3 shows that they are part of a whole. There is only one circumstance when employee claim action under Part 3-3 will be protected industrial action. That is when it is for a proposed enterprise agreement under Part 2-4 and the applicant for the protected action ballot that authorised the industrial action had been, and was, genuinely trying to reach an agreement. The object of Division 8 of Part 3-3 is "to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement." [s.436] The "agreement" that each applicant for a protected ballot order must have been, and be, genuinely trying to reach is, in our view, the proposed agreement in respect of which Chapter 2 bargaining has been occurring. The "proposed agreement" referred to in s.443(1) is the s.173(1) "proposed enterprise agreement" in respect of which an employer must give to its employees a notice of their representational rights.

[37] Paragraph 1630 of the Explanatory Memorandum that accompanied the *Fair Work Bill 2008* draws a distinction between the Act and its predecessor as follows:

> 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**. (Full Bench emphasis)

[38] At Paragraph 1708 the Explanatory Memorandum states:

> 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 … (Full Bench emphasis)

[39] If, indeed, protected industrial action may only be taken during bargaining for an enterprise agreement it would seem odd that an application for a protected action ballot to authorise such action could occur prior to bargaining commencing.

[40] In our view the scheme of the Act demonstrates that that is the case. There is nothing to indicate that it was intended that a protected action ballot order be made, or that protected action be able to be taken, prior to bargaining commencing.

...

[42] A critical issue is when does bargaining for an agreement under the Act commence. We have dealt with this earlier and concluded that, at the earliest, it is the notification time for a proposed agreement.

[43] If FWA is satisfied that an application has been made under s.437, subject to it being 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, it must make the order. It may well be the case here that no application had been made under s.437 because the expression “proposed enterprise agreement” in that section is the same “proposed enterprise agreement” referred to in s.173(1) and the “proposed agreement” referred to in s.443(1). However, as the issue of whether there was an application under s.437 was not argued, having regard to the conclusion we have reached, it is not necessary to decide this issue.

[44] The unions submitted that it is sufficient, on the plain reading of s.443(1)(b), that each applicant for the order has been, and is, genuinely trying to reach an agreement with the employer for the order to issue and that it is not necessary that there already must have been bargaining occurring. They point, by way of example, to the situation where employees, through their bargaining agent, wish to make an agreement but the employer refuses to bargain at all. They submitted that in such a situation the requirements of s.443(1)(b) would have been met because the applicant can be said to be genuinely trying to reach an agreement because it genuinely wishes to have an agreement. If it had consistently tried to engage the employer in negotiations, but had constantly been rebuffed, it is submitted, it demonstrates that it had also been genuinely trying to reach an agreement with the employer of the employees who are to be balloted. That they could have applied for a majority support determination, it is submitted, merely provides an alternative and optional way to persuade the employer to bargain.

[45] In our view the unions’ submissions have little regard for the scheme of the Act, in particular the matters to which we have referred in relation to how bargaining commences and between whom. In our view, those employees to be covered by the proposed agreement must be identified and known at all stages of the bargaining process. If an employer refuses to bargain at all, an application can be made for a majority support determination under s.237 and the employer can be compelled to bargain, and the provisions of s.173 come into play. Similarly, if bargaining has commenced and there are issues about the appropriateness of the employees proposed to be covered, a scope order can be made and again the provisions of s.173 are activated. Single interest and low-paid bargaining also requires that the employers and employees to be covered by the proposed agreement be identified.

[46] If a majority support determination or a scope order has been made, and bargaining does not proceed appropriately, a bargaining order under s.230 can be made, requiring a recalcitrant bargaining representative to bargain in good faith.

> [47] Our analysis of the Act strongly suggests that bargaining must have been, and be, occurring before it can be said that an applicant for a protected action ballot order can be said to have been, and be, genuinely trying to reach an agreement. In her second reading speech, consistently with the extracts form the Explanatory Memorandum to which we have referred, the Minister for Employment and Workplace Relations observed that the "bill distinguishes between protected industrial action which may legitimately occur **during bargaining** and unprotected industrial action taken outside of bargaining." " (original emphasis)

[79] In *Stuartholme School v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane*[29] (**Stuartholme**) a Full Bench declined to follow the reasoning of the majority in Ford and concluded that the scope of a proposed agreement is a matter that can itself be the subject of bargaining for the agreement.[30] After setting out paragraph [45] of the reasons of the majority in Ford, the Full Bench in Stuartholme observed:

> "[19] The appellants wish to argue that this passage requires the conclusion that because the IEUA and the appellants were in disagreement as to the number and scope of the enterprise agreements to be made, bargaining had not commenced and the IEUA was not genuinely trying to reach an agreement. There are a number of difficulties arising from this passage.
>
> [20] The first difficulty relates to the fact that the conclusion expressed was reached without reference to the single interest employer authorisation provisions with which we are directly concerned in this case. The conclusion is inconsistent with the conclusion we have arrived at independently based on the construction of those provisions.
>
> [21] The second difficulty is that there is Full Bench authority, not referred to by the majority in Ford, which strongly suggests the scope of a proposed agreement can be a proper subject for bargaining under the Fair Work Act. In *Liquor, Hospitality and Miscellaneous Union v Coca-Cola Amatil (Aust) Pty Ltd* (*Coca-Cola*) [[2009] FWAFB 668] a Full Bench considered an appeal against the refusal of a member of Fair Work Australia to make a scope order. In the course of its decision the Full Bench noted that there was disagreement between the negotiating parties as to the scope of any agreement or agreements to be made. The situation is concisely set out in this paragraph:
>
>> "[32] Against this background, we turn to consider the competing interpretations of a s.237(2)(b) majority support determination, which arise because the LHMU and Coca-Cola have different bargaining positions as to the number and scope of agreements which should be made in relation to the relevant employees. The LHMU seeks a single agreement covering all employees, while Coca-Cola seeks three agreements covering various specified groups of employees. None of the agreements cover one small group of employees. There is a dispute as to the scope of the agreement or agreements to be made." [Ibid]
>
> [22] Despite the disagreement as to scope, there is no indication in the decision that because of that disagreement bargaining had not commenced. To the contrary, the Full

Bench approached the appeal on the basis that a scope order might be applied for after bargaining had commenced. [Ibid at para 51]

[23] The third difficulty arises from the terms of s.238, which deals with scope orders.

...

[24] The terms of [s.238] unambiguously suggest that bargaining may have commenced under the Fair Work Act even though the parties to the bargaining process are in disagreement about the scope of the proposed agreement.

[25] Given these difficulties we would not be inclined to adopt the reasoning of the majority in *Ford*. There is no reason why questions of scope cannot be included in bargaining in the context of a single interest employer authorisation and the mere fact that a bargaining representative puts scope in issue does not mean the bargaining representative is not genuinely trying to reach an agreement. This conclusion removes the basis for the appeals against the decision of 10 December 2009 and therefore we have concluded that those appeals would not succeed. In the circumstances we decline to extend the time for lodging the appeals against the decision of 10 December 2009."

(emphasis added)

[80] It is clear that if the approach in *Ford* had been followed, the result in *Stuartholme* would have been different. The approach of the Full Bench in *Stuartholme* was endorsed by a Full Bench in *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union*[31] (***MSS***) where the Full Bench observed:

"[12] It goes without saying that ordinarily, if not invariably, where an employer has refused to bargain it will not have issued a notice of representational rights under s.173 to any of its employees. This is because, in the absence of a majority support determination, a scope order or a low paid authorisation, the obligation [under s.173] to issue such a notice does not arise until after the employer "agrees to bargain, or initiates bargaining".

[13] Thus, s.236 proceeds on the premise that a union or other person can be "a bargaining representative of an employee who will be covered by a proposed single enterprise agreement" where the employer has "not yet agreed to bargain, or initiated bargaining, for the agreement", that is, *before* a notice of representational rights has been issued by an employer of employees who would be covered by that proposed agreement. It follows that a union or other person can be a bargaining representative of an employee who will be covered by a "proposed single enterprise agreement" prior to the issue of a notice of representation rights to the employee pursuant to s.173 of the FW Act.

[14] In *Stuartholme School v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* (Stuartholme) a Full Bench of Fair Work Australia held that the scope of a proposed agreement is a matter than can itself be the subject of bargaining for the agreement. We respectfully endorse the reasoning and conclusion of the Full Bench in that regard.

> [15] Once it is accepted that the scope of a proposed agreement can itself be a matter for bargaining it follows that the employer's obligation under s.173(1) to issue a notice of representation rights in relation to a "proposed enterprise agreement" is to issue such a notice to all employees who would be covered by the broader scope of the agreement proposed by the union or the employer as the case may be.
>
> [16] An employer is not obliged to agree to bargain or to commence bargaining for an enterprise agreement in response to a union or other employee bargaining representative proposing an enterprise agreement. An employer can refuse to bargain for an enterprise agreement or can make its agreement to commence bargaining subject to a condition precedent as to the scope of any agreement. If the union or other employee bargaining representative does not accept that condition precedent as to scope, the employer is entitled to refrain from bargaining or agreeing to bargain and the employee bargaining representative's remedy is to seek a majority support determination under s.236 of the FW Act. When such a determination is made the employer is obliged to bargain in good faith for an agreement in accordance with the good faith bargaining requirements of the FW Act: see s.228(1). Of course, s.228(2) makes it plain that the employer is not required to make concessions during bargaining for the agreement or to reach agreement on the terms that are to be included in the agreement."
>
> (footnotes omitted)

[81] None of *Ford*, *Stuartholme* or *MSS* was directly concerned with the central issue that falls for determination in this appeal. To the extent that the reasons of the majority in *Ford* address that issue, they are strictly *obiter dicta* and, in any event, are not a reliable guide for this Full Bench given apparent rejection of the reasoning in *Ford* in both *Stuartholme* and *MSS*.

[82] Next it was contended by those supporting the appeal that the decision of the Full Bench in *Total Marine Services* required a finding that the TWU had not been, and was not, "genuinely trying to seek an agreement" within the meaning of s.443(1)(b). In that case the Full Bench held:

> "[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. [*Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* Print T1982; *Re Media, Entertainment and Arts Alliance* PR928033] It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.
>
> [32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. ..."

[83] We entirely agree with and endorse those observations.

[84] Paragraph [32] of the Full Bench's reasons continues:

> "At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted."
>
> (**the TMS observations**)

[85] JJR relied on those observations before the Commissioner and on appeal. We have some difficulty accepting the TMS Observations without qualification. Quite apart from their tendency to detract from what was held by the Full Bench in paragraph [31] of its decision, our concern is with what was said "[a]t the very least one would normally expect".

[86] We have already made several observations about what constitutes genuinely trying to reach an agreement which are apposite to a consideration of the TMS observations.[32] We note further, as a matter within the direct experience of the Tribunal, that it is often the case that a union or employer will decline to adopt a position on an offer or claim for increased wages until after other, non-wage related claims, have been agreed upon. For example, it is not unusual for an employer that is a subsidiary of a foreign corporation to be given a budget by its parent company in connection with the bargaining. In such a case, it will typically be perfectly rational and reasonable for that employer to refrain from making an offer of increased wages, or responding to a union claim for a particular increase in wages, until all significant non-wage related claims have been resolved. This is because until such claims are resolved the employer will not be in a position to assess the total cost of non-wage related claims and therefore be in a position to ascertain the amount of any increase that can be offered within the available budget. In the same way, it is not unusual for a union to advance non-wage related claims that it regards as important to its members with a view to later setting its claim for increased wages depending upon the outcome of bargaining in relation to those non-wage related claims (sometimes a union will be prepared to accept a lower increase in wages than it would otherwise have insisted upon in order to achieve important non-wage related gains). In both these examples, a bargaining party may refrain from articulating a major item (namely its wage offer/claim) while still bargaining in good faith and "genuinely trying to reach an agreement" within the ordinary meaning of that expression.

[87] Obviously, sometimes a bargaining representative may be content to advance a claim for or offer of a wage increase and make it conditional upon a particular outcome or concession in relation to other claims. However, sometimes a bargaining representative may reasonably and rationally form the view that to do this is likely to create an expectation in the other party that will itself become an impediment to reaching an overall agreement in the event that it becomes necessary to alter the wage offer/claim because other non-wage related claims do not settle as hoped or anticipated. A withholding of a wage claim/offer in such circumstances will not, of itself, be indicative of the bargaining representative not genuinely trying to reach agreement.

[88] In short, we can see no warrant in the language of s.443(1)(b) for putting a straight jacket on the availability of negotiating strategies that would otherwise be rational and reasonable strategies for a bargaining representative to adopt.

[89] The TMS observations, in describing what one would "normally expect" and in the reference to "premature applications", suggest that in the typical case referred to in paragraph [63] above, a union bargaining representative will not be "genuinely trying to reach an agreement" until "it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side". With respect, this is at odds with the reality of the typical case to which we have referred. In relation to the typical case, one may ask rhetorically: what were the bargaining representatives doing in the period prior to the point identified by the majority in TMS if they were not genuinely trying to reach an agreement? It seems to us a matter of common sense that the level of specificity that is consistent with a party "genuinely trying to reach agreement" will vary depending upon the state of the bargaining. At the time a party seeks to initiate bargaining and in the early stages of bargaining its claims and the agreement it proposes may, to use the language of French J in *Wesfarmers*, be "inchoate".[33] However, that fact will not necessarily or even commonly be indicative of a bargaining representative not genuinely trying to reach an agreement.

[90] This is not to say that a failure to articulate a major claim can never be a factor in favour of a finding that a bargaining representative is not "genuinely trying to reach an agreement". Obviously, in particular circumstances such a failure could well support such a finding.

[91] For the reasons we have given, a proper application of the relevant principles of interpretation leads to a conclusion that an employee bargaining representative can be genuinely trying to seek an agreement within the meaning of s.443(1)(b) in circumstances where the employer has refused to bargain for the agreement. The Commissioner was correct to reject the jurisdictional objection raised by JJR that he had no jurisdiction to grant the application because bargaining had yet to commence.

Application of the law to the facts in the present case

[92] The letter of 24 February 2010 sought an enterprise agreement covering all of JJR's employees in NSW. JJR refused to bargain for such an agreement. The application for a protected action ballot order dealt with by the Commissioner related to a proposed enterprise agreement for "[e]mployees of [JJR] who perform work in connection with [JJR's] contract with Canterbury City Council...".

[93] It was contended by JJR that the mismatch between the scope of the agreement proposed by letter of 24 February 2010 (all employees in NSW) and the group of employees in respect of whom the protected action ballot order was sought (JJR employees who perform work in connection with its contract with Canterbury City Council) was such that, for the purposes of the application for a protected action ballot order, the union was seeking a different agreement to that in relation to which JRR had refused to bargain. That is, JRR had not refused to bargain for an agreement covering only those employees who worked on the Canterbury City Council contract. Accordingly, it was argued that the could not be found to have been, and to be, "genuinely trying to reach agreement" with JRR in relation to those employees.

[94] The facts set out at paragraphs [2]-[7] above are the facts as they emerge from the evidence before the Commissioner. In oral submissions to the Commissioner reference was made to a second letter written by the "TWU" to JJR in which it again sought an agreement

with JJR (**second letter**). That second letter was not produced or tendered to the Commissioner. It may be noted, however, that JJR admitted in submissions to the Commissioner that it was aware that the TWU was seeking an agreement with JJR for the Canterbury City Council employees.

[95] On the hearing of the appeal we decided to provisionally receive evidence in relation to the second letter. Section 607(2) confers a discretion on a Full Bench hearing an appeal to "admit further evidence" and "take into account any other information or evidence". The principles governing the admission of fresh evidence on appeal in the courts provide a useful guide to the exercise of that discretion. It is arguable that the fresh evidence in this case would not be admitted if those principles were strictly applied because it was available at the time of the hearing at first instance. Nevertheless, in our view, there are special considerations that apply in relation to an appeal against a decision on an application for a protected action ballot order. Section 441(1) requires FWA, as far as practical, to determine an application for protected action ballot order within two working days after the application is made. A practical consequence of this requirement is that parties, particularly the respondent to such an application, will often not have sufficient time to fully prepare their case. Consequently, *in an appropriate case* it will be a permissible exercise of the discretion in s.607(2) to admit fresh evidence on an appeal against a protected action ballot order decision notwithstanding that, strictly speaking, the evidence was available to be led at first instance. In the exercise of our discretion we admit the further evidence in this case.

[96] We make the following findings in relation to the further evidence:

- The second letter, dated 30 April 2010, advised that the TWU now sought to bargain with JJR for an enterprise agreement to cover only JJR's employees "working on the Canterbury Council Waste Contract and engaged at 6 Childs Road, Chipping Norton in New South Wales."

- The second letter was not received by JJR. (We make that finding on the basis of the evidence of Ms Forster for JJR and notwithstanding that we accept the evidence of the relevant union official, Ms Walton, that she dealt with the letter in accordance with her usual practice which would have seen it placed in a tray for posting by the responsible clerk. We accept that she believed that it has been posted. Whether the non-receipt of the letter by JJR was due to a mistake on the part of the clerk within the union's office responsible for posting mail or whether it went astray in its passage through the postal system is beside the point.)

[97] The requirement in section 443(1)(b) is concerned with the subjective intention, purpose or object of the applicant. Neither the NSW TWU nor the Federal TWU was aware that the JJR had not received the second letter. The relevant official was operating on the reasonable assumption that it had been received. The NSW TWU had sought to bring the influence of the Canterbury City Council to bear on JJR. At the time of the hearing before the Commissioner the NSW TWU had been, and was, trying to get JJR to participate in bargaining for an enterprise agreement. That is, the NSW TWU had been, and was, genuinely trying to reach an agreement with JJR albeit that it had been unsuccessful in persuading JJR to participate in bargaining.

[98] We turn to JJR's final argument. The NSW TWU is a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009*[34] and, as such, is an

“employee organisation” within the meaning of the FW Act and capable of being a default bargaining representative pursuant to s.176(1)(b) of the FW Act. The Federal TWU has always been a federally registered organisation of employees. The NSW TWU and the Federal TWU are different legal entities. Both the first letter of 24 February 2010 and the second letter were on the letterhead of the NSW TWU. The body of the letter of 24 February 2010 makes express reference to the NSW TWU as the union seeking to negotiate an enterprise agreement with JJR on behalf of JJR employees.

[99] JJR contended on appeal that the Commissioner could not have been satisfied, and on a rehearing the Full Bench could not be satisfied, that the “applicant” for the protected action ballot order - the Federal TWU - had been genuinely trying to reach an agreement as required by s.443(1)(b) because the actions relied upon by the Federal TWU to establish that jurisdictional fact were not the actions of the Federal TWU but, rather, were the actions of a different legal entity, the NSW TWU. There was no evidence that the NSW TWU, in taking those actions, was acting as the agent of the Federal TWU. On the contrary, the terms of the two letters make it plain that the entity seeking an enterprise agreement was the NSW TWU.

[100] While there may be little industrial merit in this point (it seems the two entities have a number of common officials and there is no suggestion that JJR ever distinguished between the two entities in its dealings prior to this appeal), it is a point with technical legal merit. Under s.443(1)(b), FWA must be satisfied that “the applicant” for the protected action ballot order has been and is genuinely trying to reach an enterprise agreement. There was no evidence that the Federal TWU, as distinct from the NSW TWU, had done anything in pursuit of an enterprise agreement with JJR prior to making its application under s.437. It follows that we cannot be satisfied on the material before the Commissioner (and irrespective of whether account is taken of the fresh evidence), that the Federal TWU, as the applicant for the protected action ballot order that is the subject of this appeal, had been genuinely trying to reach an agreement with JJR. The application should have been dismissed. We are obliged to uphold the appeal and quash the Commissioner’s decision and order.

[101] We emphasise that this point was not taken before the Commissioner and, given the industrial realities, it is unsurprising that he did not turn his mind to it unprompted by the advocate for JJR. Nevertheless, the point goes to jurisdiction and, it having now been taken, we are obliged on the rehearing to uphold it.

<u>VICE PRESIDENT</u>

DECISION OF SENIOR DEPUTY PRESIDENT O'CALLAGHAN

[102] I have had the opportunity to consider the decision of Lawler VP and Bissett C in this matter. I agree with the decision to allow intervention, with the general summary of the background to the matter and the decision to grant permission to appeal. Further I agree that the appeal should be allowed on the basis that the application was made by a different union entity to that which sought to negotiate with JJ Richards Pty Ltd (**JJR**) such that the Commissioner could not have been satisfied that the applicant was genuinely trying to reach an agreement. I am respectfully unable to agree with the majority position in two related respects. These concern the construction of the *Fair Work Act 2009* (**the FW Act**) as it bears on the bargaining process and the characterisation of the conduct of the federal Transport Workers Union (TWU) in terms of its purported efforts to genuinely try to reach an agreement with JJR for the purposes of s.443 of the FW Act. I have set out the reasons for my conclusions in this matter.

[103] The decision of Harrison C of 12 November 2010 noted the competing position of the parties with respect to the extent to which a protected action ballot order was available in this circumstance, where JJR had declined to bargain. The Commissioner concluded that s.443, relating to protected action ballots was properly available to the TWU in these circumstances. The Commissioner stated:

> "[16] In this matter it is clear that bargaining has not commenced because JJR has refused to engage with the TWU, but the question for decision, having regard to the ordinary meaning of the words of s.443 is whether the applicant, not the respondent, is genuinely trying to reach an agreement.
>
> [17] The object of s.436, referred to above, is not only predicated on a simple notion but is also a facilitative provision to ascertain employee support or otherwise for engaging in protected action.
>
> [18] In my view the preconditions JJR assert as necessary to the granting of an order for protected action are not supported by the Act or by the Explanatory Memorandum's text at paragraph 1755, paraphrased above."

[104] I have briefly outlined the background to the matter in the following terms.

[105] JJR undertakes waste removal services. On 24 February 2010 the Transport Workers Union of New South Wales (TWUNSW) wrote to JJR advising that members of the TWUNSW had asked that union to initiate negotiations for an enterprise agreement in New South Wales. The letter asked JJR to advise if it was willing to enter into discussions to this effect. This letter did not detail, or summarise any claims being pursued by the TWUNSW.

[106] On 3 March 2010 JJR replied such that, at that stage, it declined to enter into discussions for a new agreement. In this letter, JJR advised that it believed the award, legislative protections and individual benefits offered by the company were sufficient.

[107] The parties disagree over a second letter the TWU assert was forwarded (under the same TWUNSW letterhead) with a specific request that negotiations occur for an agreement to cover JJR employees working on the City of Canterbury Waste Contract in New South Wales. Evidence with respect to this second letter was provided to us on a provisional basis in

the appeal. The second letter, however, was not before the Commissioner at first instance. The evidence of the then TWUNSW Official, Ms Walton was that she believed that it was sent to JJR, notwithstanding that this letter was not recorded on the union's mail log. The evidence of Ms Forster of JJR was that it was not received by JJR.

[108] Independent of this second letter, the evidence before Harrison C established that the TWUNSW had approached the City of Canterbury and had complained about its capacity to access JJR employees, for the purposes of negotiating a collective agreement. The TWU in some form had also made various media comments relative to its desire to access JJR employees on the City of Canterbury Waste Contract and negotiate an agreement on their behalf.

[109] As a consequence, the City of Canterbury wrote to JJR on 3 August 2010 in the following terms:

> "Dear John
>
> On Thursday 29 July 2010, I had a meeting with two officials from the Transport Worker Union of NSW. They had a couple of issues which they felt warranted meeting with me to allow me to convey their concerns to you.
>
> Firstly they believe that access to your site at Chipping Norton remains more difficult than necessary when attempting to discuss issues with their members. They also spoke of an issue they have regarding the negotiation with your company regarding an enterprise agreement.
>
> In the discussions held with us there was talk of stoppages occurring in the future if these issues are not able to be resolved.
>
> As you would be aware any stoppages with regard to the removal of waste can look poor in the media for both the council and contractor involved.
>
> I am not suggesting that it is my position to tell you how to run our operations but only to bring these issues to your attention to hopefully allow them to be resolved in a satisfactory way.
>
> Yours sincerely
>
> Jim Montague PSM
> GENERAL MANAGER
>
> 3 August 2010"

[110] JJR responded on 19 August 2010 in the following terms:

> "Dear Jim,
>
> I refer to your letter of the 3rd of this month regarding complaint from the Transport Workers Union about access to our site at Chipping Norton and our employees.

We have always, and continue, to allow the Union access to the site and the drivers according to the current laws. We have diary notes and visitor book signatures recording the visits already undertaken. There has been at least one occasion where the Union representative was asked to return at another time when the arrival has been unannounced.

We are not aware of any discussion of stoppage and consider our relationship with the employees harmonious at this time. I have made enquiries with the local management and they also agree there are no contentious issues and relations are convivial.

I have in the past, and again now, assure you there will be no disruption to the collection service. Any issues we have with the employees are worked out without the need to involve the Council.

I am at a loss as to why the Union would choose to come to you and made these comments when we have had no communication from them on the matter and feedback from the employees suggest they are content.

Thank you for bringing this to my attention, I hope I have provided reassurance there is nothing for you or Council to be concerned about. If this changes I will make sure you are made aware immediately.

Yours sincerely,

John Richards
Managing Director"

[111] The City of Canterbury passed a resolution on 23 September 2010 supporting the rights of JJR employees to be represented by trade unions and calling on JJR to enter into meaningful negotiations with the TWU for an enterprise agreement.

[112] JJR then responded to this correspondence on the basis that it considered that its relations with its employees was harmonious, that rights of entry would be granted in accordance with the FW Act and that JJR had discussed an enterprise agreement with its employees and was not convinced that this was sought.

[113] The protected action ballot application made by the (Federally registered) TWU, identified the group of employees to be balloted as the employees of JJR who perform work in connection with the JJR contract with the Canterbury City Council. It detailed a series of specific questions to be put to these employees.

[114] In the hearing before Harrison C the application for a protected action ballot was made on the basis that the application was properly made and that the TWU's genuine attempts to reach an agreement were truncated by the JJR refusal to negotiate.

[115] JJR asserted that the TWU had not established that it was genuinely trying to reach an agreement and that, because bargaining had not commenced, a protected action ballot was not available.

The Appeal

[116] The matter under appeal goes to the exercise of discretion and hence the principles in *House v King*[35] apply such that the fundamental issue is whether it was reasonably open to the Commissioner to reach a finding that the TWU was genuinely trying to reach an agreement with JJR. This requires consideration of questions about whether and/or when a bargaining representative can be genuinely trying to reach agreement when an employer declines to bargain. Secondly, if bargaining is not an essential characteristic of the concept of genuinely trying to reach an agreement, did the Commissioner have sufficient information available to him to be satisfied that the TWU was genuinely trying to reach agreement in this circumstance? The factual issue in dispute over the second letter allegedly sent to JJR and the import of the fact that the earlier correspondence was from the transitionally registered union, and the application was made by its federal counterpart, are relevant to my consideration of this latter issue.

Is a protected action ballot available if the parties are not bargaining?

[117] The union and employer parties have proposed competing contentions about the construction of the FW Act with respect to whether a protected action ballot is available in a circumstance where there has been no agreement to bargain for an agreement.

[118] In Project Blue Sky Inc and Others[36] the High Court stated:

> “69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.”

[119] More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[37] the Court addressed the task of legislation interpretation in the following terms:

> “47 This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.”

[120] I have considered the construction of the FW Act in specific and overall terms with respect to whether it explicitly permits a protected action ballot application in these circumstances.

[121] It is appropriate to note that I have taken the phrase ‘agreement to bargain’ as referring to the circumstances described in s.237(2). JJR has refused to discuss an agreement with the TWU. I do not consider that this refusal could itself be regarded as bargaining for the

purposes of the FW Act. In this respect, I have noted the dictionary definition[38] of "bargain" is in the following terms:

> "1. an agreement between parties settling what each shall give and take, or perform and receive, in a transaction. ... 6. to discuss the terms of a bargain; haggle over terms. ..."

[122] Part 2-4 of the FW Act deals with the making of enterprise agreements between employers and their employees. The objects of this part of the FW Act are set out in s.171 in the following terms:

> **"171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay."

[123] Section 176 of the FW Act provides that employees are able to be represented in the agreement making process by bargaining representatives. Employee organisations, eligible to be the industrial interests of employees and which have members within the employer's workforce assume the status of default bargaining representatives, absent election by employees of other bargaining representatives.

[124] Section 173 requires that employers who have agreed to bargain, or are initiating bargaining for an agreement must issue a notice of employee representational rights to each employee who will be covered by the agreement. This notice sets out the representational rights of employees. Section 181 mandates that a minimum of 21 days be provided between the issuing of this notice and the making of any agreement.

[125] The time at which the notice of employee representational rights is required to be issued is the "notification time" specified in s.173. This is either the time the employer agrees to bargain, or initiates bargaining for the agreement, or the time at which a majority support determination, a scope order or a low paid authorisation comes into effect.

[126] In the vast majority of situations employers and employee bargaining representatives then proceed to negotiate an agreement. These agreements are formally "made" in that they are endorsed by employees before an application for approval is made pursuant to s.185. A

union bargaining representative may give notice that it seeks to be covered by the agreement pursuant to s.201.

[127] The FW Act details the various considerations required of Fair Work Australia in order to approve or not approve an agreement. Whilst certain issues of agreement content are matters of discretion, there is no discretion to approve an agreement which has been reached through a process which is not compliant with the provisions of Part 2-4.

[128] As the objects of Part 2-4 of the FW Act recognise, there are occasions when either there is no agreement to bargain, no agreement on the scope of the proposed agreement, or allegations that the bargaining process is being marred by behaviour not consistent with the good faith bargaining requirements set out in s.228.

[129] Division 8 of Part 2-4 deals with a number of mechanisms directed at the facilitation of the bargaining process.

[130] Sections 236 and 237 deal with majority support determinations which may be sought by an employee bargaining representative. Such a determination may be issued by Fair Work Australia where it is satisfied that a majority of all the employees who will then be covered by the agreement, want to bargain for that agreement, and the employer has not agreed to do so. In making a majority support determination, Fair Work Australia must also be satisfied that the group of employees to be covered by the agreement was fairly chosen and that such a determination is reasonable in all the circumstances. A requirement for the seeking of a majority support determination is that the application must specify the employer and the group of employees to be covered by the proposed agreement.

[131] Whilst there is no immediate penalty for the breach of a majority support determination, this determination creates an obligation that notices of employee representational rights be issued at that time. The notice of representational rights is particularly significant in its own right. It commences with the following paragraph:

> "*[Name of employer]* gives notice that it is bargaining in relation to an enterprise agreement *([name of the proposed enterprise agreement])* which is proposed to cover employees that *[proposed coverage]*."

[132] The notice of employee representative rights thus represents the statutory commencement of the bargaining process. The notice then continues, to specify the basis for the agreement and employee rights with respect to representation.

[133] In addition, the granting of a majority support determination provides the foundation for other actions that might be taken by bargaining representatives.

[134] A bargaining representative may also seek scope orders pursuant to s.238. Fair Work Australia has the discretion to make a scope order if it is satisfied about certain prerequisites, including whether the group of employees to be covered by the agreement was fairly chosen. Again, the making of a scope order creates a requirement for notices of employee representational rights to be provided where this has not already occurred.

[135] Section 228 specifies the good faith bargaining requirements which must be met by bargaining representatives. These include meeting attendance and conduct, and the

presentation of, and response to proposals. Bargaining Orders may be granted pursuant to ss.229, 230 and 231 where Fair Work Australia is satisfied that there is an agreement to bargain, or a majority support determination or a scope order or a relevant low paid authorisation. Fair Work Australia must be satisfied that one or more bargaining representatives are not meeting the good faith bargaining requirements or that the bargaining process is not proceeding efficiently because there are multiple bargaining agents. Whilst these sections of the FW Act do not explicitly state that notices of employee representative rights must have been issued as a prerequisite for the making of a bargaining order application, the preconditions for the making of such an order, set out in s.230(2) mean that these notices must have been issued. Penalties may apply for the breach of a Bargaining Order.

[136] A further mechanism open to Fair Work Australia to facilitate the bargaining process involves the issuing of a serious breach determination pursuant to ss.234 and 235. Such a determination requires that Fair Work Australia be satisfied about the serious and sustained contravention of one or more bargaining orders that have significantly undermined the bargaining process. Further, that all reasonable alternatives to reaching an agreement have been exhausted and agreement will not be reached in the near future.

[137] A serious breach determination is one of the prerequisites for the making of a bargaining related workplace determination pursuant to s.269. Such a determination specifies the resolution of the matters in dispute between the bargaining representatives and is, in effect, the arbitration of last resort relative to such disputed matters.

[138] Part 3-3 of the FW Act deals with protected industrial action on the part of employees or employers. This action must be in support of a position with respect to a proposed agreement, or in response to action being taken by another negotiating party.

[139] For the current purposes it is worth noting that an employee claim action is specified in s.409(1) in the following terms:

> **“409 Employee claim action**
>
> Employee claim action
>
> (1) Employee claim action for a proposed enterprise agreement is industrial action that:
>
> (a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and
>
> (b) is organised or engaged in, against an employer that will be covered by the agreement, by:
>
> (i) a bargaining representative of an employee who will be covered by the agreement; or
>
> (ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section."

[140] Protected industrial action must be authorised by a protected action ballot. It must be taken consistent with the common requirements specified in ss.413 and 414 and is immune from civil action consistent with s.415.

[141] Protected action ballots are dealt with in Division 8 of Part 3-3. The objects of this division state:

"436 Object of this Division

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot."

[142] Section 437 provides that a bargaining representative of an employee who will be covered by a proposed enterprise agreement may apply for a protected action ballot. It further specifies the matters required to be identified in the application and documents to accompany the application.

[143] Section 443 relevantly provides that:

"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.

...."

[144] It is patently clear that protected industrial action may be taken in support of claims that have not been agreed as part of the bargaining process. However, not only are the provisions relating to the agreement making process and the taking of protected industrial action in different parts of the FW Act, these provisions are not cross-referenced such that the capacity to take protected industrial action is explicitly linked to a specified point in the agreement making process. Significantly, however, the references in Part 3-3 to action being taken in support of a "proposed agreement" reflect the same words referenced in the notice of employee representational rights.

[145] I have noted the objects of the FW Act which relevantly state:

> **"3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> ....
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
>
> ...."

[146] I do not consider that Australia's international labour obligations provide guidance in the interpretation of the provisions of the FW Act with respect to the extent to which bargaining must commence before protected industrial action can be taken. Those international obligations make clear the primacy of Australian law and this question simply goes to the construction of the relevant legislation.

[147] Secondly, I do not consider that the object of the FW Act, set out in s.3(f), assists in this process other than identifying the need for clarity.

[148] In considering the structure of the FW Act, only limited assistance is to be found in other Full Bench decisions**.** In *Total Marine Services Pty Ltd v Maritime Union of Australia*[39] a Full Bench considered whether an applicant was genuinely trying to reach agreement. The essential difference between this matter and the situation in *Total Marine Services* is that in *Total Marine Services* there was no dispute that the parties were engaged in bargaining. Notices of employee representational rights had been issued and the matters in dispute went to the relevant unions' bargaining behaviour. The Full Bench in that matter stipulated that there was a necessary threshold degree of specificity about the claims being pursued and the negotiation process in order for Fair Work Australia to be satisfied that the applicant was genuinely trying to reach agreement.

[149] In *Ford Motor Company of Australia Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union-Vehicle Division Victoria Region; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union-Victorian Branch; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union-Technical and Supervisory Division*[40] (*Ford*), a Full Bench considered the provisions of the FW Act with respect to the concept of genuinely trying to

reach agreement. In that matter, Ford was engaged in bargaining with employee bargaining representatives who had declined to bargain with respect to a significant group of Ford employees. The dispute over the scope of the negotiations underpinned Ford's objection to a protected action ballot, on the basis that it asserted that the unions' were not genuinely trying to reach agreement.

[150] The majority decision in *Ford* determined:

> "[39] If, indeed, protected industrial action may only be taken during bargaining for an enterprise agreement it would seem odd that an application for a protected action ballot to authorise such action could occur prior to bargaining commencing.
>
> [40] In our view the scheme of the Act demonstrates that that is the case. There is nothing to indicate that it was intended that a protected action ballot order be made, or that protected action be able to be taken, prior to bargaining commencing.
>
> ....
>
> [47] Our analysis of the Act strongly suggests that bargaining must have been, and be, occurring before it can be said that an applicant for a protected action ballot order can be said to have been, and be, genuinely trying to reach an agreement. In her second reading speech, consistently with the extracts form the Explanatory Memorandum to which we have referred, the Minister for Employment and Workplace Relations observed that the "bill distinguishes between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside of bargaining." "

[151] The majority position was that because bargaining had not, and was not, taking place with respect to employees whom the unions sought to exclude, a finding that the unions were genuinely trying to reach agreement was not available.

[152] The dissenting decision of Lewin C concluded that the provisions of Part 2-4 of the FW Act should be considered in their own right rather than providing a constraint over the operation of s.437. The Commissioner concluded:

> "[68] It follows from my construction of the limited effect of s.172 of the Act that whether or not an applicant for a protected action ballot order under s.443 of the Act is genuinely trying to reach agreement in relation to a proposed enterprise agreement is only conditional to the extent that the applicant is genuinely trying to reach agreement about permitted matters in respect of employees who are employed at the time an agreement is proposed to be made, who may make an enterprise agreement as provided for by s.172 of the Act."

[153] In *Stuartholme School and Others; The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane T/A Brisbane Catholic Education Office and Others v Independent Education Union of Australia*[41] (*Stuartholme*) a Full Bench was also called upon to consider contested scope issues. This was again in the context of a substantial negotiation and bargaining process, which involved the issuing of notices of employee representational rights.

[154] In *Stuartholme* the Full Bench disagreed with the conclusion reached by the majority in *Ford* to the extent that it concluded:

> "[19] The appellants wish to argue that this passage requires the conclusion that because the IEUA and the appellants were in disagreement as to the number and scope of the enterprise agreements to be made, bargaining had not commenced and the IEUA was not genuinely trying to reach an agreement. There are a number of difficulties arising from this passage.
>
> [20] The first difficulty relates to the fact that the conclusion expressed was reached without reference to the single interest employer authorisation provisions with which we are directly concerned in this case. The conclusion is inconsistent with the conclusion we have arrived at independently based on the construction of those provisions.
>
> [21] The second difficulty is that there is Full Bench authority, not referred to by the majority in Ford, which strongly suggests the scope of a proposed agreement can be a proper subject for bargaining under the Fair Work Act. In Liquor, Hospitality and Miscellaneous Union v Coca-Cola Amatil (Aust) Pty Ltd (Coca-Cola) a Full Bench considered an appeal against the refusal of a member of Fair Work Australia to make a scope order. In the course of its decision the Full Bench noted that there was disagreement between the negotiating parties as to the scope of any agreement or agreements to be made. The situation is concisely set out in this paragraph:
>
>> "[32] Against this background, we turn to consider the competing interpretations of a s.237(2)(b) majority support determination, which arise because the LHMU and Coca-Cola have different bargaining positions as to the number and scope of agreements which should be made in relation to the relevant employees. The LHMU seeks a single agreement covering all employees, while Coca-Cola seeks three agreements covering various specified groups of employees. None of the agreements cover one small group of employees. There is a dispute as to the scope of the agreement or agreements to be made."
>
> [22] Despite the disagreement as to scope, there is no indication in the decision that because of that disagreement bargaining had not commenced. To the contrary, the Full Bench approached the appeal on the basis that a scope order might be applied for after bargaining had commenced.
>
> [23] The third difficulty arises from the terms of s.238, which deals with scope orders. Section 238(1) is as follows:
>
>> "238 Scope orders
>>
>> Bargaining representatives may apply for scope orders
>>
>> (1) A bargaining representative for a proposed single-enterprise agreement may apply to FWA for an order (a scope order) under this section if:

(a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and

(b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover."

[24] The terms of this section unambiguously suggest that bargaining may have commenced under the Fair Work Act even though the parties to the bargaining process are in disagreement about the scope of the proposed agreement.

[25] Given these difficulties we would not be inclined to adopt the reasoning of the majority in Ford. There is no reason why questions of scope cannot be included in bargaining in the context of a single interest employer authorisation and the mere fact that a bargaining representative puts scope in issue does not mean the bargaining representative is not genuinely trying to reach an agreement. This conclusion removes the basis for the appeals against the decision of 10 December 2009 and therefore we have concluded that those appeals would not succeed. In the circumstances we decline to extend the time for lodging the appeals against the decision of 10 December 2009."

[155] The final Full Bench decision which touches upon the matters at issue here is *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union*[42] (*MSS*). In that matter the LHMU, as an employee bargaining representative had sought an agreement to cover a broad group of MSS employees. MSS agreed to bargain only with respect to a narrower category of employees. Notices of employee representational rights were not issued to the employees with whom MSS had not agreed to bargain.

[156] In that matter, MSS contended that there could be no bargaining representative for a group of employees until notices of employee representational rights were issued.

[157] The Full Bench in that matter addressed the operation of the FW Act in the following terms:

"[10] The primary circumstance where a majority support determination will be sought is where the employer who is going to be covered by a "proposed single-enterprise agreement" has refused to bargain.

....

[12] It goes without saying that ordinarily, if not invariably, where an employer has refused to bargain it will not have issued a notice of representational rights under s.173 to any of its employees. This is because, in the absence of a majority support determination, a scope order or a low paid authorisation, the obligation to issue such a notice does not arise until after the employer "agrees to bargain, or initiates bargaining".

[13] Thus, s.236 proceeds on the premise that a union or other person can be "a bargaining representative of an employee who will be covered by a proposed single enterprise agreement" where the employer has "not yet agreed to bargain, or initiated bargaining, for the agreement", that is, before a notice of representational rights has

been issued by an employer of employees who would be covered by that proposed agreement. It follows that a union or other person can be a bargaining representative of an employee who will be covered by a "proposed single enterprise agreement" prior to the issue of a notice of representation rights to the employee pursuant to s.173 of the FW Act.

[14] In Stuartholme School v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (Stuartholme) a Full Bench of Fair Work Australia held that the scope of a proposed agreement is a matter than can itself be the subject of bargaining for the agreement. We respectfully endorse the reasoning and conclusion of the Full Bench in that regard.

[15] Once it is accepted that the scope of a proposed agreement can itself be a matter for bargaining it follows that the employer's obligation under s.173(1) to issue a notice of representation rights in relation to a "proposed enterprise agreement" is to issue such a notice to all employees who would be covered by the broader scope of the agreement proposed by the union or the employer as the case may be.

[16] An employer is not obliged to agree to bargain or to commence bargaining for an enterprise agreement in response to a union or other employee bargaining representative proposing an enterprise agreement. An employer can refuse to bargain for an enterprise agreement or can make its agreement to commence bargaining subject to a condition precedent as to the scope of any agreement. If the union or other employee bargaining representative does not accept that condition precedent as to scope, the employer is entitled to refrain from bargaining or agreeing to bargain and the employee bargaining representative's remedy is to seek a majority support determination under s.236 of the FW Act. When such a determination is made the employer is obliged to bargain in good faith for an agreement in accordance with the good faith bargaining requirements of the FW Act: see s.228(1). Of course, s.228(2) makes it plain that the employer is not required to make concessions during bargaining for the agreement or to reach agreement on the terms that are to be included in the agreement."

[158] With respect to this issue, it concluded:

"[20] This is not a case where MSS had refused to bargain, rather it had agreed to bargain, and had in fact been bargaining, in relation to one of the three categories of employees within the scope of the agreement proposed by the LHMU. Specifically, it was happy to bargain in relation to Revenue Protection Officers but not in relation to Patrol Officers or Aboriginal Liaison Officers. However, once MSS had agreed to bargain within the scope sought by the LHMU, MSS was obliged to commence bargaining in good faith for the proposed agreement. The scope of the agreement was itself a matter for bargaining or, if the scope could not be agreed, for an application under s.238 of the FW Act for a scope order."

[159] I note that, whilst provisions of the FW Act such as s.437 remain substantially unchanged from the former *Workplace Relations Act 1996*, Part 2-4 represents a new series of provisions which reflect a substantially different approach to the basis upon which agreements are founded and mandate different minimum requirements which must be met for any agreement to be approved. They follow a long series of legislative provisions which deal with

the details about agreement claims required of applicants to commence the bargaining process and the time at which bargaining was deemed to commence.

[160] Some conclusions can be drawn from the provisions of the FW Act in the context of these decisions.

[161] The extent to which Fair Work Australia is requested to facilitate the bargaining process pursuant to Part 2-4 is a matter for bargaining representatives, but this Part of the FW Act nevertheless defines certain essential and mandatory elements of the bargaining process.

[162] Once bargaining has commenced, or once there is an agreement to bargain, issues related to the scope of an agreement may form part of the bargaining process and may be the catalyst for a protected action ballot application and/or a scope application.

[163] The requirement that Fair Work Australia be satisfied that an applicant is genuinely trying to reach an agreement relative to a proposed agreement requires the provision of information, by the applicant, to demonstrate what it seeks.

[164] In my opinion the FW Act, taken as a whole, and in the context of these Full Bench decisions, requires that bargaining be occurring before a protected action ballot can be granted. The FW Act provides a mechanism whereby employers can be required to bargain, if the majority of employees confirm through a majority support determination, that they wish to bargain. I consider that it logically follows that where an employer has declined to bargain, a bargaining representative who is genuinely trying to reach an agreement should then establish that there is employee support for bargaining for an agreement because, absent that support, no agreement is possible.

[165] Once the notice of representational rights is issued, the employer has agreed to bargain and employees have been advised of their rights in terms of representation, access to a protected action ballot is one of the bargaining strategies open to a bargaining representative.

[166] Notwithstanding this preliminary conclusion, the effect of the absence of any explicit limitation on access to a protected action ballot before the bargaining process referenced in Part 2-4 commences means that, as this decision demonstrates, this issue could be argued from other perspectives.

[167] The operation of the FW Act with respect to whether or not a protected action ballot is available before bargaining has commenced has significant consequences. Some of these can be simply identified. They go to whether protected industrial action can occur if a majority of employees reject a bargaining proposal through the majority support determination process. In this respect, I note that a protected action ballot is most likely to apply to a smaller employee population than is the case in the consideration of a majority support determination.

[168] Secondly, if Part 2-4 of the FW Act is recognised as providing for agreements between employers and employees with an explicit capacity for employees to nominate bargaining representatives, who are not their union, to what extent does the conduct of a protected action ballot before employees receive formal advice of their representational rights, pre-empt the bargaining process set out in Part 2-4 and operate contrary to the objects stated in s.436 ?

[169] Thirdly, if it is the case that a protected action ballot is available to an applicant before the agreement making process has commenced, does this mean that the concept of genuinely trying to reach an agreement is reduced to a simple request for negotiations? In this last respect I note that there is nothing that indicates that the TWU is pursuing claims which could not be countenanced in an agreement or taking other actions which would automatically exclude its members from taking protected industrial action.

[170] Ambiguities such as these about the operation of the provisions of the FW Act, in the context of the legislation as a whole, mean that it is appropriate to have regard to the overall purpose and operation of the FW Act, to the content of the Explanatory Memorandum and, to the extent necessary, to the Minister's Second Reading Speech. Section 15AB of the *Acts Interpretation Act 1901* provides for access to extraneous material where the meaning of legislative provisions are ambiguous.

[171] The Explanatory Memorandum details the intention that Part 2-4 establishes representational rights and protections and specifies the obligations of bargaining representatives together with mechanisms to help resolve bargaining differences.

Paragraph 651 states:

> "651. If an employer does not agree to bargain with its employees, a bargaining representative for an employee may apply to FWA for a majority support determination. If FWA determines that there is majority support among employees for collective bargaining the employer is required to bargain. If the employer still refuses to bargain, the employee bargaining representative may seek a bargaining order to require the employer to meet the good faith bargaining requirements. Where there is a dispute about which clauses or groups of employees will be covered by the proposed enterprise agreement, FWA has power to make scope orders. A scope order is available on application by a bargaining representative."

Paragraph 697 states:

> "697. Bargaining representatives have a more significant formal role in the bargaining process compared to bargaining agents under the WR Act. Bargaining representatives are entitled to: bargain for enterprise agreements and depending on the type of agreement will usually be entitled to apply for (among other things) protected action ballot orders, bargaining orders, majority support determination, scope orders and serious breach declarations. Bargaining representatives are also entitled to represent a person in matters before FWA (see clause 596). As part of their responsibilities, bargaining representatives for a single-enterprise agreement and multi-enterprise agreement to which a low paid authorisation is in operation are required to meet the good faith bargaining requirements set out in subclause 228(1). Non-compliance with the requirements exposes a bargaining representative to bargaining orders. Division 3 also makes clear that an employer must not refuse to recognise or bargain with a bargaining representative."

Paragraph 948 states:

> "948. If an employer has not agreed to bargain with its employees, an employee bargaining representative may apply for a majority support determination. If FWA

determines that there is majority support for collective bargaining and an employer continues to not participate in bargaining, a bargaining representative for the employees may seek a bargaining order. Where the agreement is a single-enterprise agreement not subject to single interest employer authorisation, a bargaining representative may apply to FWA for a scope order to determine which classes or groups of employees are to be covered by a proposed enterprise agreement."

Paragraph 1630 states:

"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."

Paragraph 1708 states:

"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 ceases - at least temporarily."

Paragraphs 1770, 1771 and 1772 deal with protected action ballots in the following terms:

"1770. FWA must make a protected action ballot order if an application has been made in accordance with clause 437 (which deals with content and related requirements) and the applicant is and has been genuinely trying to reach an agreement with the employer of the employees to be balloted (subclause 443(1)). The 'genuinely trying to reach an agreement' requirement only applies in relation to the particular employer to which the application for a protected action ballot relates.

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.

1772. It could be that an applicant engaged in pattern bargaining (as defined in clause 412) in relation to the relevant employer would not be genuinely trying to reach an agreement, based on the indicia listed in subclause 413(2) (e.g., the applicant may not have been prepared to take into account the individual circumstances of the employer in bargaining for the agreement)."

(the underlining is mine)

[172] Notwithstanding that paragraph 1771 is directed at joint applications for protected action ballots, I am unable to reconcile this paragraph with the other relevant provisions of the explanatory memorandum and the Minister's Second Reading Speech which states:

"The bill provides clear rules to govern industrial action. The bill distinguishes between protected industrial action which may legitimately occur during bargaining and unprotected industrial action taken outside of bargaining."

[173] Taken in isolation, paragraph 1771 of the Explanatory Memorandum suggests that a protected action ballot may be granted even though a majority support determination has been refused. In such an instance it would appear to envisage that protected industrial action may be authorised by a protected action ballot. In those circumstances no notice of employee representative rights would have been issued and no agreement could be reached because the majority of employees to be covered by any agreement would have already indicated that an agreement is not sought. Any protected industrial action would therefore be futile.

[174] However, I could envisage a circumstance where a majority support determination application has failed because of the majority view of employees to be covered by the proposed agreement, but a sub-group of employees, represented by a bargaining representative then seeks to pursue an agreement with more limited application or to a smaller employer population.

[175] In summary terms, the Explanatory Memorandum and the Second Reading Speech indicate the intention of the legislation is to provide for agreements to be made between employers and employees, through mandatory employee representation arrangements and a series of mechanisms designed to facilitate bargaining processes. While these mechanisms can require an employer to bargain, they do not require that agreement must be reached through the bargaining process. Importantly, the Explanatory Memorandum and Second Reading Speech confirm that the taking of protected industrial action is limited to the bargaining process.

[176] Where parties are bargaining for an agreement, a protected action ballot may be sought to authorise protected industrial action to support the claims being made. The use of protected industrial action outside of a bargaining situation appears counter intuitive, inconsistent with the objective intention of the FW Act as a whole and inconsistent with the intention of the legislation.

[177] Where there is no agreement to bargain, the majority support determination becomes fundamental to the agreement making process in so far as it represents the formal mechanism whereby employee support for the commencement of bargaining for an agreement can be tested independently and entirely separately from the protected action ballot process, so as to determine whether a majority of employees support the taking of industrial action. If that majority support exists, s.173(2) requires the employer to agree to bargain.

[178] For Fair Work Australia to be satisfied that an applicant for a protected action ballot has been, and is genuinely trying to reach an agreement, necessitates consideration of the agreement making prerequisites set out in Part 2-4.

[179] In a situation where a bargaining representative requests that an employer bargain or where there is an agreement to do so, this will be obvious. The notices of employee representational rights will be issued and presumably the parties will engage in good faith bargaining behaviour. In the event that they are unable to reach agreement, a bargaining representative may seek a protected action ballot to enable protected industrial action to be taken, or threatened, to further the employee claims.

[180] Fair Work Australia would, in that circumstance, take into account the bargaining process, its status and the conduct of the applicant in deciding whether that applicant was genuinely trying to reach an agreement.

[181] In a situation where a bargaining representative requests an employer to bargain and the employer refuses, the objective intention of the FW Act dictates that the concept of genuinely trying to reach an agreement requires that the bargaining representative must pursue a majority support determination to establish the majority view of all of the employees to be covered by the proposed agreement. If this is established, the employer is then obligated to issue the notices of employee representational rights and to engage in the bargaining process. At that point, if all of the bargaining representative claims are rejected, or the employer refuses to meet and negotiate, a protected action ballot could be available to a bargaining representative where Fair Work Australia is satisfied about the genuineness of the bargaining endeavour.

[182] In such a circumstance, the absence of action on the part of a bargaining representative to initiate the bargaining process consistent with Part 2-4 means that the bargaining representative has not utilised the only way in which an agreement can be put into effect, and the mechanism which requires an employer to bargain, and cannot thus be regarded as genuinely trying to reach an agreement for the purposes of s.443. It may be the case that the bargaining representative clearly wants to reach an agreement but absence of any agreement to bargain must require that the mechanism to start the bargaining process is activated.

[183] In *Total Marine Services* the concept of "genuinely trying to reach an agreement" was expressed in the following terms:

> "[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.
>
> [32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. ...."

[184] I have adopted that general principle on the basis that I do not understand that the subsequent series of minimum normal expectations must be literally applied such that they deprive parties negotiating about how, for instance, an overall employment cost should be packaged, of the capacity to demonstrate that they are genuinely trying to reach an agreement.

[185] To this general principle I would add that where there is no agreement to bargain at all, the concept of genuineness for the purposes of s.443 should incorporate recognition that the only way in which an agreement can be ultimately achieved is consistent with the requirements of Part 2-4. Within this part, s.236 provides the mechanism to deal with an employer's refusal to bargain and the capacity to require the employer to bargain. In such

circumstances a failure to utilise this mechanism cannot be generally consistent with the genuine pursuit of an agreement under the FW Act.

[186] Conceivably, there may be situations where a bargaining representative can establish that the population of employees which it represents is synonymous with the overall employee population such that a protected action ballot can be considered. I think this is unlikely but, even then, until action is taken consistent with Part 2-4, to initiate the bargaining process, it will be very difficult for a bargaining representative to establish that it has been genuinely trying to reach an agreement. That circumstance was not established before Harrison C.

[187] Further, it is conceivable that there could be no dispute that negotiations have been occurring but no notice of employee representational rights has been issued despite the requirements of s.173. In that instance, the capacity to access a protected action ballot order will depend on the information provided to Fair Work Australia. That circumstance clearly does not apply here.

If bargaining is not an essential characteristic of the concept of genuinely trying to reach agreement, was Fair Work Australia able to be satisfied the TWU was genuinely trying to reach agreement?

[188] Even if I am wrong in my conclusion about the structure of the FW Act, I consider that the conclusion of the learned Commissioner was in error in that he was not able, on the material before him, to be satisfied that the TWU was genuinely trying to reach an agreement. The provision to the employer of a letter simply requesting negotiations, cannot meet this requirement.

[189] Not only was there nothing about the content of the claims before the Commissioner or, for that matter before us, but the evidence of Ms Forster of JJR and the correspondence from JJR to the City of Canterbury in August 2010 clearly confirms that JJR was not aware of the agreement content or scope sought by the TWU. At its highest, the February 2010 request for an agreement and the April 2010 request for an agreement of narrower scope (which I am not satisfied was ever received by JJR) represented a statement of intention rather than at least some elemental position established by the provision of a claim, such as a specified wage increase claim, or at least even a request to meet and discuss claims at a particular date and location. The TWU provided no information about its claims or its requests for meetings so as to enable Fair Work Australia to be satisfied about its genuineness. There is no certainty about the scope of the agreement sought.

[190] Additionally, I cannot reconcile the concept of genuinely trying to reach agreement with the TWU approach of seeking to use a third party, being the City of Canterbury as the negotiating medium.

[191] Simply put, and without further commenting on the issue of which union was seeking to negotiate with JJR, the TWU did not provide evidence of actions that would enable the Commissioner to be satisfied as to any of the claims and to whom these were to apply. In that circumstance, satisfaction about whether the TWU was genuinely trying to reach agreement was simply impossible.

[192] I consider that there is a positive onus on the TWU, as the applicant for a protected action ballot, to establish to Fair Work Australia that it is and has been, genuinely trying to reach agreement.

[193] On the approach adopted in Total Marine Services this must go beyond a mere statement of intention. The absence of a claim, clarification of the scope of the agreement sought, or who was the bargaining representative means that the Commissioner could not have been satisfied in these circumstances.

Conclusion

[194] This appeal raises significant issues associated with conduct in pursuit of an agreement. I consider that the decision incorporates an error in the application of the FW Act relative to the circumstances under which Fair Work Australia could find that a bargaining representative is, and has been genuinely trying to reach an agreement. The structure of the FW Act and its objective intention must be that protected industrial action is available as a bargaining device. Consequently the parties have to be bargaining to enable access to a protected action ballot order. Where an employer refuses to bargain, a majority support determination must generally be sought if the applicant is genuinely pursuing an agreement. Majority employee support can require the employer to bargain and hence enable legitimate access to a protected action ballot. In this matter the TWU provided no basis upon which this general requirement could be avoided. In my view the decision was in error in concluding that the TWU was genuinely trying to reach an agreement when it had not responded to the employer refusal to bargain by seeking a majority support determination. I would uphold the appeal on this basis.

[195] Independent of this, if bargaining is not a prerequisite for the making of a protected action ballot, the information before the Commissioner was not sufficient to establish that the TWU was genuinely trying to reach an agreement. I consider that the proper application of the approach in *Total Marine Services* requires the making of actual and specific claims, the identification of the agreement scope sought and clarity in terms of who is the bargaining representative.

[196] Accordingly, irrespective of whether a majority support determination is a prerequisite for a protected action ballot where there is no agreement to bargain, I consider that the discretion available to Fair Work Australia has been misapplied in this situation.

[197] I would uphold the appeal and quash the Order for a protected action ballot.

SENIOR DEPUTY PRESIDENT

Appearances:

J. Murdoch, Senior Council, for JJ Richards & Sons Pty Ltd.

O. Fagir 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.

G. Bull for the Australian Mines and Metals Association.

I. Argall for the Australian Higher Education Industrial Association.

Hearing details:

2010.
Brisbane:
December 7.

Melbourne (video-link to Brisbane and Sydney):
December 14.

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[1] *Transport Workers Union of Australia v J.J. Richards & Sons Pty Ltd* [2010] FWA 8766 (15 November 2010)

[2] PR503546

[3] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at para [17]

[4] Ibid at paras [17] and [32]

[5] [2009] FWAFB 1240

[6] [2009] FWAFB 368

[7] (1998) 194 CLR 355

[8] Ibid at para [69]

[9] (1997) 187 CLR 384

[10] Ibid at 408

[11] (1986) 68 ALR 416 at 420

[12] (2009) 239 CLR 27

[13] Ibid at para [47]

[14] (2000) 202 CLR 629

[15] Ibid at para [27]

[16] (2010) 84 ALJR 507; (2010) 267 ALR 204

[17] (1987) 162 CLR 514 at 518

[18] [2010] FWAFB 6021

[19] Ibid at para [37]

[20] *Australian Postal Corporation v CEPU* [2010] FWAFB 344 at para [60]; see also *Australian Postal Corporation v* CEPU [2009] FWAFB 599 at paras [43] - [45]

[21] (2004) 138 IR 362 at para [70]

[22] [2010] FWAFB 526 at para [38]

[23] [2010] FWAFB 6021 at para [27]

[24] [2010] FWAFB 526 at para [38]

[25] Explanatory Memorandum paragraphs R283, 648, 651, 696, 697, 948 and 975-977 (to which may be added paragraphs 1630 and 1708)

[26] Explanatory Memorandum, paragraph 1771

[27] [2009] FWAFB 1240

[28] Ibid at para [48]

[29] [2010] FWAFB 1714

[30] Ibid at paras [21]-[25]

[31] [2010] FWAFB 6519

[32] see para [64] of this decision

[33] (2004) 138 IR 362 at para [71]

[34] The NSW TWU became a transitionally registered organisation under the *Workplace Relations Act 1996* in 2006. Pursuant to item 627, Sch 22, of the *Fair Work (Transitional Provisions and Consequential Amendments Act) 2009* it is a transitionally recognised organisation under the FW Act.

[35] (1936) 55 CLR 499

[36] (1998) 194 CLR 355 at para 69

[37] (2009) 239 CLR 27 at para 47

[38] the Macquarie Dictionary

[39] [2009] FWAFB 368

[40] [2009] FWAFB 1240

[41] [2010] FWAFB 1714

[42] [2010] FWAFB 6519