DECISION

Fair Work Act 2009
s.437 - Application for a protected action ballot order

United Voice
v
Castlemaine Perkins Pty Limited T/A Lion
(B2017/863)

COMMISSIONER HUNT BRISBANE, 27 SEPTEMBER 2017

Proposed protected action ballot of employees of Castlemaine Perkins Pty Limited.

[1] This decision concerns an application by United Voice for a protected action ballot order. The application has been made under section 437(1) of the *Fair Work Act 2009* (the Act) in relation to certain employees of Castlemaine Perkins Pty Limited T/A Lion (Lion), at Lion's XXXX brewery site in Milton, Queensland.

[2] Lion opposed the application on the grounds that United Voice has not been, and is not, genuinely trying to reach agreement pursuant to s.443(1)(b) of the Act, primarily on the basis that United Voice is advancing claims that are about non-permitted matters. Lion also raised an objection to the inclusion of question eight of the proposed ballot on the basis that it does not constitute industrial action.

Legislative Context

[3] Section 443 of the Act sets out when the Fair Work Commission (the Commission) must make a protected action ballot order. Section 443 states:

> **'443 When the FWC must make a protected action ballot order**
>
> (1) The FWC 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) the FWC 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) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
>
> (3) A protected action ballot order must specify the following:
>
> (a) the name of each applicant for the order;

(b) the group or groups of employees who are to be balloted;

(c) the date by which voting in the protected action ballot closes;

(d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

(3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.

(4) If the FWC decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:

(a) the person that the FWC decides, under subsection 444(1), is to be the protected action ballot agent; and

(b) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.

(5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.'

Hearing

[4] The application was made on 19 September 2017 and heard on 21 September 2017. Section 441(1) of the Act prescribes the following:

'441 Application to be determined within 2 days after it is made

(1) The FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.'

[5] While it was possible to hear the matter within two days of the application being filed, it was not practicable to determine the matter within two days. At the conclusion of the hearing on 21 September 2017, I informed the parties I would determine the application as soon as practicable.

[6] United Voice was represented by Mr Simon Ong, Industrial Officer and permission was granted pursuant to s.596(2)(a)-(b) of the Act for Lion to be represented by Mr Rohan Doyle, Solicitor. Evidence was given by Mr Greg Davey, Organiser on behalf of United Voice, and by Ms Michelle Wicks, Workplace Relations Specialist on behalf of Lion.

Issues in dispute

[7] Before I can make the protected action ballot orders sought by United Voice, one of the matters about which I must be satisfied is that United Voice has been, and is, genuinely trying to reach an agreement with Lion.

[8] Apart from the contested matters set out in [2], there is no dispute between the parties and I am satisfied on the evidence that the statutory requirements for the protected action ballot orders sought by United Voice have been met.

Principles regarding genuinely trying to reach an agreement

[9] As to the question of whether a bargaining representative has been, and is, genuinely trying to reach an agreement, Flick J said the following in *JJ Richards & Sons Pty Ltd v Fair Work Australia*:[1]

> '58. It is ultimately concluded that s 443(1)(b) is to be construed such that Fair Work Australia cannot reach a state of satisfaction that an "*applicant ... is ... genuinely trying to reach an agreement with the employer*" unless:
>
> - an applicant has approached the employer and informed the employer of the general ambit of that for which agreement is sought; and
> - the employer has foreshadowed – even in the most general of terms – its attitude as to the proposed agreement.
>
> More may be required. Much may well depend upon the factual scenario in which the terms of s 443(1)(b) are to be applied. But such a minimum statement of that which is required is sufficient to dispose of the present *Application*. Contrary to the submissions advanced on behalf of the Applicants, the terms of s 443(1)(b) do not require:
>
> - bargaining to have commenced within the meaning of and for the purposes of s 173, found within Part2-4, of the *Fair Work Act.*
>
> 59. So much, it is concluded, follows from the natural and ordinary meaning of the phrase "*trying to reach an agreement ...*". It is difficult to conclude that any person can try to reach an agreement with another in the absence of a disclosure of that for which consensus is sought. One person may wish to reach an agreement with another. But, until the general content of the proposed agreement is disclosed, it cannot be said that he has even attempted to reach an agreement. Until disclosed, it is not known whether the other person will readily embrace the proposed agreement or shun it or (perhaps) embrace the concept of an agreement but wish to vary one or other of its terms. Until disclosed, the person seeking agreement has not even tried to solicit the response of the other. Unless the disclosure is genuinely with a view to reaching agreement, it could well be said that the attempt to reach an agreement falls short of a person even trying to reach agreement. The addition of the word "*genuine*" – on one approach to construction – perhaps adds little. But the addition of that term serves to emphasise the importance of a person actually trying to solicit agreement. Until a proposed agreement has been disclosed to the prospective parties, and a response solicited, an applicant has not even tried to reach agreement – let alone genuinely tried to reach agreement.
>
> 60. The Transport Workers' Union, in the present proceeding, satisfied that requirement by writing to J.J. Richards on 24 December 2010. Rightly or wrongly, J.J. Richards indicated its response in the terms it did in its letter dated 7 January 2011. That exchange of

> correspondence was sufficient to satisfy the precondition to the exercise of the power conferred by s 443(1).'

[10] In *Total Marine Services Pty Ltd v Maritime Union of Australia*[2], the Full Bench expressed the following views about s.443(1)(b):

> '[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. 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.'

[11] The Full Bench in *Esso Australia Pty Ltd v AMWU & Ors*[3] made the following observations about paragraphs [31] and [32] of the earlier Full Bench decision in *Total Marine Services Pty Ltd v Maritime Union of Australia*:

> '[35] For our part, for reasons we articulate later, we agree with the observations in paragraph [31] and the first three sentences of paragraph [32] of *Total Marine,* set out above. We note that the observations which follow the first three sentences in paragraph [32] are *obiter* and although we do not consider that they should be understood as attempting to establish any binding decision rule, nonetheless they are, with respect, somewhat inconsistent with the earlier expressed proposition (with which we agree) that it is not useful to articulate any alternative test or criteria to the words of s.443(1)(b). We note that similar reservations were expressed by the majority of the Full Bench in *JJ Richards and Sons Pty Ltd v TWU* (*JJ Richards No.1*) and by the Full Bench in *Farstad Shipping (Indian Pacific) Pty Ltd v MUA (Farstad).*'

[12] A useful examination of the consideration required in *Esso* was made by Saunders C in *Telum*[4]

> 'In light of these authorities, I will proceed on the basis that whether an applicant "has been, and is, genuinely trying to reach an agreement" is a question of fact to be decided having regard to all of the facts and circumstances of the particular case. No one factor is necessarily determinative of the question of whether an applicant is, or has been, genuinely trying to reach an agreement. No alternative test or criteria to the words of s.443(1)(b) should be applied. In addition, no specific stage must be reached in the negotiations in order for there to be a finding that an applicant is, and has been, genuinely trying to reach an agreement with the employer.' (references omitted).

Temporal consideration

[13] Section 443(1)(b) of the Act requires the Commission to be satisfied, in this instance, that United Voice "has been, and is," genuinely trying to reach an agreement with Lion. To

determine "has been", regard would need to be had to the conduct of United Voice as a bargaining agent and applicant in a historical context. To determine "and is", regard would need to be had to present conduct, including up until and during the hearing of the application.

[14] Arguably, even if the Commission reserved a decision on an application, if communication was received from the applicant to soften a position where the Commission held a preliminary view that an order might not be able to be made, on receipt of the correspondence, and before a decision is issued, regard should be had to the correspondence.

Non-permitted matters

[15] The leading authority in *Esso* has cleared up any earlier disparate views as to whether the inclusion of non-permitted matters in bargaining automatically ruled that a relevant union was not genuinely bargaining. The Full Bench in *Esso* at [59] stated that it is relevant to, but not determinative of, the question of whether the applicant, is and has been, genuinely trying to reach agreement with the relevant employer:

> 'There is no legislative warrant for the adoption of a decision rule such that if an applicant is, or has been, pursuing a substantive claim which is not about a permitted matter it is not genuinely trying to reach an agreement within the meaning of s.443(1)(b). The fact that an applicant is, or has been, pursuing a claim about a non-permitted matter is relevant to whether the test posited by s.443(1)(b) has been met, but it is not determinative of the issue. A range of factual considerations may potentially be relevant in that context, including but not limited to the subject matter of the claim, the timing of the advancement of the claim, the basis upon which the claim is advanced, the significance of the claim in the course of the negotiations, the claimant's belief as to whether the claim is about a non-permitted matter or not, where there is legal clarity about the permitted status of the claim, whether the other party has placed in contest whether the claim is about a permitted matter, and whether such a claim has been withdrawn and, if so, when and in what circumstances. The diversity of the factual circumstances and nuances which will be found in different cases means that it is not possible to say that any particular factor or consideration will always be determinative of the result.'

[16] When determining whether a particular clause in an enterprise agreement or a proposed enterprise agreement is about matters pertaining to the employment relationship, it is principally the subject matter of the clause that is to be considered, rather than the precise terms of the clause or claim.[5]

Relevant Facts and Circumstances

[17] The application for protected action ballot orders relate to an enterprise agreement which United Voice, together with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) are seeking to negotiate on behalf of each union's members with Lion.

[18] An enterprise agreement, the *Castlemaine Perkins Pty Limited Certified Agreement 2014-2017*[6] is currently in force. The nominal expiry date of the current agreement is 30 September 2017.

[19] Lion, United Voice, the CEPU and member employees of each of the unions have been bargaining for a new enterprise agreement since May 2017. The first bargaining meeting was held on 15 June 2017, and there have been nine meetings to-date.

[20] The existing agreement includes a clause relevant to indirect labour. It states as follows:[7]

> '**Clause 2: Contractors**
>
> The Company will ensure that contract cleaning employees (those engaged in production cleaning) will be paid at the rate prescribed by this Agreement.
>
> It is not the intention of the employer to engage indirect labour to perform core production duties. In the event that the employer is considering any changes to these intentions it will discuss these considerations with United Voice and the employees concerned.
>
> In such circumstances the employer must consult with United Voice and the employees concerned about matters including, but not limited to, the type of work contemplated as might be undertaken by indirect labour employees, the number of indirect labour employees as might be considered to be engaged, the potential length of employment, and any effects whatsoever on the job security of directly engaged employees.
>
> The Company will ensure that contractors engaged to perform core production duties will be paid not less than the appropriate rates (including allowances, loadings and penalty rates) for the relevant classification as contained in this Agreement.'

[21] Mr Davey's evidence is that this kind of clause has been in place in earlier agreements relevant to this site since around 1993. The terms of the clause had been drafted approximately 24 years ago stemming out of a dispute, and the Queensland Industrial Relations Commission recommended a clause largely reflecting Appendix E, clause 2 of the existing agreement.[8]

[22] During the hearing, I inquired of Mr Davey if it was his understanding that Appendix E, clause 2 of the current agreement requires Lion to *consult* with the relevant unions, or to *reach* agreement over the use of indirect labour. Mr Davey agreed it was his understanding the clause required consultation only, and not agreement.[9]

[23] In a matter before Richards SDP in July 2015, his Honour issued a recommendation[10] concerning Appendix E. His Honour expressed his views on the operation of the provision as follows:[11]

> 'Appendix E of the Agreement sets out conditions regulating the engagement of indirect labour, in this case the cleaning functions of the employer's business.
>
> Clause 2 of the Appendix places an obligation on the employer to consult with the Union and the employees concerned about matters including the type of work contemplated as might be undertaken by indirect labour employees, the number of indirect labour employees as might be considered be engaged, the potential length of the engagement, and any effects whatsoever on the job security of directly engaged employees.
>
> The point of contest here it is as to whether or not the employer has officially engaged the Union in respect of the effects on the job security of the directly engaged employees.
>
> There appears to be some confusion as to whether or not this clause obligates the employer to reconsider the foundation of its decision to outsource or contract out the cleaning function within its business. In my view, the clause requires the employer to discuss with the Union

whether or not the employees affected by the change will lose their positions or whether they will be retained in the business, and if so, with what appropriate degree of security of employment (compared to what they previously enjoyed).

The scope for the Union and the employer to discuss this very matter has been compromised by the dispute process itself. Of the seven employees affected, it appears that four have indicated that they wish to seek redundancy, two have indicated they wish to be redeployed and one has not as yet indicated a decision one way or the other.

It would appear to me that the obligation to consult about the job security of the affected employees could only be discharged once the employer, under clause 2(c) of Appendix D of the Agreement, takes all reasonable steps to assist in arranging suitable employment opportunities for the employees whose jobs are being declared redundant.

That is, until such time as the Union and the employer agreed to discuss how the affected employees will be managed in the business change process the employer will not be in a position to discharge its obligations under the Appendices to the Agreement.

Of course, the Union is reluctant to engage in consultation of this kind because it is consultation about an outcome which it seeks to resist in the interests of its members.'

[24] On the evidence before the Commission, in the months leading up to June 2016, Lion consulted with United Voice and employees about the introduction of indirect labour on the site. The following letter dated 23 June 2016 from Lion to United Voice details the consultation undertaken, together with the types of indirect labour Lion would thereafter engage, and the circumstances under which the labour would be engaged:[12]

'…

During the consultation process for changes at our Castlemaine Perkins Brewery, we have spoken about the use of indirect labour under the terms of the Castlemaine Perkins Pty Limited Collective Agreement 2014-2017 (the Agreement).

This letter confirms the discussions held about the engagement and payment of indirect labour during the consultation period and the guidelines for engagement. As a business we will continue to review the effectiveness of our approach to the engagement of indirect labour and will consult with you regarding any adjustments that may be required under our consultation obligations.

Appendix E, Clause 2 of the Agreement, sets out the terms under which indirect labour can be engaged.

Type of work contemplated –

We envisage that our use of indirect labour will be for coverage of a short term nature and cover the following circumstances

- Sick leave greater than 3 shifts,
- Holiday leave
- Training
- Projects
- Extra volume
- Major breakdowns
- Best practice groups and Taskforce meetings (MEX)

Indirect labour will not be used for short term sick leave cover (less than 3 shifts/3days), unless there are no permanent team members available to perform overtime.

It is the intention to utilise indirect labour across the following roles –

- Forklift Driving
- Palletiser operation
- Depalletiser Operation
- Stream 1 Packer

Number of indirect labour employees to be engaged –

The number of indirect labour workers will vary depending on the reason for which coverage is required.

Length of engagement –

The length of engagement for indirect labour workers will vary depending on the reason for which coverage is required.

Appropriate rates -

The nature of indirect labour aligns to Contract of Employment clause 19.3 in the Agreement. This provides for a casual loading of 25%. As the Agreement is silent on the application of the 25% casual loading, the Food Beverage and Tobacco Manufacturing Award will determine that the 25% casual loading will provide an all-purpose rate.

The applicable rates are set out in Clause 25 – Wage Rates and Increases. The appropriate classification will initially be Level 2. Where an indirect labour worker has the recognised skills to move into a higher classification level, the rates of the relevant classification will be used.

All allowances, shift penalties and overtime incurred will be paid in accordance with the appropriate terms set out in the Agreement.

…

For clarity allowances will not form part of the all-purpose casual rate.

Use of Temporary Employees-

The use of temporary employees under the Agreement at Clause 20 – Temporary Employment has been common practice at Castlemaine Perkins Brewery. Temporary employment will continue as is currently the practice over peak periods and to cover long terms absences of our existing permanent workforce. These employees may also be used to cover other types of work as detailed above under 'type of work' contemplate' if business requirements are able to be met.

…'

[25] As is clear from the letter, following consultation, Lion declared that it would, at its discretion engage indirect labour in four classifications of employees, in relevant

circumstances, and would pay site rates of pay. Where the indirect labour is engaged through a third party as casual employees, Lion agreed a 25% casual loading would apply.

[26] The letter does not set out any agreement reached between Lion and United Voice. It declares what Lion will do thereafter, having consulted with United Voice. Mr Davey referred to the letter as a memorandum of understanding. His evidence is, *'..that's what it was referred to as at the time…"*[13]

[27] Mr Davey's evidence is that there was some agreed comfort around indirect labour used only for the four nominated classifications, and not beyond that. That is so because the four classifications are not ones that typically have an effect on the product, and the roles are not 'critical' roles. Less training is required for the four roles than for other roles.[14]

[28] It is clear that United Voice holds concerns about a broad introduction of the use of labour hire employees, particularly in production roles. Mr Davey stated that when Lion had engaged in consultation with United Voice, it was the first time labour hire had been discussed in the history of the site.[15]

Log of claims and pursuit of continuation of direct employment

[29] United Voice's log of claims was tabled on or around 28 June 2017 and states:[16]

1. Maintain all current wages and conditions with a fair and reasonable wage increase underpinned by CPI and payable in the first full pay period in September in each year of the agreement.
2. 3 year term of the agreement.
3. Maintain and strengthen all clauses that include statements of intent.
4. Classification structure incorporated into the agreement and updated to reflect the acquisition of new skills and the delivery of economic value to the business.
5. All handovers to be paid at overtime rates for time worked.
6. Clause 45 – Night Shift Beer Allowance clause to be broadened to all employees and to include all beer allowances i.e. purchased beer and Christmas beer.
7. Clause 31 – Christmas bonus to specify date of payment be first full pay period in December.
8. Safe working numbers to be included in the agreement.
9. Job security for temporary employees to be strengthened.
10. Confirmation that the agreement covers all core production roles.
11. Confirmation that any employee who is covered by the respected awards considered a "core production role".
12. Confirmation that direct employment of workers in core production roles is the primary option.
13. Technical redrafting to comply with the Fair Work Act.
14. Any other matters that may arise in the course of bargaining.

[30] During the bargaining that has been occurring, and what would appear to be after the second meeting and prior to the third meeting, United Voice was prevalent in media articles about the proposed use by Lion of labour hire employees. One such article titled, *'Union warns Brisbane's famous XXXX brewery is set to close its doors'*, stated:[17]

> 'The parent company of XXXX beverages in Queensland has denied union claims its iconic Brisbane brewery will be shut down.

> United Voice coordinator Damien Davie said management from Japanese controlled parent-company Lion notified staff in June the Castlemaine Perkins brewery in Milton would be shut down.
>
> But a spokesman for Lion, the food and beverage giant that owned Castlemaine Perkins, said the brewery would not close and was in fact looking to hire more staff.
>
> "In fact, there will be pay offers on the table - on top of the best pay and work conditions in brewing in Queensland," the spokesman said.
>
> "We simply want the ability to bring on additional people in summer when we brew more beer, this is how every other seasonal manufacturer operates, but our current agreement is confusing and prohibitive."
>
> The brewery is currently in talks with the union over new pay agreements.
>
> Mr Davie said other workers had received threats the plant would close if negotiations to scrap full time jobs in favour of labour-hire, part-time and casual positions were unsuccessful, .
>
> "The continued push to bring in labour-hire employees and casualise the workforce is the main reason cited by management when threatening workers with closing the plant," he said.
>
> "A large proportion of XXXX is now made at the Tooheys Brewery in Lidcombe, Western Sydney.
>
> "XXXX Gold is also made at West End in South Australia and in some circumstances even at the Boags Brewery in Tasmania."
>
> The Lion spokesman said the current pay agreement was 24 years old and needed to be updated.
>
> Doubts about the future location of the brand's production coincides with the end of its long term sponsorship of Queensland's State of Origin team after Wednesday's final 2017 game.'

[31] Mr Davey's evidence is that United Voice had not considered it necessary to introduce early in the negotiations a particular clause it was pursuing, but was pressed by Lion to do so. Lion had proposed a supplementary labour clause, and United Voice was not agreeable to it. Changes proposed by United Voice to Lion were not made by Lion. The proposed clause by Lion, and the proposed alterations by United Voice to the Lion-drafted clause have not been introduced into evidence by either party.

[32] Mr Davey said the following in evidence:[18]

> MR ONG: just a few quick questions, Greg. We are perhaps traversing some of the same ground as you have answered already, but the proposed labour hire clause, contractors and labour hire clause, why was that clause put forward in the terms so expressed?---It was a combination of what we had in our current agreement, the MOU that we believe still currently exists and taking into consideration a number of other Lion agreements. We took that back to our industrial team at the union, including yourself, and asked for advice in putting together what we believe would cover off our concerns and was a process to go back with to counter what the company had put up which is again not very clear. We did ask for some changes to be made to the clause and we thought that was agreed. That didn't happen and so we went and when we tabled that clause, I think this is important, when we were asked about the clause on

13 September, we said that we would prefer not to table anything at this stage because we were still working out the details and what we were going to - it was - it was asked by the company. They said it would be easier in that process if we tabled the clause and one of the delegates who was there at the time: "Should - do we have to if we hand it up, put the words" - I can't remember what it is now - - -

"Without prejudice"?---"Without prejudice," sorry, yes, "without prejudice." "Do we need to put that on the document?" The answer was: "No, it's easier to have a discussion about what you are putting forward if we have the document." So the fact that - I think that clearly shows that it was our intent that this clause was a starting point in response to what the company had put up in relation to labour hire.

[33] At the meeting of 13 September 2017, that being the eighth meeting, Mr Davey, on behalf of United Voice tabled the proposed 'contractor clause'. It is reproduced below:

'CONTRACTORS/LABOUR HIRE

a. Workers who are not directly employed by the Company (i.e. Labour Hire) and who perform work in accordance with the classifications outlined in this agreement will:

   i. Be paid no less than employees employed by the Company and who perform work at the same competency and classification level (including casual loading).
   ii. Work roster patterns consistent with those contained within this agreement.
   iii. Any labour hire workers employed at the site shall employed on a casual basis.

b. The use of contractors/labour hire will only be for coverage of a short term nature and cover the following circumstances:

   i. Sick leave greater than 3 shifts;
   ii. Holiday leave
   iii. Training
   iv. Projects
   v. Extra volume
   vi. Major breakdowns
   vii. Best practice Groups; and
   viii. Taskforce meetings (MEX)

c. Indirect labour will not be used for short term sick leave cover (less than 3 shifts or 3 days), unless there are no permanent team members available to perform overtime.

d. The parties agree that contractors/labour hire may be utilised in the following roles:

   i. Forklift driving;
   ii. Palletiser operation;
   iii. Depalletiser operation;
   iv. Stream 1 Packer

e. Contract cleaning employees (those engaged in production cleaning) will be paid no less than the Level 1 rate prescribed by this Agreement.

f. The introduction of labour hire/contractors, the company must establish that the work cannot be appropriately covered by permanent, full-time employees directly employed by the Company.'

[34] Ms Wicks' evidence is that during the above meeting, Mr Davey said the following relevant to the proposed clause:

(a) "It's meant to be restrictive, it's written that way";
(b) "Our members prefer no labour hire";
(c) "It's the position of our members and will take it through to the end. Absolutely we want to see it through"; and
(d) Words to the effect, "This claim is one of the most significant and important outstanding claims that needs to be addressed, and it's a more significant claim than even wages".

[35] Mr Davey agreed he said the above statements attributed to him.

[36] Ms Wicks' evidence is that upon Mr Davey tabling the proposed clause, and saying the statements in 34(a) and 34(b) above, Ms Wicks said the following:

(a) I said that the proposed clause would not work for the Respondent operationally as it imposes too many restrictions on the Respondent's capacity to engage labour, particularly in managing peaks and troughs of labour demand;
(b) I said the proposed clause is a non-permitted matter because it imposes restrictions and prohibits the Respondent from using third party labour in certain roles, in certain scenarios and for certain types of work;
(c) I said if we were to put the proposed clause into the enterprise agreement it would have no effect, and this would mislead the workforce, in that employees would mistakenly think that the clause was enforceable.

[37] It is Ms Wicks' evidence that the proposed clause would prohibit Lion (without agreement with United Voice and the CEPU) from engaging contractors or labour hire in a range of circumstances and roles including:

(a) Operating more than three production lines at any one time;
(b) Operation of the filler;
(c) Operation of the labeller;
(d) Brewing roles;
(e) Operation of the can line;
(f) Absences arising from long service leave;
(g) Absences arising from leave without pay arrangements;
(h) Absences arising from sick leave of 3 shifts or less in duration;
(i) Other circumstances, including circumstances that may have not been contemplated yet.

[38] During the meeting of 13 September 2017, and after the proposed clause had been tabled by United Voice, Ms Wicks informed all those present that Lion intended to put a draft enterprise agreement to employees to vote upon, and this would occur before the expiry of the current agreement. This has occurred, and the access period for employees to consider the Lion-drafted document is in place. The voting period is due to close on 9 October 2017.

[39] The parties again met on 14 September 2017, largely to discuss Lion's act of proposing a vote of employees. Mr Davey said the following with respect to the meeting of 14 September 2017:[19]

> 'The company at the last meeting we attended on 14 September said that they were going to put the agreement out to a vote and given that there were still a vast number of changes, we came back and requested that - or the members requested that we put a ballot in place for

taking protected industrial action in response to the fact that the company's bargaining position had not changed and we're a fair way apart.'

19 September 2017

[40] At 2.00pm on 19 September 2017, United Voice filed the application the subject of this decision. Following receipt of the application, Lion wrote to United Voice in the following terms:[20]

'Dear Greg, Garry and Simon

Bargaining for a replacement to the Castlemaine Perkins Pty Ltd Certified Agreement 2014-2017

On 13 September 2017, United Voice tabled a proposed clause entitled 'Contractors/Labour Hire' (see attached). During the meeting, United Voice made it very clear that this clause was of significant importance in the context of the negotiations. We understand that United Voice is proposing this clause on behalf of both United Voice and the CEPU (ETU), given your notification to us at the start of negotiations that the CEPU supported United Voice's claims and that the two unions were operating as a 'single bargaining unit' (please let us know if this is not the case).

As discussed during the bargaining meeting, the Company is concerned that:

- the clause does not meet the Company's operational requirements, as it imposes too many restrictions on the Company's capacity to engage labour, particularly in the Company's capacity to manage peaks and troughs of labour demand;
- the clause contains non-permitted matters and would not be enforceable if included in an agreement. The law is very settled on this type of clause and each of United Voice and the CEPU should be aware that it is not permitted;
- given the clause would not be enforceable, including the clause in an agreement would mislead employees about their entitlements (as employees would assume that the content of the agreement would be valid and enforceable, which would be an incorrect assumption).

Given we have this afternoon received United Voice's application for a protected action ballot order, the Company felt that it was important that we set out in writing the basis for the Company's concerns about the above proposed clause (as was explained to you during the meeting on 13 September 2017). We have set these out below.

Claims for non-permitted matters

The proposed Contractors/Labour Hire clause:

- imposes a financial penalty on the engagement of contractors and labour hire given the requirement to pay no less than the agreement, plus a casual loading (cl. a(i));
- prevents the engagement of contractors and labour hire on any roster pattern not contained within the agreement (cl a(iii));
- prevents the engagement of contractors and labour hire on a part-time or full-time basis (cl a(iii));
- prevents the engagement of contractors and labour hire except for coverage '*of a short term nature'* in a prescribed list of circumstances, unless agreed by the parties (cl. b);
- prevents the engagement of contractors and labour hire for '*short term sick leave cover*' unless there are no permanent team members available to perform overtime (cl. c);

- appears to prevent the engagement of contractors and labour hire in all roles except for forklift driving, palletiser operation, de-palletiser operation and stream 1 pack, unless agreed by the parties (cl. d);
- prevents the engagement of contractors and labour hire in all cases unless the Company can establish that the work cannot be appropriately covered by permanent, full time employees directly employed by the company (cl. e).

Read together, the proposed clause prohibits the engagement of contractors and labour hire in all but extremely limited circumstances.

By pursuing these claims, it is apparent that United Voice and the CEPU are not genuinely trying to reach agreement. The Company holds this view for the following reasons:

- The subject matter of the claim and legal clarity about the 'permitted' status of the claim - According to longstanding legal authority, claims (such as these) which impose a prohibition on the use of contractors- whether the prohibition be partial or complete- are clearly not 'permitted matters'. The clause goes too far to be legitimately connected with the job security of employees covered by the agreement because the clause imposes broad prohibitions on the capacity of the Company to engage external labour. The clause does not pertain to the relationship between the Company and its employees. Rather, the clause deals with matters that pertain to the relationship between the Company and third parties (or, in the case of the claim regarding labour hire workers being employed on a casual basis, the relationship between a labour hire provider and its employees). Accordingly, as unions very experienced in these matters, United Voice and the CEPU should be aware (and we think are aware) that these claims are not permitted matters;

- The basis upon which the claim is advanced - United Voice confirmed at the meeting of 13 September 2017 that the proposed clause regarding contractors and labour hire is intended to operate in the very restrictive way we have set out above. In particular, Greg Davey said:

    - *'our members prefer no labour hire'; and*
    - *'it's meant to be restrictive';*

- The significance of the claim in the course of negotiations - These claims have become a significant part of the negotiations, as demonstrated by the fact that the parties spent a good deal of the 13 September 2017 meeting discussing their positions in respect of the claims. Greg Davey stated that 'it's the position of our members and will take it through to the end. Absolutely we want to see it through'. In particular, Greg identified that this claim was one of United Voice's most significant claims. Further, on 10 and 11July 2017, various media outlets published comments by United Voice officials. In particular, United Voice officials were quoted as saying:

    - words to the effect that workers had received threats that the plant would close if the Company was unable to negotiate replacement of full time jobs with labour hire positions;
    - "*the continued push to bring in labour-hire employees and casualise the workforce is the main reason cited by management when threatening workers with closing the plant*";
      "*for some time now they've been telling us that if they don't get some concession in the way labour's structured there they'd be moving production elsewhere*";
    - long term employees "*deserve to maintain their secure jobs rather than seeing their positions go to labour-hire companies*".

The Company has already made clear to you that such alleged 'threats' to close the plant have never been made and are false;

- The timing of advancement of the claim - Whilst the draft clause has only been tabled recently, this claim appeared in the unions' initial log of claims (which relevantly read '*Confirmation that direct employment of workers in core production roles is the primary option*').

Given the media commentary referred to above, it is apparent that United Voice (and therefore the CEPU) is attempting to make third party labour a significant focus of negotiations, and we anticipate that United Voice and the CEPU will use this as a basis for advocating that employees vote 'no' in the upcoming vote on the Company's proposed agreement. Given these claims on third party labour could never be a valid and enforceable part of any agreement, it follows (in light of the matters set out above) that United Voice and the CEPU is not genuinely trying to reach agreement.

Proposed protected action ballot

As discussed during our meeting on 13 September 2017 (and in light of the application received this afternoon), we are again putting United Voice and the CEPU on notice of the Company's views that:

- United Voice and the CEPU will not be able to obtain a protected action ballot order given the pursuit of the above claims;
- United Voice and the CEPU will not be able to organise, and employees will not be able to take, protected industrial action in support of these claims.

Rather, in order for United Voice and the CEPU to obtain a ballot order and organise protected industrial action (if the upcoming EA vote is not successful), United Voice and the CEPU must first confirm that they no longer intend to press the above claims, and then attend a least a few meetings with the Company to genuinely try to reach agreement (in light of the removal of these claims, which may well change the negotiating dynamic).

In light of the above, we invite United Voice to withdraw its protected action ballot application, as it should be reasonably apparent that the application has no reasonable prospect of success.

Next steps

As you are aware, the Company intends to put its current proposed agreement to a vote of employees. The access period for this vote will be 20 September 2017 to 27 September 2017, and the voting period will be 28 September 2017 to 9 October 2017 (see our earlier correspondence this afternoon on this topic).'

[41] On 20 September 2017, United Voice responded to Lion in the following terms:[21]

'Dear Ms Wicks,

Re: Application by United Voice for a Protected Action Ballot Order in respect of a proposed replacement agreement to the Castlemaine Perkins Pty Ltd Certified Agreement 2014-2017

We refer to your correspondence dated 19 September 2017, which states that Lion will be opposing United Voice's Protected Action Ballot Order Application filed on 19 September 2017 (the Application). We note that the Application is listed for hearing at 3pm tomorrow.

It appears that Lion's opposition to the Application is based on its view that a claim by United Voice in respect of contractors is not a permitted matter and as such, the Union is not genuinely trying to reach an agreement (the Claim).

With respect, this position is misconceived. Even if that claim is not a permitted matter, it does not follow that the Union is not seeking genuinely to make an agreement (see *Esso Australia Pty Ltd v AMWU* (2015) FWCFB 2010). That Full Bench considered earlier conflicting authorities.

Section 172 (1) of the *Fair Work Act 2009* enables the making of enterprise agreement about '*matters pertaining to the relationship between an employer that will be covered by the agreement and the employer's employees who will be covered by the agreement'*

As to matters pertaining, we rely on *Wesfarmers Premier Coal Limited v AMWU* (2004) 138 IR3 62 at [73] and following. The Union contends that the clause is clearly a matter pertaining to the employment relationship and deals with the job security of employees to be covered by the proposed enterprise agreement.

In your correspondence you suggest that the proposed clause creates a number of limitations and impositions on the business. United Voice respectfully disagrees with your assessment as to the effect of the proposed clause.

United Voice remains willing to continue discussions about our proposed clause to endeavour to clarify and resolve all parties' concerns.

If the above satisfies any concerns that Lion has, we request it advises us of that position so that we can inform the Commission that there is no opposition to the Union's Protected Action Ballot Order Application, and it can be determined without a hearing.'

[42] Lion replied the same day in the following terms:[22]

'Dear Simon,

I refer to your letter received earlier this afternoon.

We agree that *Esso* is the leading authority on this matter. As you are no doubt aware, Esso identifies a number of factors that are relevant in determining whether or not a union is genuinely trying to reach agreement in circumstances where they are advancing claims that are not 'permitted matters'.

As should be apparent from our earlier letter (which refers to each of these 'Esso' factors), it is clear in the present circumstances that United Voice is not genuinely trying to reach agreement. The contractor claim is clearly not permitted. It is the central (or a central) outstanding claim in the negotiations. United Voice has, through its use of media channels, made this the centrepiece of its industrial campaign. In these circumstances, United Voice is not genuinely trying to reach agreement, as this very significant claim (which is preventing the parties from reaching agreement) can never form a valid and enforceable part of any enterprise agreement.

This position is entirely consistent with *Esso* (as our representatives will explain tomorrow).

Further, it is our position that United Voice knows, or should know, that the contractor clause is not a permitted matter. We agree that Wesfarmers is a leading authority on this (and it is apparent from your letter that United Voice is aware of this decision). Paragraph [109] of that decision reads as follows:

[109] In my opinion, cl 33 makes clear that the proposed agreement in this case was to include provisions restricting or qualifying the employer's right to use independent contractors. Having regard to the basic test set out in Electrolux that a matter pertaining to the relationship between employer and employees will affect them in their capacities as such, I am of the opinion that cl 33 imports into the proposed agreement a discrete matter which does not pertain to that relationship. It is not merely ancillary, but substantive and distinct. Having regard to Cocks and the observations of Moore J in Mount Thorley Operations, I am of the opinion that on this ground the proposed agreement is not an agreement of the kind required by s 170LI.

United Voice's proposed contractor clause does precisely that- it imposes restrictions and qualifications on the company's right to use contractors and labour hire. We have already explained the many and varied restrictions in our earlier letter. The 'job security' argument that you have referred to in your letter is inconsistent with established authority (including at High Court level - see the decision in *Re Cocks* which is referred to in *Wesfarmers*). Importantly, your proposed clause goes much further than dealing with the terms and conditions on which contractors are engaged, or imposing consultation obligations. Rather, your clause prohibits the company from engaging contractors and labour hire except in very limited circumstances. Clauses of this type are not sufficiently connected to job security.

It is disingenuous for United Voice to advance the position that the proposed clause does not contain limitations and impositions on the business' use of contractors and labour hire- it plainly does (and you have offered no explanation for your view to the contrary). Rather, your correspondence appears to be a thinly veiled attempt to claim that United Voice is genuinely trying to reach agreement notwithstanding advancing claims for matters that are clearly not permitted. In fact, the position advanced in your letter is directly inconsistent with the position advanced by Greg Davey in our most recent bargaining meeting, in which he said in relation to the contractor claim:

- *'it's meant to be restrictive, it's written that way'*
- *'our members prefer no labour hire';*
- *'it's the position of our members and will take it through to the end.*
- *Absolutely we want to see it through'.*

Accordingly, your letter does not satisfy the Company's concerns about United Voice's contractor claim. If United Voice intends to genuinely try to reach agreement, then we again invite United Voice to withdraw the protected action ballot application, confirm that it is no longing pressing its proposed contractor claim, and meet with us to explain any alternate claim that it wishes to put (which does not include any such restrictions or qualifications on the Company's right to use contractors and labour hire).'

Mr Davey's evidence

[43] During the hearing, in cross-examination, the following was put to and answered by Mr Davey: [23]

'I am going to take you through that clause, Mr Davey, and ask you to confirm a number of propositions about your understanding of the effect of the clause and the intent of your claim?---Sure.

In relation to subclause (a), Mr Davey, do you accept that subclause (a) prevents the company from engaging any labour hire worker or contractor except on a casual basis?---Yes, it does.

Do you accept that it prevents the company from engaging labour hire and contractors on any roster pattern beyond those contained within the agreement?---Yes, it does, that's right.

Do you accept that subclause (a), Mr Davey, requires the company to pay such labour hire and contractor personnel an additional casual loading on top of the minimum rate set out in the agreement?---Yes, absolutely, yep.

In relation to subclause (b), Mr Davey, do you accept that subclause (b) prevents the company from engaging contractor or labour hire on anything other than for a short term nature and in the circumstances listed in that clause; is that right?---That is correct and if I can just add that the reason that is there is because that was what the company put to us in relation to contract labour in the MOU in June the previous year. So, that's why it's there.

Mr Davey, when you say that was the position that the company put to you in relation to the MOU, you mean that is the position that the company put to you pursuant to the consultation process under appendix E clause 2 of the agreement?---Absolutely, that's correct.

Thank you, Mr Davey. Subclause (c), do you accept that subclause (c) prevents the company from engaging contractors and labour hire to cover short term sick leave absences?---Yes.

Unless there is no permanent team members available to perform overtime?---That's right, and again that was an outcome that the company came back to us in the MOU in June 2016.

In relation to subclause (d), Mr Davey, you accept that clause prevents the company from engaging any contractor or labour hire other than in those four roles?---Once again, I agree and again the company came back with those as the positions that they wanted covered and it was actually at their insistence in June of 2016 that there was no requirement other than those positions for labour hire.'

[44] And further:[24]

'Do you agree, Mr Davey, that this clause that you have tabled on behalf of United Voice prevents the company from engaging contractors and labour hire in the circumstances that are set out in this clause?---Yes.

So there are only very limited circumstances in which the company can engage labour hire or contractors, that's right, isn't it?---Yes, that's right.

Under the current arrangement that you call the MOU, there is no such restriction, is there, because that is merely a consultation process?---No, no, no.

And there is no advance commitment as to the future state of affairs?---I disagree with that. That letter was to cover off the consultation and the agreed position so - - -

Well, Mr Davey, a moment ago you accepted the proposition that that letter made no advance commitment in relation to the future state of affairs in relation to contractors and labour hire?---And prior to that, I said to you I believe it's still in play.

I put it to you, Mr Davey, that pursuant to appendix E clause 2 of the agreement, the company can at any time it wishes to, make a change in relation to the manner in which it engages contract labour. It can embark upon a consultation process, complete that process and then make those changes?---Absolutely, and we're prepared to do that tomorrow if they want to.

But they couldn't do that in accordance with the clause that you have tabled, could they?---Why? Why? It was put up as part of a negotiation consultation. We haven't even spoken about this yet.

But you would agree, Mr Davey, that this clause imposes restrictions on the capacity for the company to engage labour, doesn't it?---We agree that we have put that forward to reflect what is the current position in relation to enterprise bargaining.'

[45] In response to questions about the current status of the claim, Mr Davey gave the following answers:

'Mr Davey, does United Voice still advance a claim for this clause?---We have tabled that clause for consultation and for discussion under the enterprise bargaining process, yes.

Have you withdrawn that claim?---No.

Have you withdrawn any part of it or subclause of this claim?---We haven't discussed it and the company hasn't asked us to.

Mr Davey, I put it to you the company has asked you to withdraw the claim. It has asked United Voice to withdraw the claim multiple times in correspondence?---Not in bargaining, no.

I put it to you the company has, Mr Davey, but in any event, confirm - - -?---Well, no, you asked me something and I'll answer it. The fact is the company has not in bargaining asked us to withdraw that clause. We haven't even discussed it. It was presented to the company on 13 September which was only the second-last meeting. The last meeting went for less than an hour and we discussed the proposal of the company taking the agreement to a ballot. So, it was only on 13 September that we presented the clause. So to say that we have discussed it and the company has asked us to withdraw it is incorrect. [25]

[46] Mr Davey's evidence is that he has been an Organiser for United Voice for approximately nine years, and has been involved in between 50-100 enterprise bargaining negotiations.[26] He agreed that when Ms Wicks informed him that Lion considered the proposed clause to contain non-permitted matters, he had heard of the phrase 'non-permitted matter' before.[27]

[47] The following was put to Mr Davey and he responded as follows:[28]

I put to you, Mr Davey, that a union organiser in your position of your experience would be expected to know that such a clause with so many restrictions would not be a permitted matter?---No, I disagree with that totally. How can I - how would I think that when it's already been agreed with the company? You tell me that.

[48] Further, Mr Davey answered the following questions:[29]

Mr Davey, what I'm asking you is whether you now withdraw those claims?---No.

You don't?---No.

Thank you, Mr Davey?---And that's on behalf of our members and the delegates on site, so - - -

You made it very clear in the bargaining meeting on 13 September, didn't you, Mr Davey, that this is an important clause for you and your members, didn't you?---Everything is important, mate, as far as I'm concerned. When members have a log of claims that's my role and the role of the delegates is to advance those claims as much as we can and particularly in light of the fact of what the company wants to do in relation to labour hire.

Mr Davey, the question I asked you was that you made it very clear in that meeting that this particular clause was very important to United Voice and to members?---It is, yes.

[49] And further: [30]

'You said in relation to the contractors and labour hire claim: "It's the position of our members and we'll take it through to the end. Absolutely we want to see it through"?---Yeah.

You said that, didn't you, Mr Davey?---Yeah.

And in saying that - - -?---But hang on, I think I should be allowed to qualify what - when I said that what was meant by that is that the labour hire clause that was put up by the company was the one of concern, not that we're going to go to the end of the earth to get our clause in, but we had a position that was different from the company that needed to be worked with.

But through that statement, Mr Davey, you were making it very clear, weren't you, that you don't intend to withdraw this claim, do you, Mr Davey?---We intend to continue to try and negotiate a better outcome.

Do you intend to withdraw the various prohibitions and restrictions on contractors and labour hire that I took you to earlier?---We intend to get a better deal than what the company has put up in relation to labour hire.'

[50] In answering questions from me, Mr Davey said:[31]

Having a look at the clause, is there anything that you think the union and its members could be flexible on?---Absolutely.

Tell me what?---If the company was proposing - again the issue around the short term nature, the company said that that's what they - they only want these guys for the short term. The effect that that would have - and why we've got (c) in there was there's a concern by our members that if we open up and have more labour hire there then it could have an effect on the overtime. Now these guys are expected to work a reasonable amount of overtime and they work a lot of overtime but the company said that's not what this is about. That's the clause - the terminology they came up with to say that - to allay those concerns.

Is this what you're going to stick to or can you move on some clauses and if so which ones?---Commissioner, I can only answer that by saying if the company wishes to discuss with us removal of clauses or removal of items on the clause we provided, we haven't had those discussions and we would look at it and take it back to members. I can't say that we'll take out (a) or take out (b) or parts of (a) or parts of (b). We haven't had those discussions. The company hasn't put to us any form of a different proposition other than one that says we want open - basically we can employ labour hire anywhere and it doesn't outline how they're going

> to pay them, so we take it that that means they're not going to pay them as per the agreement. And it's open ended. That clearly is not what our members want. But if they want to negotiate around this clause and we haven't had the opportunity to do this. It was tabled on 13 September, it was a position that was derived from all of the other agreements that we had with the company and we're trying to find - is there middle ground, I hope there is.[32]
>
> What I have to have regard to is are there permitted matters within the proposed clause that would effectively do enough to stymie the application for a protected action ballot order?---I understand - I understand that, Commissioner, and all I can say is - on that note is that we went through a process with our members and our delegates and myself and we went back and got advice, and obviously we believe that this is an outcome that we could work with the company and the reason underpinning that was because it is what we've already had agreed with the company. We know they've changed their opinion now but when we presented this, this reflected either what they had in other agreements but substantially the agreement we already had with the company.[33]

[51] Where Mr Davey refers to 'other agreements', United Voice handed up evidence to demonstrate that at other Lion sites, it has been agreed in various enterprise agreements approved by the Commission, terms largely reflecting the following:[34]

> '**Labour Hire**
>
> Workers who are not directly employed by the Company (i.e. labour hire) and who perform work in accordance with the classifications outlined in this Agreement, will:
>
> i) Be paid no less than employees employed by the Company who perform work at the same competency and classification level (including casual loading).
> ii) Work roster patterns consistent with those contained within the EA.
> iii) Any labour hire workers employed at the site shall be employed on a casual basis.'

Opportunity for further bargaining?

[52] During the hearing I inquired of the parties if United Voice wished to reconsider its application, to advance discussions with Lion as to what might constitute permitted and non-permitted matters, and acceptable positions. Mr Ong advised that United Voice would be willing to enter into further discussions with Lion, if 'any sharp edges could be knocked off the proposed clause to ensure that it fell safely within the realms of permitted content', but only if Lion undertook to withdraw the employee ballot.[35]

[53] The following exchange then occurred:[36]

> MR ONG: Ultimately, yes, Commissioner. I think our members would not be particularly interested in revising the proposed clause in circumstances where there is still an agreement out to ballot. I will really be blunt about this. Whilst the agreement is out to ballot, the proposed clause remains our proposal at the moment and we're not prepared to necessarily - we'd rather effectively roll the dice before yourself, Commissioner, and have you rule that it's not permitted content.
>
> THE COMMISSIONER: Mr Doyle?
>
> MR DOYLE: My instructions are that the respondent isn't prepared to cease the vote in circumstances where the applicant has had multiple opportunities today to indicate its willingness to move, it has on multiple occasions refused to do so. So, whilst the respondent is

> more than happy to me and, who knows, Commissioner, theoretically if those meetings were to take place, there is plenty of time before 9 October, the close of the vote, it may be that an arrangement could be come to an agreement votes can be pooled and new ones made. And that is a possibility and why the respondent is more than willing to continue to have these discussions. But at the end of the day, Commissioner, either the applicant is prepared to make those kinds of concessions and be flexible or they're not and today there has been absolutely no indication of any form of flexibility in relation to those critical issues.

United Voice's closing submissions

[54] It was submitted that relevant to the proposed clause pressed by United Voice, it has not been adequately established that the claim is for non-permitted content, and in any event, even if United Voice is pursuing non-permitted content, it can still be determined that it is genuinely trying to reach agreement.

[55] It was submitted that the proposed clause has been prepared to reflect what United Voice considers has become the site-operational status quo since June 2016. Since this time there has been an understanding that some labour hire can be used on site, and the proposed clause simply reflects that arrangement. Any stretching of that arrangement would, if the proposed clause was adopted by Lion, have to be by agreement with United Voice and the CEPU.

[56] Further, at other sites, Lion has agreed within enterprise agreements to some of the same restrictions, and therefore, why should Lion object or call these agreed positions non-permitted matters now?

[57] It is the applicant's contention that upon being informed at the meeting on 13 September 2017 that Lion considered some of the proposed clause to be non-permitted matters, and then being informed a vote of employees would be undertaken, there had been limited opportunity for there to be discussion as to how the proposed clause could be amended to ensure compliance with the Act.

[58] It was submitted that United Voice was 'certainly prepared to enter into those discussions to adapt its proposal to ensure that it would address any concerns that may exist with the *Fair Work Act*.'[37]

[59] It is United Voice's submission that the goal of the clause is to ensure consistency with the claim made at the commencement of bargaining within the log of claims. It is acknowledged by United Voice that the proposed clause does restrict Lion in the use of labour hire, but there is a 'work-around' by obtaining the agreement of the relevant unions. It is proposed that United Voice could give consideration to not requiring agreement of the relevant unions to utilise labour hire, but perhaps to soften it to 'meaningful consultation' or 'by agreement which shall not be unreasonably withheld'. It is submitted that United Voice has not had the opportunity to adequately address this with Lion. I understand that United Voice believes this to be the case because of Lion's decision to take the Lion-drafted document to a vote of employees. United Voice considers that Lion's actions effectively drew to an end meaningful negotiations, for the time being.

[60] It was submitted that because Lion has agreed at other locations to some restrictive clauses around the use of labour hire, Lion is prepared to accept that they're permitted

matters. If United Voice is wrong on that, it is submitted that those who had an interest in bargaining considered it to be permitted matter.

[61] It was submitted that the determination of the Commission to be satisfied that United Voice has been, and is, genuinely trying to reach agreement with Lion is a discretionary one. Mr Ong urged the Commission to find that United Voice, while engaged in a robust bargaining process, has been, and is, genuinely trying to reach agreement with Lion.

Lion's closing submissions

[62] It is Lion's contention that the Full Bench authority in *Esso* states that there is no automatic presumption that merely advancing a claim for a non-permitted matter means you're not genuinely trying to reach agreement. *Esso* does, however, require that it be a relevant consideration.

[63] The Commission was urged to not conclude that if Mr Davey or United Voice believed he or the union were pursuing non-permitted matter, it would alone be a determinative issue. Lion submitted that it would be but one factor in the consideration the Commission must have.

[64] Lion urged the Commission to differentiate the findings in *Esso* on the circumstances that arose there, to the circumstances in the present matter. In *Esso*, the proposed clause dealing with security of employment was not part of the unions' initial claim, and the Full Bench determined that it had been apparent before the Commissioner at first instance that the unions had not adopted a rigid position in relation to the draft clause.[38]

[65] Where the unions in *Esso* withdrew their relevant claim, United Voice have failed to withdraw the claim containing non-permitted matter, even during the hearing.

[66] The Commission was urged by Lion to contrast the evidence in *Esso* where it was found that the proposed clause being discussed there did not feature prominently in the discussions between the parties, and this case where Mr Davey has stated, *"We're sticking with this until the end."*

[67] The Full Bench in *Esso* stated: [39]

> 'Further, at no stage during the negotiations did Esso's representatives express the view to the unions that the proposed clause contained non-permitted content. Having first been identified by the appellant as a claim about a non-permitted matter during the hearing before the Commissioner…..'

[68] Lion submitted that:

- having regard to Ms Wicks' communication to United Voice on 13 September 2017 that the proposed clause contained non-permitted matter;
- the claim, pronounced by the proposed clause was significant in the negotiations;
- there has been no flexibility by United Voice as to negotiation of the clause;
- the proposed clause containing non-permitted matter has not been withdrawn;
- and other considerations,

should satisfy the Commission that United Voice has not, and is not genuinely trying to reach agreement with Lion.

[69] As to what within the proposed clause would be considered permitted matters and non-permitted matters, it is Lion's contention that only (a)(i), if it simply had a reference to a casual loading being payable if the employee is a casual employee, would be permitted matter, together with (e). It considers all other clauses within the proposed clause to be non-permitted matters. Lion relies on the authorities in *Electrolux*[40], *Cocks*[41], *and Wesfarmers.*[42]

[70] It was submitted by Lion that a clause requiring agreement or consent of a union for an employer to use supplementary labour is a non-permitted matter, and Richards SDP considered that it was a non-enforceable clause within a group of ten agreements; see *Construction, Forestry, Mining and Energy Union [2013*] FWC 5033 at [16].

[71] Having regard to His Honour's views, he stated that it appeared to him that the relevant clause requiring union approval to engage outside labour 'appears not to be content about which an agreement could be made…' His Honour then went on to conclude that even if the Commission does determine that an agreement or agreements made with employees does contain non-permitted matters, it does not effect the power to approve the agreement(s), it simply might make the relevant clauses non-enforceable.

[72] I inquired of Mr Doyle if the conduct of the employer should also be taken into consideration in trying to determine if United Voice has been, and is, genuinely trying to reach an agreement with Lion. This is so because on the introduction of the proposed clause, in the same meeting, Lion informed the union it was going to take a company-drafted document to a vote of the employees. Mr Doyle conceded that the conduct of the employer would constitute part of all of the circumstances to be considered.

[73] It was submitted, however, that simply because Lion has made a decision to take a document to vote of the employees, it would still be possible to meet and further bargain.

Consideration

[74] I have had regard to all of the facts and circumstances of this case.

[75] The bargaining process between Lion and its employees commenced in earnest about three months ago, from the first meeting on 15 June 2017. United Voice communicated its log of claims to Lion in writing on 28 June 2017. It did not provide the proposed supplementary labour clause in writing until the meeting of 13 September 2017.

[76] Prior to providing the proposed clause in writing, United Voice had been active in the media discussing job security concerns, indicating it was a very important issue for United Voice and its members at the site.

[77] The evidence of Mr Davey, and the submissions of United Voice is that the proposed clause had been drafted to largely reflect the state of affairs contained within the 23 June 2016 letter, and in recognition that at other Lion sites there are some restrictions on the use of supplementary labour. The union's industrial team, including Mr Ong had helped to prepare the proposed clause.

[78] Relevant to the proposed clause, I accept Lion's submission, supported by the relevant authorities it relied upon, that the proposed clause largely contains non-permitted matter. But for the request to pay 'site rates' at (a)(i), and excluding the phrase '(including casual loading)', and subclause (e), the remainder of the proposed clause contains non-permitted matters.

[79] Upon seeing the document on 13 September 2017, Ms Wicks' reaction was to (a) inform United Voice that Lion considered the proposed clause contained non-permitted matter and it could not (as opposed to would not) be agreed to by Lion; and (b) inform the union that Lion would proceed to take a document to a vote of the employees.

[80] I accept Mr Davey's evidence, corroborated by Ms Wicks that by 13 September 2017, there was still a number of significant issues the parties had not agreed upon. The proposed clause was not the only issue of disagreement between the parties.

[81] I am satisfied that up until the provision of the proposed clause, United Voice had been (has been) genuinely trying to reach agreement with Lion for the making of an enterprise agreement to cover the employees to be balloted. This is not contested by Lion.

[82] For the sake of clarity, I find that the statement in the log of claim at '12. Confirmation that direct employment of workers in core production roles is the primary option' is a typical bargaining claim. United Voice has asked the Commission to look to the 'claim' and not focus on the details of the proposed clause. If the proposed clause contains sentences that might be non-permitted matter, it is the claim that is more important, and the proposed clause is available to be negotiated.

[83] I disagree. The claim is one that an employer might expect from a union, especially one with a reasonable density of membership in the workplace. If confirmation that direct employment of workers in core production roles is the primary option is the only commitment United Voice was seeking relevant to this issue, it would not be terribly onerous for Lion to provide sentiment to that in a clause similar to the clause in the existing agreement, but without restrictions.

[84] Accordingly, there is no barrier to a determination that up until 13 September 2017, together with all of the bargaining positions taken by United Voice, it had been (has been) genuinely trying to reach an agreement with Lion.

[85] The provision of the proposed clause, having been carefully drafted and considered by the United Voice industrial team, together with the words stated when it was presented, and the actions thereafter lead me to conclude that it is at this time United Voice ceased genuinely trying to reach agreement with Lion.

[86] I do not accept Mr Davey's evidence[43] that because the proposed clause reflects largely the position reached in June 2016 after consultation between Lion and United Voice, in his mind it would not include non-permitted matters. I accept Mr Davey's reasoning as to why he and United Voice would be seeking future terms so restricted. If that is where Lion had 'landed' in June 2016, I accept the union and members would wish for that to be the starting point under the new agreement, albeit with consultation now replaced with a new requirement to reach agreement.

[87] Mr Davey's evidence was, however, disingenuous on this point. Mr Davey is not an inexperienced union organiser; he is an experienced organiser, and his evidence is that he is familiar with the expression 'permitted matters'. He has, I conclude on the balance of probabilities, been involved in negotiations where the issue of permitted matters and non-permitted matters has been discussed. He has available to him an industrial team with which to liaise.

[88] Mr Davey confirmed that he said during the meeting of 13 September 2017 all of the statements attributed to him at [34]. Mr Davey and United Voice had opportunity following the meeting of 13 September 2017 up until and including the hearing of this matter to provide a softening of the position taken, especially in the face of communication, both oral and in writing as to the assertions by Lion that the proposed clause largely contains non-permitted matters to which it could not agree.

[89] It is not even that the proposed clause contains just one or two non-permitted matters that may be the subject of contest as to whether they are permitted or not; almost the entire clause contains non-permitted matters. If it had been a small number of items that could be 'smoothed off' as suggested by Mr Ong, it would have been incumbent on United Voice to assert, following the meeting of 13 September 2017, which concessions it could make, and which it asserted were permitted matters.

[90] United Voice submitted that perhaps with a little more time before Lion declared its intention to go to a vote of employees, it could have smoothed those edges. That action was available to United Voice from 13 September 2017, right up until 21 September 2017 at the hearing, and even thereafter as per my earlier comments at [14]. The suggestion by United Voice at the hearing that these things could possibly happen is not a positive attestation that United Voice is interested in doing these things. There was no declared willingness on behalf of United Voice.

[91] Instead, Mr Davey's evidence is that he and the union do wish to see the claim all of the way until the end, and there was a stated refusal to withdraw the proposed clause or any part of it. I consider that Mr Davey, representing United Voice, and on behalf of its members, does wish to implement the proposed clause in the form it is presently in. When questioned by me as to what items within the proposed clause he considered the union could move on, Mr Davey's evidence was less than helpful. Mr Davey's evidence was largely to the effect that the union can move on some parts of the clause if Lion wishes to negotiate, but United Voice doesn't know what that might be. His evidence is that because the discussions haven't advanced, if there is middle ground, there hasn't been an opportunity to explore that, because Lion have now taken their document to a vote of employees.

[92] I am not with Mr Davey on this point. Mr Davey's evidence neglects to deal with Ms Wicks' communication at the meeting on 13 September 2017 as to why Lion would not, as opposed to did not want to, agree to the terms proposed. Nor does it deal with the period 13 September 2017 to the filing of the application on 19 September 2017, and even the position taken by him and United Voice at the hearing on 21 September 2017.

[93] There has been ample opportunity for United Voice to communicate in writing with Lion to address the concerns raised by Lion at the meeting of 13 September 2017. While I appreciate Lion's declaration that it was going to undertake a vote directly of its employees

might be considered by United Voice as a handbrake on meaningful bargaining negotiations, it should not be the default position. If United Voice had communicated in writing following the meeting of 13 September 2017 an acknowledgement that Lion had raised concerns about the proposed clause, and communicated a recognition that some of the terms proposed might constitute non-permitted matters, but it wished to meet further to explore those concerns, I would be more likely to find that United Voice is genuinely trying to reach agreement.

[94] Instead, the union, within six days of the eighth meeting, and five days after the ninth meeting filed the application for a protection action ballot order. It did not engage in any further communication, as I understand it, following the meeting of 14 September 2017 other than the letter of 20 September 2017 at [41].

[95] I have also had regard to the conduct of United Voice during the hearing, relevant to my invitation to the parties to consider further negotiation of the proposed clause, in an attempt to ally some of Lion's concerns relevant to the non-permitted matter contained within the proposed clause. The position taken by United Voice was that it did not wish to undertake this exercise without a commitment from Lion that it would withdraw its intention to put a document to vote to employees to be covered by a new agreement.

[96] I cannot reconcile that action with the submissions made by United Voice to find that the union is genuinely trying to reach agreement with Lion. As submitted by Lion, there is ample opportunity between 21 September 2017, the date of the hearing, and 9 October 2017 when the ballot of employees to approve the agreement would be declared, to enter into further negotiations. It is not a hopeless or meaningless exercise.

[97] The refusal to enter into further discussions without such a condition, results in me concluding that United Voice did not wish to have further discussions with Lion on this issue, but preferred its chance or opportunity, as Mr Ong put it, at having the protected action ballot order made.

[98] I do not agree with the submissions made by United Voice that the proposed clause tabled on 13 September 2017, was prepared to generate further discussion between the parties. When all of the circumstances are considered, it is my view:

(a) The United Voice log of claims tabled on 28 June 2017 does not, at item 12, contain any proposal that would have, or should have caused any concern to Lion;
(b) From 10 July 2017, United Voice participated in media activity relevant to its concerns around job security and supplementary labour at the site;
(c) The proposed clause was prepared by the United Voice industrial team, who in my view would have the requisite understanding as to what might constitute permitted matters and non-permitted matters;
(d) The proposed clause provides far greater restrictions on Lion than the enterprise agreements Lion has earlier entered into at [51];
(e) Given their experience, Mr Davey and Mr Ong have the requisite understanding as to what might constitute permitted matters and non-permitted matters;
(f) In tabling the proposed clause, Mr Davey made it clear that it was a very important issue (more important than any wage increase to be negotiated), and the clause, among other things is deliberately meant to be restrictive on Lion engaging supplementary labour;

(g) United Voice did not consider the largely correctly-informed views of Ms Wicks at the meeting of 13 September 2017 regarding the proposed clause being a clause Lion could not agree to because of the prevalence of non-permitted matters;
(h) United Voice did not offer any alternative views in any communication following the meeting of 13 September 2017;
(i) On receipt of the Lions' letter dated 19 September 2017, United Voice communicated that it pressed the current application, had regard to the relevant authorities, and pressed the proposed clause without any attempt to at least identify or seek to reach agreement with Lion as to what parts of the proposed clause might constitute non-permitted matters causing the relevant concern to Lion;
(j) At no time during the hearing did United Voice commit to withdraw any item of the proposed clause;
(k) During the hearing, United Voice declined an opportunity to continue discussions with Lion on the basis that it considered it would not be meaningful discussions unless Lion withdrew its direct vote of employees for the approval of a draft agreement.

[99] It is clear from the submissions of United Voice that it took a calculated risk in pressing its claim in the form of the proposed clause, with all of the non-permitted matter and all of the other relevant circumstances, on the chance that the Commission would find it has been, and is genuinely trying to reach agreement with Lion. By words stated, conduct and submissions made at the hearing, United Voice is not prepared to genuinely reach agreement with Lion on this issue.

Conclusion

[100] Having had regard to all the relevant facts and circumstances, as summarised above, I am not satisfied that the applicant **is** genuinely trying to reach agreement. I am satisfied that up until the meeting of 13 September 2017, United Voice **had been (has been)** genuinely trying to reach agreement. From the tabling of the proposed clause on 13 September 2017, and the subsequent conduct of United Voice, I conclude the application is not genuinely trying to reach agreement.

[101] Pursuant to s.443(2), the Commission must not make a protected action ballot order except if s.443(1) is met. The Commission is not satisfied the applicant is genuinely trying to reach agreement, and accordingly, I must not make a protected action ballot order.

[102] This decision does not prevent United Voice from communicating with Lion as to a revised clause or claim, and seeking to advance discussions on the revised clause or claim, and making a further application for a protected action ballot order under the appropriate circumstances.

[103] Having found that the Commission must not make a protected action ballot order, it is not necessary to deal with question 8 of the proposed protected action ballot order. If I had found that an order could be made, I would not have included question 8 on the order for the reasons that the relevant employees do not perform social media tasks in the performance of their work, and therefore the question posed would not constitute protected industrial action.

[104] The submission for the making of the order relevant to question 8, as I understand it, would be to provide some sort of immunity to employees to engage in social media campaigns free of prosecution by Lion of disciplinary action. I do not consider an immunity, the like provided in s.415 of the Act should be afforded in these circumstances.

COMMISSIONER

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[1] [2012] FCAFC 53.

[2] [2009] FWAFB 368.

[3] [2015] FWCFB 210.

[4] *The Australian Workers' Union v Telum (QLD) Pty Ltd T/A Telum*; and *Construction, Forestry, Mining and Energy Union v Telum (QLD) Pty Ltd T/A Telum* 2016 FWC 8496 at [11].

[5] *Wesfarmers Premier Coal Limited v The Automotive Food Metals Engineering Printing and Kindred Industries Union (No 2)* [2004] FCA 1737, per French J (as his Honour then was) at [92].

[6] [2015] FWCA 1308.

[7] Ibid.

[8] PN254.

[99] PN242.

[10] *United Voice v Lion Pty Limited* [2015] FWC 4673.

[11] Ibid at [25]-[32].

[12] Exhibit A2.

[13] PN105.

[14] PN253.

[15] PN93.

[16] Exhibit R2 at Annexure MW-01.

[17] Ibid at Annexure MW-03.

[18] PN220.

[19] PN101.

[20] Exhibit R2 at Annexure MW-06.

[21] Ibid at Annexure MW-07.

[22] Ibid at Annexure MW-08.

[23] PN137-PN145.

[24] PN157-164.

[25] PN170-174.

[26] PN188.

[27] PN190.

[28] PN191.

[29] PN198 – PN202.

[30] PN212 – PN216.

[31] PN261 – PN262.

[32] PN271.

[33] PN273.

[34] *Lion Dairy & Drinks Victorian Dairy Beverages Agreement 2016* [2016] FWCA 9063 at clause 16.2.

[35] PN426.

[36] PN432.

[37] PN412.

[38] *Esso Australia Pty Ltd v AMWU and ors* [2015] FWCFB 210 at [73].

[39] Ibid at [75].

[40] *Electrolux Home Products Pty Limited v AWU* [2004] HCA 40; (2004) 221 CLR 309.

[41] *R v The Judges of the Commonwealth Industrial Court; Ex parte Cocks* [1968] HCA 86; (1968) 121 CLR 313.

[42] *Wesfarmers Premier Coal Limited v the Automotive Food Metals Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737.

[43] PN191.