DECISION

Fair Work Act 2009
s.437—Protected action

Australian Maritime Officers' Union

v

Solstad Australia Pty Ltd T/A Solstad Offshore ASA
(B2023/45)

DEPUTY PRESIDENT BEAUMONT PERTH, 1 FEBRUARY 2023

Proposed protected action ballot of employees of Solstad Australia Pty Ltd

[1] This decision concerns an application by the Australian Maritime Officers' Union (**AMOU**), pursuant to s 437 of the *Fair Work Act 2009* (Cth) (the **Act**) for a protected action ballot order. The application was made on 20 January 2023 and relates to employees who are members of the AMOU and are employed by Solstad Australia Pty Ltd T/A Solstad Offshore ASA (**Solstad**) in the position of Deck Officers. These employees are covered by the *Farstad Shipping (Indian Pacific) Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2015* (**2015 Agreement**).[1]

[2] Solstad operates in particular segments of the shipping industry and is said to be one of the leading providers of specialised offshore shipping services to the global energy markets.[2] As a global company, it has approximately 3,500 employees and 100 vessels, and is understood to be one of the largest vessel operating companies of its kind.[3] The company's main activities are in the markets of Europe, Brazil, Australia and Asia.[4]

[3] Bargaining to replace the 2015 Agreement commenced in March 2020 and since then, there have been three representatives of the AMOU who have assumed the lead negotiator role. The latest of those is Mr Mark Charles, an Industrial Officer of the AMOU, who appears to have been interposed into the bargaining when his predecessor, a Mr Moran, departed the negotiations.

[4] Mr Charles has been on the scene since 23 November 2022. In short, Solstad holds the view that Mr Charles has, on behalf of the AMOU, 'shifted the goal posts' on Solstad, who prior to this, had been negotiating for a simple two year agreement to achieve an immediate improvement in the employees' salaries and employment conditions. It is Solstad's view that Mr Charles' involvement in the bargaining has significantly changed the negotiations. Solstad takes no issue that the AMOU had been genuinely trying to reach agreement prior to the involvement of Mr Charles.

[5] Solstad submits that of late, the AMOU has comprehensively altered the clauses which were agreed, misrepresented Solstad's position on what had or had not been previously agreed

and changed a number of issues being discussed between the parties. Solstad noted that Mr Charles had presented a further amended log of claims on 9 December 2022 (**9 December Log**),[5] which went far beyond that previously contemplated by the parties.

[6] The basis of Solstad's objection to the application is that the AMOU had not genuinely tried, at least recently, and was not as at the time of the application genuinely trying, to reach agreement. Solstad advanced two alternative submissions in support of its position:

a) the AMOU has not been and is not genuinely trying to reach agreement with respect to, what Solstad contends is, the second proposed agreement; or in the alternative
b) if the proposed agreement sufficiently aligns with what has been previously proposed by the AMOU, the drastic moving of the goal posts, combined with the failure to negotiate, and the premature pursuit of this application since Mr Charles commenced negotiating, show that the AMOU is not (and has not been) genuinely trying to reach agreement.

[7] Further, in respect of the draft order and the ballot questions listed, the inclusion of exemptions from the proposed industrial action, had, according to Solstad, made the nature of the action unclear, such that the application is rendered invalid.

[8] Solstad advanced if the Commission was to grant the protected ballot action order, then it sought a variation to any such order to extend the written notice period to seven working days. At hearing, the AMOU submitted that it would be content to arrive at the consent position of allowing for four days for the written notice.

[9] The hearing of this matter was listed for 27 January 2023. However, the AMOU requested an adjournment until 30 January 2023 to enable it to brief an internal representative to assist with running of the matter. The Respondent did not oppose the request and consequently the application was adjourned, part-heard on 27 January 2023. At the conclusion of the hearing on 30 January 2023, I advised the parties that I would reserve my decision.

[10] For the reasons that follow, an Order has been separately issued in PR749961.

1 Background

[11] There appears to have been a relatively long history of bargaining between the parties. This history can be traced in the evidence of Mr Charles, Mr Josh Newman, Ships Officer and AMOU Delegate, and Mr Peter Cooke, Industrial Relations/Employee Relations Consultant, who gave evidence on behalf of Solstad. The witnesses gave somewhat different accounts of the negotiations, which is unsurprising given the objections raised. However, before traversing the bargaining history, detail is provided regarding Solstad's operations.

1.1 Operations

[12] Solstad's activities are aimed towards the offshore hydrocarbons exploration and production industry.[6] The activities are subdivided into two market segments, Platform Supply Vessels (**PSV**) and Anchor Handling Tug Support vessels (**AHTS vessels**).[7]

[13] In Australia, Solstad currently operates eight vessels that are said to form a critical part of the offshore supply chain performing supply and support services to drilling rigs and other offshore facilities on the North West Shelf of Australia, the Browse basin off the Kimberley coast and in the Timor Sea.[8]

[14] Solstad's eight operating vessels have been contracted or assigned to the following oil and gas clients in Australia:

a) Normand Skimmer – Chevron Australia;
b) Normand Swan – Shell;
c) Normand Tortuga and the Normand Ranger – Woodside;
d) Far Seeker / Far Senator – Santos; and
e) Normand Saracen / Normand Scorpion – Inpex.

[15] Mr Cooke gave evidence that Solstad considers the following tasks as critical because they are key to its clients being able to safely undertake their operational tasks:

a) Solstad regularly tows drilling rigs to and from location using AHTS vessels and carefully positions them by running up to 12 anchor systems per rig, each anchor weighs in excess of 15 tonnes and is up to 500m long;

b) each week, each of Solstad's PSVs transport critical food stores and fuel to a range of offshore facilities. Where these food and other supplies are not delivered, the rig may not be able to operate fully; and

c) each week all of Solstad's AHTS vessels transport drilling fluids in bulk, critical to the drilling process to maintain the integrity and downhole pressure of a hydrocarbon reservoir. Without these fluids, drilling cannot be undertaken. These fluids are used in drilling and must be replaced and topped up.[9]

1.2 Bargaining

[16] It is uncontroversial that the notice of employee representational rights (**NERR**) was issued to Deck Officers on 11 March 2020, and Mr Cooke confirmed bargaining commenced at this time to replace the 2015 Agreement. According to Mr Cooke, the proposed agreement would apply to employees in the classifications of Master, Chief Officers, Second Mates and Third Mates.[10] Those same employees currently work a roster of five weeks on and five weeks off, unless the vessel they are working on has been deployed to a construction project or on work in southern waters, in which case the roster is four weeks on and four weeks off.[11]

1.2.1 AMOU's evidence

[17] Mr Charles said meetings between the AMOU and Solstad have occurred sporadically since June 2022.[12]

[18] As part of the evidence filed, the AMOU provided a document titled 'AMOU/Solstad 2021 EBA: Draft Log of Claims. July 2, 2021' (**AMOU Log of Claims July 2021**). The AMOU Log of Claims July 2021 was attached to an email from 'Glenn Andersen' and sent to

'Natasha Lindfield', dated 2 July 2021. Copied to the email were two email addresses which referenced 'aimpe'.

[19] On the first page of the AMOU Log of Claims July 2021 the following was set out:

> Without Prejudice:
> In regards to the current Farstad Shipping (Indian Pacific) Pty LTD and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2015. The following represents items for discussion and a log of claims put forward by the AMOU on behalf of members employed by Solstad. Notice is given that Items for Discussion may eventually become part of the log of claims. Claims may be altered, added to, or withdrawn during the negotiation process. New claims may also be added.
>
> ITEMS for Discussion:
> Items for discussion may be introduced as EBA claims:
> 1. A Permanent Deck Officer employed by Solstad as either Master or Chief Officer shall be employed in that role in preference to a Casual Employee either employed directly by Solstad or sourced from a third-party labour-hire company.
> 2. The work practice of 6-hours on, 6-hours-off.
> 3. Any Master's Post Swing, Client or Employer project debrief/evaluation to be paid as a Dead Day.
> 4. An employee is requested to be on Stand-by in order to join their last vessel before their regular rostered crew change date the employee is entitled to a Dead Day payment for each 24hour period the employee is on Stand-by to Join.
> 5. Re-insert Deck Officer salary relativity table (Master: 100%; Chief Officer 84%; 2/Officer 75.5%). Previous EBA clause
> 6. Personal Performance System Evaluation range (clause 19) re-insert the 2010 clause (18). Previous EBA clause
> 7. Manning clause 64.4 – Third Officer position
> 8. Learning and Development Commitment funding. Agreed number of superior certificate sponsorship positions per year.
> 9. Casuals recruited via third party labour-hire to receive EBA Ballot voting rights. Similar FWC rights.
> 10. Clause 29.8 Sailing Shorthanded: Replace with wording from 2010 EBA (clause 30.2). Previous EBA clause.
> 11. 3/Officer designation: Exclusive to Solstad.
> 12. Clause 34.7: alter wording; clauses 29 and 42.3 to clauses 29.1 and 42.3
> 13. Trade Union Training: See Annex "C"
> 14. Cadetship employment conditions: Employment conditions to include things such as: Sick-leave, wages during periods waiting vessel re-assignment.

[20] Mr Charles gave evidence that in June 2022, the AMOU made a without prejudice offer to Solstad that included a pay claim of 10% in the first year and then 3% or CPI + 1%, whichever is greater.[13] In response, Solstad maintained a pay offer of 4.6% followed by 2% for subsequent years.[14]

[21] Mr Charles said that a bargaining meeting occurred on 8 December 2022. The next day he provided to Solstad a 'revised' log of claims.[15] It is noted that by email dated 9 December 2022, Mr Charles forwarded two documents to Ms Claire Cubis-Edwards, Crew Manager, Solstad, and Mr Cooke in addition to others.[16]

[22] Further bargaining meetings were held on 13, 19, and 20 December 2022.[17]

[23] Mr Newman gave evidence that the AMOU had put to Solstad its full log of claims on multiple occasions over the past 18 months[18] and on 20 December 2022, it again completed a full read through of the log of claims, where Solstad finished its questions and confirmed it understood the claims.

[24] It is Mr Charles' evidence that at the bargaining meeting on 20 December 2022, Solstad advised that it would provide a full response to the AMOU's log of claims and would have a revised pay offer ready to present at the next scheduled bargaining meeting on 20 January 2023.[19]

[25] Mr Charles said the AMOU attempted to contact Solstad on 9 January 2023 to confirm that Solstad would put forward an offer and that a meeting would be scheduled for 20 January 2023 but received no response.[20] Thereafter, Mr Charles said the AMOU attempted to contact Solstad's representative via telephone on 10, 16, 17 and 18 January 2023, to confirm the date of the meeting and that an offer would be made.[21] According to Mr Charles, no response was received,[22] presumedly from Solstad.

1.2.2 Solstad's evidence

[26] Mr Cooke acknowledged that he became involved in the bargaining process for the proposed agreement from around April 2022 onwards.[23]

[27] Mr Cooke said that Solstad's records show that previous bargaining meetings were held on 18 October 2021 and 16 December 2021 with Mr Glenn Andersen (WA Area Secretary for the AMOU) negotiating on behalf of the AMOU. Mr Cooke said that it was his understanding that little immediate bargaining took place following the issue of the NERR due to Solstad's primary concern, which was with dealing with the business challenges in the face of the COVID-19 pandemic.[24]

[28] It appears from Mr Cooke's evidence that Mr Andersen left the AMOU and was replaced in the negotiations by Mr Jarrod Moran, Senior Industrial Officer of the National Office.[25] Mr Cooke said that meetings with Mr Moran took place on: (a) 24 March 2022; (b) 30 March 2022; (c) 5 July 2022; (d) 19 July 2022; I 16 August 2022; (f) 22 August 2022; (g) 25 August 2022; (h) 20 September 2022; and (i) 27 October 2022.

[29] Mr Cooke said that on 23 November 2022, Solstad received notification that the AMOU's bargaining representative was again changing, and from this date Mr Charles became the lead negotiator for the AMOU.[26] Following Mr Charles' appointment, bargaining meetings took place on 8 December 2022, 13 December 2022, 19 December 2022 and 20 December 2022.[27] However, there was also an informal meeting held on 2 December 2022.

[30] Returning to the bargaining that took place with Mr Moran in the lead, Mr Cooke said that he was only aware of one log of claims document that had been created and submitted before the handover between Mr Moran and Mr Anderson.[28] That same log had been the one worked upon by the parties from April 2022.[29]

[31] Mr Cooke said that at the first bargaining meeting he attended on 5 July 2022, there were 10 claim items which he understood to be a summary of those items in dispute and for bargaining between the parties, which loosely fell within the following categories:

a) salary (term length of agreement, salary increase);
b) dead day (payment for travel time prior to joining a vessel);
c) commitment to future enterprise agreement negotiations;
d) coverage of the proposed agreement;
e) the level of employer superannuation contributions;
f) service in higher ranks (this being a claim that where an Officer is working on an acting basis in a higher level role, after a set amount of sea time in the higher level role they will be deemed to be appointed permanently to such higher role);
g) new entrant program (a commitment from Solstad to expend a nominated % of payroll on new entrant training);
h) deck Cadet Program (removal of clause 32.10); and
i) a "Me Too" Clause.[30]

[32] Mr Cooke said that the attendees at this meeting included Ms Cubis-Edwards, himself, Mr Moran, Mr Wayne Lewis, AMOU delegate, Mr Newman and Ms Louise Hornsby, Solstad Health and Wellbeing Advisor. Mr Cooke said that Ms Hornsby's primary reason for attending the meetings was to take minutes.

[33] Mr Cooke considered that whilst slow, progress occurred at bargaining meetings on 19 July, 16, 22 and 25 August, 20 September and 27 October 2022.[31]

[34] Mr Cooke said that bargaining throughout these months took place according to a familiar and consistent scope: bargaining was restricted to a discussion of issues that were relevant to AMOU members and Solstad, rather than issues or terms that were from agreements reached between other parties (e.g. the Maritime Union of Australia (**MUA**), which was also bargaining with Solstad for a replacement agreement) in the industry.[32]

[35] Mr Cooke gave evidence that items such as dead days, salary increases, and payment for isolation, were embedded in the negotiations early and became a foundational core of the negotiations as they were important to both parties to resolve.[33]

[36] By way of explanation regarding the benchmarking of conditions, Mr Cooke said that enterprise agreements in the Offshore Oil & Gas space had, for a long time, been split between three relevant unions and the classifications they cover.[34] Each of these classifications (Ratings, Engineers, Officers) had different enterprise agreements, with different terms and conditions reflective of their seniority in the profession.[35] Mr Cooke said that Solstad made it clear (and it was agreed, at least from the time that he commenced bargaining on behalf of Solstad) that this would be an 'Officers agreement'. By that, he said, he meant the terms and conditions would be benchmarked against industry standard for officers, not Ratings (covered by the MUA) or engineers (covered by the Australian Institute of Marine and Power Engineers).[36]

[37] Mr Cooke continued that in light of this imperative, items had been negotiated from a consistent position. By that, he said, things like the duration of the agreement had been bargained, understood, and agreed from the perspective that both parties wished to get an

agreement done quickly to provide a pay rise for the workforce, rather than re-negotiate all terms in the proposed agreement. According to Mr Cooke, this had been a common position shared by the parties which guided the breadth of issues and bargaining styles while Mr Moran was running negotiations for the AMOU.[37]

[38] Mr Cooke said that in terms of the record keeping, items subject to negotiation were generally organised in the minutes and log of claims documents according to the following categories: whether they were agreed, no agreement reached, or Solstad to confirm position. This enabled quick identification of those issues which required further discussion at subsequent meetings.[38]

[39] Mr Cooke gave evidence that Solstad wrote to Mr Moran setting out a condensed list of what it understood to be the remaining issues in dispute between the parties, following a request from the AMOU at the bargaining meeting held on 20 September 2022.[39] Mr Cooke expressed that implicit in the correspondence was that anything not listed was agreed between the parties, and the proposed agreement was 'ready to go'.[40] Whilst Mr Cooke acknowledged that there was no response from the AMOU in respect of the letter (condensed list), the items that Solstad had identified in the list were discussed at the bargaining meeting on 27 October 2022.[41]

[40] Mr Cooke said that on 23 November 2022, Solstad was notified that Mr Charles would be taking over the negotiations, and on 8 December 2022, a meeting took place between Mr Cooke, Ms Cubis-Edwards, and Mr Charles.[42] Mr Cooke purports that at the meeting, Mr Charles informed him that the position expressed in the correspondence of 29 September 2022 did not align with the AMOU's position and it considered there were other items which required further discussion.[43] Mr Cooke stated that the AMOU's position now differed to the one that had been expressed by the AMOU at the bargaining meeting on 27 October 2022.[44]

[41] In light of Mr Charles intimating there were additional new claims, Solstad requested that Mr Charles provide a summary of the AMOU's position in respect of the matters agreed and not agreed between the parties.[45] Mr Cooke said that Mr Charles undertook to provide this position for Solstad to review in advance of a scheduled bargaining meeting on Monday, 12 December 2022.[46]

[42] Mr Cooke explained that having not received this position from the AMOU by early afternoon on 9 December 2022 (being a Friday with the bargaining meeting scheduled for the following Monday, 12 December 2022), Ms Cubis-Edwards suggested, and the parties agreed, that the meeting on Monday, 12 December 2022 should be vacated to provide Solstad with time to review the AMOU's consolidated log of claims before a bargaining meeting scheduled for Tuesday, 13 December 2022.[47]

[43] Mr Cooke said that Mr Charles agreed with this course of action and expressed that this was preferable as it would provide him with time to go through the claim form with delegates to 'refine the claim from its previous form'.[48] Mr Charles provided the AMOU the 9 December Log at 4:59 PM on Friday, 9 December 2022.[49]

[44] Mr Cooke observed that the 9 December Log included a new classification for the status of a term, distinct from agreed or not agreed: 'parked'. Mr Cooke said it was not clear what this classification meant. Many of the items now marked as 'parked' (a number of which had

previously been marked as agreed by the AMOU, but to which Solstad had not actually agreed) were not discussed at bargaining meetings on 19 and 20 December.[50] Mr Cooke said that Mr Charles explained that 'parked' meant that they were claims to which Solstad had not agreed, and the AMOU was not prepared to drop.[51] He indicated that these would require further discussion.[52]

[45] Mr Cooke said that bargaining meetings were held on 19 and 20 December 2022.

[46] According to Mr Cooke, at these meetings, notwithstanding that Mr Charles undertook to provide a fulsome log of claims to Solstad (being the 9 December Log), which reflected the position of the parties, the position had, once again, shifted.[53] Several of the items labelled as 'agreed' in the 9 December Log were, at the bargaining meeting of 19 December, apparently in fact, not agreed between the parties.[54]

[47] Mr Cooke noted that this slowed progress of these two meetings, as it was necessary to go back through the claim and make sure each party understood the other's position.[55] This meant that only some (but not all) of the new items which were raised in the revised 9 December Log were discussed.[56]

[48] Mr Cooke gave evidence that in addition to incorrectly marking things as not agreed in the 9 December Log, at the bargaining meeting on 19 December, the AMOU sought to further change its position in relation to a number of previously agreed items and sought to put them 'back in the mix' for negotiation, some of which had long since been the subject of agreement between both parties, or indeed not even discussed including:

a) bargaining was now taking place on the basis that the AMOU wanted a 4 year agreement (something which had been agreed since at least April 2022);
b) meal breaks which were previously the subject of agreement were now 'parked' and were not discussed at these meetings;
c) the definition of permanent employee was now subject to negotiation;
d) the proposed change in definition of the Hydrocarbons Industry in clause 3 which had been agreed to by the parties since the 29 September 2022 and had a flow on effect to the coverage clause, the majority of which had been previously subject to the agreement of the parties (sub clauses (a)-(d) of the coverage clause agreed (e) outstanding), was now in effect no longer agreed;
e) an MUA-drafted clause had now been put on the negotiating table for clause 16 'general' – an entirely new clause, not previously foreshadowed;
f) newly created clauses 16.8(e),(f), and (g) had all been added as claims relating to the employment of casuals and third party labour;
g) the AMOU sought that clause 25.6, and pay increases in general, to be relative to MUA pay deals, as opposed to the long-standing basis for the negotiation of pay (market rate for Officers);
h) allowance increases which were previously agreed to be set at a level independent of the yearly % wage increase, were now being negotiated on the basis that they should be tied to the yearly wage increase in the proposed agreement; and
i) clause 36.17 regarding dead day payments for masters de-briefing for over four hours after a swing was included as a new claim.[57]

[49] Mr Cooke gave evidence that the AMOU did not conclude explaining and elaborating on all of its claims in its 9 December Log, and at the conclusion of the meeting the AMOU was discussing proposed new subclause 36.17.[58]

[50] The AMOU agreed that bargaining would re-commence on the outstanding claims (i.e. the other new claims, and changes in bargaining position made clear by the 9 December Log, and further changes at the 19 December meeting) in mid-January of 2023, with bargaining meetings flagged for 19 and 20 January 2023.

[51] Mr Cooke said that many of the new claims and new items had financial impacts for Solstad.[59] He said that he was aware that the terms and conditions negotiated in the proposed agreement were tied to Solstad's commercial contracts, and any change which would have financial impact would need to be discussed and agreed with Solstad's clients before it could be agreed.[60]

[52] Mr Cooke said that on 9 January 2023, Mr Charles sent an email to Ms Cubis-Edwards seeking confirmation that the meetings on 19 and 20 of January were confirmed.[61] Mr Cooke said he was aware that Ms Cubis-Edwards was away from the Solstad office from Thursday, 22 December 2022 until Monday, 9 January 2023, and had an automated 'out of office' reply set up during this period on her email account.[62] Ms Cubis-Edwards' out of office message directed anyone with an industrial relations matter to contact Mr Cooke during this period. Mr Cooke said he was not contacted by Mr Charles during this period.

[53] Mr Cooke gave evidence that Ms Cubis-Edwards had informed him that on 18 January 2023, following her return to work, that she and Mr Charles spoke over the phone and Ms Cubis-Edwards informed Mr Charles that Solstad had not received responses to their queries from their clients in relation to the AMOU's new claims (and the financial impact these would have). Ms Cubis-Edwards informed Mr Charles that Solstad was not in a position to put a revised offer on the table as it did not entirely understand the AMOU's new claims and had not received responses from Solstad's clients in respect of the ones they did.[63]

[54] According to Mr Cooke, Mr Charles was said to have expressed to Ms Cubis-Edwards his disappointment that Solstad will not be able to present a revised offer to the AMOU at the bargaining meeting on 20 January 2023.[64] This, said Mr Cooke, was notwithstanding the AMOU had not completed outlining all items in their revised log of claims to Solstad.

[55] Mr Cooke detailed that Mr Charles followed up this phone call with an email on 19 January 2023. On 20 January 2023, Ms Cubis-Edwards replied to Mr Charles' email, outlining Solstad's position in relation to the state of bargaining. Following receipt of Ms Cubis-Edwards' email, the application for a protected action ballot order was filed at 4:06 PM (AWST) on the same day.[65]

2 Factual findings

[56] It is apparent from the evidence of Mr Cooke that Solstad places some reliance on the spreadsheets it filed at Annexures PC-11 and PC-17 to the witness statement of Mr Cooke, in addition to Annexure PC-15, the 9 December Log. These spreadsheets detail each clause of the proposed agreement and appear to have been drawn from the 2015 Agreement. Effectively, the

spreadsheets appear to be an articulation of the log of claims inclusive of commentary in respect of each claim (or clause as the case may be). The consideration of them has amounted to an almost Sisyphean task.

[57] Whilst Mr Cooke, correctly in my view, conceded he was not the author of the aforementioned spreadsheets that are attached to his witness statement, he gave evidence at hearing of having reconciled the spreadsheets with his own notes after each bargaining meeting. It is observed from the outset that the spreadsheets do not appear to have been a shared document with the AMOU, such that the parties did not, after each bargaining meeting, reach contemporaneous agreement as to content of the spreadsheets (or log of claims).

[58] As noted, Mr Cooke received a request from the AMOU on 20 September 2022 for a condensed list of what Solstad understood to be the remaining issues in dispute between the parties.[66] Mr Cooke also acknowledged that no response was forthcoming from the AMOU in respect to the letter from Ms Cubis-Edwards to Mr Moran of 29 September 2022. Whilst it appears to have been Mr Cooke's view that implicit in the correspondence was that anything not listed was agreed between the parties and the proposed agreement was 'ready to go', there is no other evidence to show that was the case,[67] and understandably I hold a palpable hesitancy of making such a finding based on an assertion of something said to be 'implicit'.

[59] As would be appreciated, there is no evidence before me to persuade me that the AMOU had been accepting of Solstad's viewpoint as expressed on 29 September 2022 with respect to the outstanding issues. The silence or lack of response from the AMOU at this time is not, in my view, indicative of the AMOU acceding to the proposition that the correspondence of 29 September 2022 encapsulated all that was left to bargain.

[60] I am content to find that Mr Charles' arrival heralded a 'revision' of the log of claims (culminating in the 9 December Log). It is evident from Mr Charles' evidence that the 9 December Log was provided to Solstad with a view of providing the AMOU's update and understanding on the status of negotiations with respect to the clauses in the proposed agreement and claims being negotiated. Mr Charles did not shy away from suggestion that *some* of the claims were new, having not been broached with Solstad previously.

[61] Solstad pressed that the 9 December Log showed that items which were previously subject to an agreed position between the AMOU and Solstad as of 27 October 2022 were now identified as not agreed.[68] The items purportedly no longer agreed included:

a) the definition of 'Casual Employee'; and

b) clause 16.9(d) relating to permanency.

[62] Annexure PC-11, which Solstad reports is a copy of the log of claims as at the conclusion of the negotiation as of 27 October 2022, shows that the definition of 'Casual Employee' had been agreed, as had clause 16.9(d) relating to permanency. The 9 December Log at Annexure PC-15 to the witness statement of Mr Cooke shows that these two clauses were no longer agreed.

[63] However, again it must be emphasised that whilst Solstad purports that Annexure PC-11 evinces that the parties had reached agreement, there is no other evidence before me to suggest that this spreadsheet had been shared with the AMOU or otherwise endorsed by it. The letter from Ms Cubis-Edwards to Mr Moran of 29 September 2022 sets out in part:

> During the bargaining meeting held on Tuesday 20 September 2022, Solstad put forward a number of responses to issues/claims raised by the Australian Maritime Officers Union (AMOU) over the course of our negotiations for a new enterprise agreement (EA) to replace the Farstad (Indian Pacific) Ply Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2015 (the 2015 EA).
>
> At the conclusion of the meeting the AMOU requested that Solstad set out in writing our position on those matters we had agreed to or that we had put counterproposals in response to AMOU issues.
>
> Set out below is a consolidated list of our responses. As we have noted, the starting point when considering these responses is the 2015 EA with amendments as described below.
>
> 3. Definitions. Casual Employee - Current definition remains: "Casual" means an Employee that is not employed as a permanent Employee and has no guaranteed work".[69]

[64] The letter of 29 September 2022 does not reflect a position that the *parties* had agreed to the definition of 'casual employee', and I am therefore not content to find that was the case. However, with regard to clause 16.9(d) relating to permanency, the AMOU did not press that it had not changed its position.

[65] Solstad added that the 9 December Log now introduced several entirely new items. It is uncontroversial that a new dispute settlement procedure clause had been included. Solstad observed that the new clause empowered the AMOU to raise a dispute on behalf of an employee or employees as well as removing a number of key provisions from the dispute settlement procedure as it had been in the 2015 Agreement. This was not disputed by the AMOU.

[66] Solstad pressed that clause 16.5(d) was a new clause. However, the evidence is such that the clause was present in Annexure PC-11, albeit in Annexure PC-17, a spreadsheet created by Solstad that mirrored the 9 December Log, it appeared that from the commentary in that spreadsheet that part of the clause was agreed to by the AMOU and part was not. Mr Charles gave evidence that he could not recall who put in the word 'new'.

[67] At hearing, Mr Charles was taken to row 44 in Annexure PC-17, a clause that was marked as new. However, it was Mr Charles' evidence that the claim or clause had been referred to in a marked-up agreement at the time when Mr Andersen was the lead negotiator for the AMOU.

[68] Other clauses purported to be new included clause 39(a) – an accommodation clause – and clauses 65.5 and 65.6, 65.7, which were manning clauses. The AMOU did not appear to argue that this was not the case.

[69] It is noted that Mr Cooke gave evidence at paragraph [51] of his witness statement that in addition to incorrectly marking things as not agreed in the 9 December Log, at the bargaining

meeting on 19 December, the AMOU sought to further change its position in relation to a number of previously agreed items and sought to put them 'back in the mix' for negotiation, some of which had long since been the subject of agreement between both parties, or indeed not even discussed.

[70] Mr Cooke stated that bargaining now appeared to be taking place on the premise that the AMOU wanted a four year agreement. However, Annexure PC-17 records that at the bargaining meeting on 19 December 2022, the following exchange took place:

> PC - 2 years, fundamentally based around the salary. A 4 year deal is fine also but if there is sticking point in years 3 & 4 lets stick with 2 years and see what happens in 18 months.

[71] Whilst it is apparent from the evidence presented that bargaining had been on foot for a two year agreement, the abovementioned passage does not, in my view, indicate that the AMOU was firmly pushing for a four year deal.

[72] Mr Cook observed that meal breaks which were previously the subject of agreement were now marked as 'parked' on the 9 December Log – and were said not to have been discussed at these meetings. However, Annexure PC-11 to the statement of Mr Cooke reads:

> JM: Meal break. Consume a meal in a mess room. Can you please let me know why this wasn't acceptable.
> PC: Whereever (sic) possible, crew take meal break. But operational considerations, from time to time (rig shifts), where this wouldn't be possible. Which is not a viable option for Solstad.
> JN: You need to acknowledge this would be a big change if it was changed. Myself, we have no issues in keeping the ops done. 45 minute meal break will stop ops.
> PC: That is not the case. There is about 140 logs in total.
> JN: It is a bit operational commitment, professionalism on board the bridge. This clause is more about a manning clause.
> PC: We take this on board. This a manning claim and very expensive.
> JN: Put a "if practicable" clause into the agreement.

[73] It is not apparent from the passage extracted from Annexure PC-11 that the parties were in agreement about the meal breaks clause notwithstanding another aspect of the spreadsheet representing this was the case. According to contents of Annexure PC-17, Mr Charles confirmed at the bargaining meeting on 19 December 2022 that the meal breaks clause was not agreed.

[74] Mr Cooke identified that the definition of 'permanent employee' was now subject to negotiation. Annexure PC-11 records that it was agreed.

[75] Mr Cooke referred to the proposed change in definition of the 'Hydrocarbons Industry' in clause 3 which had been agreed to by the parties since the 29 September 2022 and had a flow on effect to the coverage clause the majority of which had been previously subject to the agreement of the parties (sub-clauses (a)-(d) of the coverage clause agreed, (e) outstanding). Mr Cooke asserted that in effect the clauses were no longer agreed. The spreadsheets at Annexures PC-11, PC-15 and PC-17 (record of the discussion at the meeting on 19 December 2022) state:

> PC – 11 Solstad to confirm position

PC – 15 – Agreed yes

PC-17

PC – The definition sent on 29.9.22 definition sent was agreed but this definition has been changed. Careful with detail when off hire etc. Vessels contracted short term to cable laying, EA was applied. Agreement didn't apply as a matter of law. We want to be transparent. Client communications it was pointless to renegotiate for 3 weeks work so applied the agreement rates of pay.
MC – Moving forward no mechanism to pay less than what is in the agreement. How would you word that. Current practice continues and in 2 years someone does not read it differently.
PC – Hear what you are saying. We were happy to apply the agreement. As a matter of concern we could converse in an exchange of letters.
JN – Look at the wording in the EA.
MC – Agreement may change.
PC – Short term work outside oil and gas the following would apply. Offshore renewables will become a bit thing and may need a new agreement specific to the sector.
MC – Parked.
PC - Earlier discussions removed e from this.
MC - To achieve status quo.
PC - A new agreement tends to replace an old agreement in its entirety.

[76] It is apparent from the evidence led, which was not refuted by the AMOU, that there had been a proposed change to the definition of 'Hydrocarbons Industry'.

[77] Mr Cooke further observed that 'an MUA drafted clause' had now been put on the negotiating table for clause 16 'general' – which was an entirely new clause, not previously foreshadowed. The direct evidence supports Mr Cooke's account and the AMOU did not parry with it.

[78] Reference was made by Mr Cooke to newly created clauses 16.8(e), (f), and (g) which he said had all been added as claims relating to the employment of casuals and third party labour. Again, the AMOU took no issue with Mr Cooke's evidence in this respect, and I am content to find that the clauses were introduced in the 9 December Log.

[79] Mr Cooke expressed that the AMOU sought that clause 25.6 and pay increases in general were to be relative to MUA pay deals, as opposed to the long-standing basis for the negotiation of pay at the market rate for Officers. It is not clear from the 9 December Log that this was the case. However, in Annexure PC-17, it is evident that there was discussion concerning:

After this current EA - Irrespective how long it takes to replace an agreement the company will continue to increase the pay rate in line with positive CPI plus 1% as defined by the ABS until a new agreement is agreed and in place.

[80] Annexure PC-17 provides the following account of the discussions that followed:

JN – Another point we are behind in relativity to the MUA.
PC – We have worked on this from a different angle comparing the relativity of the market for Engineers and Officer. Not based on what the MUA are being paid. The focus is what competitors are paying and we agree there is catch up.

> MC – We were hoping to have the discussion today. We may have to revisit some claims based on the offer. To make up in a short fall. Fine to go through the claims list but a lot hinges on pay. Superannuation being rejected is a big one. The business model looks like it's being dragged out. What does the number look like. I need to go back to members to say whether we are making progress and I don't think we are.
> PC – Expect at the next meeting.
> MC – We haven't spoken about that.
> PC – We put an offer on the table in September, weeks before you got involved. Not saying its anyone fault. We expected to have a discussion around the 8% and 6% we are not naïve to think you'd accept it. We haven't received anything from yourself until last week. From September until the 13.12.22 with radio-science. It's not part of Solstad' s desire to take longer than it has too & we happily would have done a deal in Sept. There is no advantage to us for this to take longer than it needs to. The best way is it have an EA between AMOU and Solstad. What is the right number more than 8% and 6% but less that 17%. We need to sell it to the clients to get the number over the line. Contracts are in place and the clients need to be on board. Between now and the next meeting, we hope to put a meaningful offer to you that is in the ball park. 3 years delay should never have been allowed to happen, itsno (sic) ones fault at the table.
> MC – Agreed. Meet relatively soon to put all on the table. Prior to another meeting happening.
> PC – We need time to go to clients. Target middle of January.

[81] While it is apparent from the passage extracted above (a record of the 20 December 2022 bargaining meeting) that Mr Charles is recorded as speaking to the AMOU's members as being 'behind in relativity to the MUA', it does not appear to have been a preoccupation. Rather, the gravamen of what was recorded was that the AMOU was asking what was the 'number' (of the pay increase), with Mr Cooke acknowledging that 'between now and the next meeting, we hope to put a meaningful offer to you that is in the ball park'.

[82] Mr Cooke further mentioned that the inclusion of clause 36.17 was a new claim in respect of dead day payments for 'masters de-briefing for over four hours after a swing'. However, Annexure PC-11 at row 99 states 'Dead Day' and the commentary reads: 'PC: I realised that the dead day is missing from the proposal. This is included'. I am therefore unconvinced from the evidence presented that the subject matter of clause 36.17 had not been previously traversed. Furthermore, the 9 December Log states as agreed 'clause 36.17 regarding dead day payments for masters de-briefing for over four hours after a swing was included as a new claim'.

3 Threshold

[83] It is not in dispute that the AMOU:

a) is a bargaining representative and hence has standing to make this application;
b) had made a proper application as required by the Act and met the documentary and notice requirements for the application; and
c) is not prevented from bringing the application by virtue of s 438 given the nominal expiry of the Agreement.

[84] It was confirmed that Solstad was provided with a copy of the application within 24 hours of it being made, as required by s 440 of the Act.

[85] I am satisfied that the threshold requirements have been met.

4 Statutory framework

[86] Section 437 of the Act enables a bargaining representative to apply for a protected action ballot order. Subject to the restrictions in ss 437(2A) and 438(1), the Commission must make an order in relation to employees who will be covered by a proposed agreement in the circumstances set out in s 443. Section 443 relevantly provides:

> **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.

[87] Whether an applicant 'has been, and is, genuinely trying to reach an agreement' within the meaning of s 443(1)(b) is a question of fact to be decided by reference to all of the circumstances of the bargaining in question.[70] It will frequently involve consideration of the extent of progress in negotiations and the steps taken in order to try to reach agreement.[71] There are two temporal components to s 443(1)(b): the applicant must *have been* genuinely trying to reach agreement and must *be* genuinely trying to reach agreement.[72]

[88] While there is a relationship between s 443(1)(b) and the need to bargain in good faith under s 228 of the Act, a Full Bench of the Commission in *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* cautioned against conflating the two requirements.[73] As it stands, the Respondent clarified it levels no assertion at the AMOU that it has not been bargaining in good faith.

5 Consideration

[89] As was said by the Full Bench in *National Tertiary Education Industry Union v Curtin University* (**Curtin**), the Commission's power to make a protected action ballot order under s 443 of the Act is not discretionary in nature.[74] Section 443(1) imposes a duty on the Commission to make an order if two conditions have been met: first (in paragraph (a)), that an application for such an order has been made under s 437 and, second (in paragraph (b)), that the Commission is satisfied that each applicant for an order has been, and is, genuinely trying

to reach an agreement with the employer of the employees to be balloted. If these conditions are not met, then the Commission is prohibited from making an order: s 443(2).

[90] Whilst I have concluded that an application for such an order has been made under s 437, it is the latter element that this decision first traverses.

5.1 Genuine agreement

[91] Whether the AMOU is genuinely trying to reach an agreement with Solstad requires a finding of fact which is to be arrived at by reference to the circumstances of the particular negotiations which must be assessed to establish whether the AMOU has met the test or not.[75] Generally, the determination of this factual question will require consideration of the extent to which negotiations have progressed, the steps taken by the AMOU to try and reach an agreement, the nature of the items about which it seeks agreement and the extent to which these have been identified.[76]

[92] Essentially, Solstad argues that on Mr Charles' arrival there was a fundamental departure from the negotiations that had taken part before receipt of the 9 December Log and the meetings on 19 and 20 December 2022.

[93] The Act does not expressly proscribe a party from changing its, her, or his position concerning a claim or claims in a bargaining process. However, that is not to say that such conduct is immaterial to deciding whether a negotiating party is, or has been, genuinely trying to reach agreement.

[94] In *Liquor, Hospitality and Miscellaneous Union – Western Australian Branch v CSBP Ltd* (**CSBP**), the Australian Industrial Relations Commission (**AIRC**), as it was then, considered the meaning of 'genuinely try' in circumstances where counsel for CSBP had urged the Senior Deputy President to consider the 'genuinely try' test as one that included a good faith bargaining obligation on the initiating party (presumedly for the application that had been made).[77]

[95] At the time *CSBP* was determined, the legislation in place (*Workplace Relations Act 1996* (Cth)) required the AIRC to grant an application for a ballot order if (and not grant the application unless) satisfied that during the bargaining period, the applicant: (a) genuinely tried to reach agreement with the employer of the relevant employees; and (b) is genuinely trying to reach agreement with the employer; and (c) is not engaged in pattern bargaining.[78] Further, when determining whether to terminate or suspend what was then known as a 'bargaining period' for reasons of 'failing to genuinely try to reach agreement', the AIRC had to be satisfied that a negotiating party:

a) did not genuinely try to reach an agreement with the other negotiating parties before organising or taking the industrial action; or

b) is not genuinely trying to reach an agreement with the other negotiating parties.

[96] In *CSBP*, the Senior Deputy President made the following observations in respect to what was meant by the term 'genuinely try':

> [70] The nature of negotiations for a collective agreement is also very different from most other types of negotiations, including commercial negotiations. In commercial negotiations the seller may change the conditions sought for a sale at risk of a buyer withdrawing from the negotiations. That is the end of the matter and there is no risk of repercussion or consequence other than there being no transaction. In collective bargaining if the buyer (the employer) withdraws from the negotiations the consequence is the risk of economic sanctions by the seller (the union).
>
> [71] The rights achieved by meeting the obligations to genuinely try and reach agreement are therefore substantial. The meeting of the obligations therefore need to be viewed as something more than the meeting of simple procedures and standard notifications. Similarly the role of the AIRC is more than being satisfied that the proper procedural steps have been taken. The obligation on the AIRC is to be satisfied that the endeavours to reach agreement do truly have the character claimed.

[97] The Senior Deputy President expressed that in matters of this nature, it would be most unlikely that there would be direct evidence of an organisation's intent to frustrate the reaching of an agreement and therefore reliance had to be placed on evidence of conduct from which inference must be drawn.[79] The Senior Deputy President continued:

> [75] It is also unlikely that a single isolated incident could establish that an organisation was not genuinely trying. Rather the conduct needs to be considered by examining all aspects of the party's bargaining conduct as a whole. Inferences might then be drawn based on an established pattern of behaviour.
>
> [76] I am also mindful that in the bargaining process the tactics of a party may frustrate the other party, particularly where, as here, one party considers that the other is regularly shifting the goal posts once agreement is reached or is nearly reached. However I consider that something more than frustration is required. The test I am required to apply is not one to determine whether a party has been regularly frustrated but rather whether conduct displayed a lack of genuinely trying to reach an agreement.

[98] In *Total Marine Services Pty v Maritime Union of Australia* (**TMS**), the Full Bench confirmed that with respect to a determination of whether a party was genuinely trying to reach an agreement, it iss not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached.[80] The Full Bench continued at paragraph [32]:

> 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.[81]

[99] According to Solstad, essentially what has occurred is that at the commencement of bargaining, there was a log of claims. Three years down the track, or more specifically come December 2022, agreement regarding some claims is reversed or otherwise modified (outline those claims) and new claims have been added. This has, according to Solstad, occurred in circumstances where each party has put forward proposals that have previously been negotiated,

the status of each party is known in respect of that claim or proposal, and some of the claims have been agreed.

[100] It is important at this juncture to reflect on the factual findings made in respect of assertions levelled at the AMOU in this respect. However, before doing so, I again observe that in this case there are evidential shortcomings when a party asserts that its direct evidence shows the position of the parties with respect to a claim or clause, and yet it is unable to show that the opposing party viewed the document and endorsed that very position.

[101] Nevertheless, based on the evidence of both parties, I am content to find that Mr Charles' arrival heralded a 'revision' of the log of claims (culminating in the 9 December Log), but it did not constitute a revision of *all* claims. However, subsequent to Mr Charles' involvement in bargaining, clause 16.9(d) appeared to have been no longer agreed, there was a new dispute settlement procedure, there was an amendment to part of clause 16.5(d), a clause in respect of a promotion ladder had been added or was again being pursued,[82] and clause 39(a) – an accommodation clause – appeared new as did clauses 65.5 and 65.6, 65.7, which were manning clauses.

[102] It is also correct to find that the AMOU sought to change its position in relation to a number of previously agreed items and sought to put them 'back in the mix' for negotiation. The definition of permanent employee was now subject to negotiation after it had been agreed, there had been a proposed change to the definition of 'Hydrocarbons Industry', clause 16 'general' had been added, and newly created clauses 16.8(e), (f), and (g) were included in the 9 December Log.

[103] Turning to Solstad's first argument that that the proposed agreement is not the one that was negotiated prior to December 2022, but the one that surfaced on 9 December 2022 in the form of the 9 December Log (**second proposed agreement**), the argument cannot be sustained.

[104] Solstad submitted that second proposed agreement differed to the proposed agreement which had been the subject of extensive negotiations with Messrs Andersen and Moran (**first proposed agreement**). Solstad added that whatever disclosures and discussions occurred were not disclosures and discussions about the second proposed agreement because of the changed substance of its terms.

[105] Solstad further submitted that the parties were negotiating successfully for the first proposed agreement from the time that Mr Moran took over negotiations for the AMOU, and they commenced in earnest. Solstad added that the first proposed agreement was being negotiated between the parties with a common understanding of what was being pursued – a two year agreement, on common terms, with common goals, as outlined and communicated to the AMOU (on multiple occasions), but no later than 31 May 2022, and confirmed by the AMOU's response on 30 June 2022.

[106] Solstad pressed that the circumstance was not one where a proposed agreement had been put to a vote and rejected by the employees necessitating a change in position. It argued that it was a change from the negotiation position from the first proposed agreement to the second proposed agreement by the AMOU, in the context where, prior to this application, it had placed

the AMOU on notice that it did not consider the claims had been fully ventilated and it did not understand them.

[107] Having considered the decisions in *Mermaid Marine Vessel Operations Pty Ltd v The Maritime Union of Australia*[83], *Skilled Offshore Pty Ltd v Australian Manufacturing Workers' Union*[84] and *Maritime Union of Australia v Maersk Crewing Australia Pty Ltd* (**Maersk Crewing**),[85] I am satisfied that at the time of the application there was a 'proposed enterprise agreement' within the meaning of ss 437(1) and 443(1) of the Act. So much was evidence from the multiple spreadsheets (for example Annexures PC-11, 15 and 17).

[108] As was said in *Maersk Crewing*:

> [15] *Mermaid Marine* and *Skilled Offshore* stand for the proposition that all that is required for there to be 'a proposed enterprise agreement' within the meaning of ss. 437(1) and 443(1) of the FW Act is an 'agreement [which] the bargaining representative applying for an order under [s.437] is proposing at the time the application for a protected action ballot order is made'. Further, in *MUA v Swire Pacific Ship Management (Australia) Pty Ltd (Swire)* the Full Bench characterised a 'proposed enterprise agreement' as something that one of the parties wants to negotiate: 'There need not be a developed draft, and it may simply be an idea or a series of claims…' While *Mermaid Marine*, *Skilled Offshore*, and *Swire* were all decided before the commencement of s.437(2A), we are not persuaded that the introduction of s.437(2A) affects the reasoning in those cases in respect of this issue.[86]

[109] Further, I am unpersuaded by the argument that there was a second proposed agreement in existence at the time the application was made. The 9 December Log does not, in my view, represent a fundamental departure in the topics of clauses and claims presented in Annexure PC-11. Furthermore, whilst the parties acknowledged that Annexures PC-5 to PC-11 all adopted the same format and the spreadsheets at Annexures PC-15 and PC-17 departed from that format, I am not satisfied that the position of the AMOU as presented by Mr Charles in the 9 December Log and at the bargaining meetings on 19 and 20 December 2022 gave rise to a second proposed agreement – albeit there were some changes in the position of the AMOU and some new claims were flagged, as found.

[110] Solstad argued that the drastic movement of the goal posts, when considered among all of the facts and circumstances, suggests that whatever the AMOU is trying to do, it is not genuinely reach agreement. The significant issue is of course whether the state of the negotiations and the conduct of the AMOU as confirmed in the evidence before me are sufficient to meet the onus cast by s 443 of the Act.

[111] It is accepted that sufficient progress in the negotiations must be present in order to establish the necessary intent.[87] Further, it is clear that the Full Bench has in the past expressly rejected the notion that some form of rigid rule or threshold should be established for this purpose.

[112] It is evident that the AMOU had not provided a response to Solstad's correspondence of 29 September 2022. On Mr Charles' commencement, correctly in my view, he sought to clarify for Solstad the position of the AMOU regarding various clauses and claims by provision of the 9 December Log and by his input in the bargaining meetings on 19 and 20 December

2022. This conduct appeared to be part of the natural course of bargaining, rather than an act to deliberately frustrate.

[113] Whilst there may have been change in respect of some claims, as identified, and new claims had been added (and one reversal of agreement on another), I do not consider that the AMOU's conduct demonstrates that it was not, and is not, trying to genuinely reach agreement.

[114] Effectively, what the AMOU did was to simply clarify its position with respect to the progress made on the terms of the proposed agreement. This step apparently necessary to allay any confusion given the lack of response to the correspondence of 29 September 2022. Further, in circumstances where negotiations had been on foot for some three years, it is understandable in this case, that either party may wish to press for claims that had not been included in an initial log. There is no general prohibition under the Act with respect to new claims surfacing, and in a three year period one might expect that external and other factors may have bearing on the claims pursued. As it is, on any objective level, the claims pressed by the AMOU appeared reasonable subject matter in the context of the negotiations, such that a conclusion could not be reached that the AMOU had not met the two temporal components of s 443(1)(b). This may have proved frustrating to Solstad, but notwithstanding, the conduct of the AMOU does not warrant an adverse finding that it was not and is not genuinely trying to reach an agreement.

[115] There was disagreement between the parties as to whether all clauses or claims pressed by the AMOU had been traversed and discussed at the bargaining meetings on 19 and 20 December 2022. Whilst relying upon Mr Cooke's evidence in this respect, Solstad also placed reliance upon the correspondence of Ms Cubis-Edwards who, on 20 January 2023, emailed Mr Charles, stating, among other matters:

> 4.The most recent set of AMOU claims was sent to us on 9 December 2022. We had meetings on 19 December 2022 and 20 December 2022. During these meetings the AMOU ran through the latest revised claims but only got as far as your claims pertaining to Clause 36.17. We have yet to receive any explanation, elaboration or justification of the balance of the most recent set of claims.
>
> 5. Given that we have not yet been through with the AMOU all of the most recent set of claims, it is perhaps not realistic that Solstad should be expected to respond to the latest claims prior to being given explanation, elaboration or justification of the balance of the most recent set of claims.
>
> 6. We further note that many of the claims involve labour cost increases and changes to employment conditions. We are commercially required to seek approval for such matters from our clients and we are in the process of seeking such approvals. We are currently engaged in this process. The time required to carry out this process has been impacted by the Christmas/New Year period with key client staff taking leave.
>
> 7. Notwithstanding the points outlined above, once we have received some explanation, elaboration and justification of the balance of the most recent set of AMOU claims, we will respond to each of your claims.[88]

[116] An application under s 437 may be considered to have been made prematurely where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement. As expressed by the Full Bench in *TMS* at paragraph [32], 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.

[117] Solstad evidently considered, as noted in Ms Cubis Edwards' email dated 20 January 2023, that it required some explanation, elaboration and justification of the balance of the most recent set of AMOU claims, for it to be able to respond. I consider it more likely than not that the *verbal* discussion of the AMOU's claims or its position in respect of the clauses in the proposed agreement concluded at clause 36.17 of the proposed agreement on 20 December 2022. However, I am satisfied that the AMOU clearly articulated the items it sought for inclusion in the proposed agreement and that it had provided a considered response to demands made by Solstad as evinced in Annexures PC-15 and PC-17, and in the evidence of Messrs Newman,[89] Charles and Cooke.

[118] As observed, there are two temporal components to s 443(1)(b): the applicant must *have been* genuinely trying to reach agreement and must *be* genuinely trying to reach agreement.[90] On the evidence before me, the AMOU has satisfied those two temporal components.

5.2 The questions and exemptions in the proposed ballot order render the application is invalid.

[119] In *Curtin*, the Full Bench clarified that in respect of elements in s 443, the Commission first determines whether there is an obligation to make an order under s 443(1) and then determines the content of the order in conformity with ss 443(3)-(5). The Full Bench considered what was necessary to satisfy the requirement in s 443(1)(a), which it observed operated as a condition precedent to the duty to make an order.[91]

[120] The Full Bench in *Curtin* continued that for an application to have been made '*under*' s 437, it must have been made in conformity with s 437, meaning that the application must specify the matters in s 437(3). The Full Bench observed that unlike s 443(1)(b), the jurisdictional prerequisite in s 443(1)(a) is not expressed in terms of the Commission's satisfaction as to the requirement. Therefore, whether an application has been made under s 437, including whether it specifies the matters in s 437(3)(b), must be regarded as a matter of jurisdictional fact.[92]

[121] Section 437(3)(b) of the Act provides that the application for a protected action ballot order 'must specify the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action'.

[122] It was acknowledged in *Curtin* that the Full Bench decision in *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (**John Holland**)[93] had generally been regarded as authoritative in relation to what is necessary for compliance with s 437(3)(b).[94] The Full Bench in *Curtin* did not depart from that approach.

[123] In *John Holland*, the employer contended that the application for a protected action ballot order was not valid 'because the question to be put to the employees was ambiguous and did not adequately specify the nature of the industrial action for which the endorsement of the employees was sought'. To demonstrate the ambiguity, the employer relied upon the preamble

to the questions which stated, amongst other things, that the industrial action specified in each question might be taken 'separately, concurrently and/or consecutively'. Rejecting the employer's argument about the purported ambiguity, the Full Bench spoke of the proper construction of s 437 stating:

> [19] Moving now to the construction of s.437 itself, seen in its statutory context, all that the section requires is that the questions should describe the industrial action in such a way that employees are capable of responding to them. If the questions are ambiguous or lack clarity there may be consequences for the bargaining representative and the employees if reliance is placed on the result of the ballot in taking industrial action. If the question or questions give rise to ambiguity, the conclusion may be reached that the industrial action specified in a notice under s.414 was not authorised by the ballot and that the action is not protected for the purposes of s.409(2). It is true that ambiguity or lack of clarity in the description of the industrial action is undesirable, but these are matters more appropriate for consideration under other provisions. It follows that in most cases the drafting of the questions will be a matter for the applicant.[95]

[124] Concerning the passage extracted from *John Holland* above, the Full Bench in *Curtin* rejected the submission that perceived ambiguity in a specified question constitutes a basis to find that an application does not comply with s 437(3)(b). Instead, the Full Bench considered that the consequence of any such ambiguity, if any, would arise at the point of consideration as to whether particular industrial action taken pursuant to a notice issued under s 414 is authorised, as required by s 409(2) such as to be 'protected' (that is, subject to the immunity in s 415).[96]

[125] The Full Bench in *Curtin* endorsed the test posited by the Full Bench in *John Holland*. Namely, compliance with s 437(3)(b) requires that the ballot questions must describe the industrial action in a way that employees are capable of responding to them.[97] It was stated that informed consent has no bearing on such analysis,[98] again it is sufficient that questions are specific enough such that employees are capable of responding to them.

[126] This approach similarly found favour in in *Transport Workers' Union of Australia v Prosegur Australia Pty Ltd* (**Prosegur**) where the Full Bench said:

> [33] As *John Holland* makes clear, it will not normally be the proper role of the Commission to interfere in the drafting of questions to appear in a protected action ballot order. If the questions describe the nature of proposed industrial action in a sufficiently clear way such that employees are capable of responding to them, then there is no basis for the Commission not to include them in a protected action ballot order that it is required to make under s 443(1).[99]

[127] Evidently, there is a high bar for concluding that a question is incapable of being responded to: it must contain language that 'deprive[s] the question of meaning' or be 'meaningless' or 'nonsensical'.[100] Further, a 'technical and pedantic approach' is eschewed.[101]

[128] Solstad submits that the ballot questions, on their face, not only give rise to ambiguity, but are littered with exceptions such that they are rendered nonsensical. Turning to the exceptions, Solstad submits that the application contains two types of exceptions: (a) those contained in the individual questions (questions 3, 6, and 8); and (b) those stated to be 'exceptions' ('questions' 24 through 26), which I have termed 'general exceptions'.

[129] Questions 3, 6 and 8 read:

> 3. A ban on night work (other than work that affects vessel or crew safety)
> YES/NO.
> 6. A ban on operating the workboat or fast rescue craft (except for emergencies).
> YES/NO.
> 8. A ban on performing any administration duties except those essential to navigational watchkeeping or vessel safety
> YES/NO.

[130] At hearing, the AMOU conceded that reference to 'night work' may be interpreted in multiple ways and therefore expressed it was content to make reference to 'night work' being work performed between 1800hrs and 0600hrs.

[131] Returning to the exceptions within the questions, Solstad submits that the first and third 'exception' – or perhaps more appropriately termed, qualification – (questions 3 and 8) can be grouped together, as the objective ambiguity is common amongst them. The first qualification is that work will continue (in respect of the ban purportedly authorised by question 3) in 'circumstances in which imminent risk to health and safety of Solstad crew members & vessels or other vessels may occur'.

[132] The second qualification is that work will continue (in respect of the ban purportedly authorised by question 8) in 'any taskings required by the Joint Rescue Coordination Centre or operations requiring Solstad mobilisation to address imminent threats to safety of any vessel or the marine environment'.

[133] Solstad argues that these qualifications share a common issue. Namely, that it cannot objectively be determined, in circumstances of taking industrial action purportedly authorised by the protected action ballot order, how these exceptions would operate and what work would be done, and what work would not be done.

[134] The general exceptions found at paragraphs 24 through to 26 state:

> Exceptions:
>
> The following are exceptions to **any** industrial action taken in reliance on this ballot:
>
> 24. Circumstances in which imminent risk to health and safety of Solstad crew members & vessels or other vessels may occur; and
> 25. Statutory drills, that would affect health and safety of vessels or crew.
> 26. Any taskings required by the Joint Rescue Coordination Centre or operations requiring Solstad mobilisation to address imminent threats to safety of any vessel or the marine environment.

[135] In respect of the first general exception, Solstad noted that its vessels cannot sail without 'Deck Officers' (which includes Masters). Solstad submitted that on that basis, attempting to perform any work (including navigating a vessel in a stationary position) without deck officers (including the master) would, by its very nature, create a circumstance which represented an imminent risk to the health and safety of the Respondent's crew, other vessels in the area of operations, and the marine environment.

[136] Solstad argued that in circumstances where the action purports to authorise 'a ban on performing any work in relation to aids to navigation maintenance, sailing, launching, recovery and dynamic positioning' and such action is subject to the exceptions, it is impossible to determine what work would remain to be performed.

[137] The second 'exception' ('question' 25) raises a further level of complexity, said Solstad. Solstad submitted that the Offshore Oil and Gas industry is subject to comprehensive statutory (and other forms of) regulation. This exception provides that all 'statutory drills, that would affect health and safety of vessels or crew' will continue to be performed, despite any notified action.

[138] According to Solstad, there are, on its face, two issues with exception. First, it questions what is a 'statutory drill', asking, does this extend to compliance with anything required by the various regulatory schemes (including that under that created by the *Navigation Act 2012* (Cth), and various NOPESMA regulations applicable to Solstad's operations)? Second, it asks when will this 'affect the health and safety of vessels or crew'? It pressed that one cannot expect those employees who are voting on this to be entirely familiar with the regulatory scheme governing their work and even if they were, it is impossible to determine, on the face of the application, what a 'statutory drill' is.

[139] Solstad contended that where there is an overarching exemption which applies to each of the foregoing questions, it cannot be said that the questions specify the nature of the action: the exemptions are too shortly stated and too generalised in order to meaningfully convey to employees what work they should do, and should not do, during proposed industrial action.

[140] In summary, Solstad's starting position was that the ballot questions, on their face, give rise to ambiguity. It then proceeded to observe that the questions are littered with exceptions such that they had been rendered nonsensical.

[141] The test posited in *Curtin* regarding what was required to show compliance with s 437(3)(b) was simply that the ballot questions must describe the industrial action in a way that employees are capable of responding to them.[102] The Full Bench added that even if ambiguity was a test, it is to be assessed objectively, not by evidence of the subjective understanding of individuals (who may simply be wrong in their reading of the question).

[142] On any objective basis, the proposed actions specified in the 23 questions are capable of constituting 'industrial action' within the meaning of the definition of that expression in s 19(1) of the Act and are capable of being responded to by relevant employees. They are in plain English, are not devoid or deprived of meaning, are in no way close to being nonsensical and, in short, are unremarkable. I consider nothing is to be gained by adopting a peripatetic approach whereby each of the 23 ballot questions is visited and forensically examined for 'ambiguity' in circumstances where all are capable of being responded to.

[143] Solstad quite correctly points out that ballot questions 3, 6 and 8, contain their own exception or qualification. To the extent that there is an inconsistency between the exceptions in these ballot questions and the general exceptions in questions or paragraphs 24 to 26, it is relevant to point out that the AMOU have made it abundantly clear in the proposed ballot order

that the general exceptions are exceptions to '**any** industrial action taken in reliance on this ballot' (bold my emphasis).

[144] Solstad draws attention to the perceived difficulty that arises in respect to action (described in question 2) that purports to authorise 'a ban on performing any work in relation to aids to navigation maintenance, sailing, launching, recovery and dynamic positioning' when subject to the exceptions. Solstad contends that it is impossible to determine what work would remain to be performed.

[145] The general exceptions may have been cast somewhat broadly. The exception at question 24 refers to 'circumstances' in which there is 'an imminent risk to health and safety'. However, as was stated in *Prosegur*, albeit by reference to s 443(3)(d) rather than s 437(3)(b), ss 443(3)(d) and s 414(6) use different language and are concerned with different subject matters.[103]

[146] In *Prosegur*, the Full Bench emphasised that s 443(d) requires specification of the nature of the '*proposed industrial action*' in a question in a protected action ballot (as does s 437(3)(b)). It is therefore concerned with the identification of categories of industrial action that might be taken in the future, with the statutory purpose being for employees to be able to understand the type of industrial action that they are being asked to authorise. By contrast, s 414(6) requires specification of the nature of '*the action*' – that is, identification of industrial action which employees are actually going to undertake.

[147] As observed in respect to the word 'circumstances', the general exceptions at questions 24, 25, and 26 refer to some terms or phrases that are, in some respects, absent specificity, definition or parameter. These words or terms include 'circumstances', 'statutory drills' and 'any taskings required by the Joint Rescue Coordination Centre or operation', respectively. However, this does not detract from a conclusion that the ballot questions have the categories of proposed industrial action.

[148] The exceptions are not devoid of meaning. 'Circumstances' in question 23 are those where there is an imminent risk to health and safety. 'Statutory drills' are those that would affect health and the safety of vessels and crews. 'Any tasks' are tasks required by either the Joint Rescue Coordination Centre or operations, in which Solstad must mobilise to address imminent threats to safety. The general exceptions are open to be further defined or specified as are questions 1 to 23, for the purpose of s 414(6).

[149] If the AMOU is ever required to give written notice of industrial action, at that point, it will be obliged to detail the precise form of the industrial action to be taken. One would anticipate that a greater degree of particularity will be required in respect to questions 1 to 23 and the general exceptions, than otherwise provided for the purpose of this application. At that juncture, the AMOU may specify the particular 'statutory drills', define the 'circumstances' and/or list the 'tasks'. However, that level of precision is not required for the purpose of this application.

[150] The proposition that the application must be dismissed because it is invalid cannot be sustained. It is not the case that the exemptions from the proposed industrial action mean that the questions do not specify the nature of the *proposed industrial action*.

[151] However, I am mindful of the AMOU's concession that the reference to 'night work' may be open to interpretation and as such the suggestion that it be defined as 'work performed during the period of 1800hrs to 0600hrs'. In *Curtin*, the Full Bench expressed at paragraph [55] the following in respect to an adjustment to the text of a question:

> **[55]** That is not to say that the Commission is compelled, in making an order, to reproduce the questions in precisely the same terms as applied for. Section 599 of the FW Act provides that, except as provided by the FW Act, the Commission is not required to make a decision in relation to an application in the terms applied for, and there is no reason to think that anything in s 443 ousts the operation of s 599. If there is some adjustment which can be made to the text of a question in order to more clearly express what the applicant proposes, then that may be done in discharging the requirements of s 443(1) and (3)(d).

[152] In the circumstances, I consider that the adjustment is not only permitted but also justified. The Order[104] is therefore amended accordingly.

5.3 Extension to the notice period

[153] The Commission can require a longer period of notice to be given, if satisfied there are exceptional circumstances justifying this.[105] The onus sits with Solstad to provide evidence that would satisfy the Commission that there are exceptional circumstances in this instance.

[154] The approach to exceptional circumstances, in this context, was discussed by Vice President Lawler in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation*,[106] which concerned an equivalent provision of the *Workplace Relations Act 1996* (Cth):[107]

> [10] In this passage his Honour was concerned with the ordinary meaning of the expression "exceptional circumstances" and the approach identified is, in my view, equally applicable to the use of that expression in s.465(3). In summary, the expression "exceptional circumstances" requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of "exceptional circumstances" includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.
>
> [11] However, it is important to note that when considering whether to make an order pursuant to s.463(5) the Commission is not simply concerned with determining whether there are exceptional circumstances. There must be exceptional circumstances "justifying" the specification of a longer notice period. The notion of justification is critical and calls for a consideration of the purpose of the notice required by s.441.[108]

[155] The Vice President went on to state:

> [21] Essentially, what is required in determining whether exceptional circumstances justify an extension of the required notices [sic] period is a weighing of the interests of the employer and third parties in the employer having a greater opportunity to take appropriate defensive action as against the diminution in the effectiveness of the employees' bargaining power that results from such an extension. The fact that the legislature has seen fit to condition the ordering of an extension of the required notice period on the presence of exceptional circumstances justifying it, as distinct from merely conferring a simple discretion to extend the required notice period, indicates that ordinarily there should be no extension.
>
> [22] The first example provided in *Davids Distribution* provides an illustration of where exceptional circumstances may justify an extension of the required notice period. A sophisticated piece of plant, such as a smelter, may take many days to shut down without damage. The employer is exposed to wholly disproportionate damage if it is prevented by too limited a notice period from undertaking an orderly shutdown of the plant. A further example may be afforded by a strike by teachers where the school needs to be able to notify parents of the strike so as to give them an opportunity to make alternative arrangements for the care of their children on the days of the strike. Typically, three working days will be insufficient for this purpose.[109]

[156] To summarise, in order to warrant an extended period of notice, the Commission must be satisfied both as to the existence of exceptional circumstances and the fact that these justify the granting of the extended notice. This requires a weighing up of the opportunity for the company to take appropriate defensive action against the diminution of the effectiveness of the AMOU members' bargaining power that is contemplated by the scheme of the Act.[110] In that light, it would not be a relevant exercise of discretion to grant additional notice simply to allow the employer to neutralise the impact of the industrial action.[111]

[157] Solstad submitted that if the Commission was moved to grant the protected action ballot order, then the order should be varied to extend the written period of notice of industrial action, as referred to in s 414(2)(b) of the Act.

[158] Solstad explained that the operations of the offshore oil and gas industry, the significant difficulty in identifying the capacity to minimise (and then minimising) the impact of protected action and the implications that the proposed protected industrial action can have not only on the vessel operator immediately in question, but also its client(s), demonstrate the exceptional circumstances inherent in this application. Solstad added that it had been commonly accepted by this Commission that the very nature of the offshore oil and gas industry, which Solstad services, and the distances and logistical considerations of the same, is such to give rise to exceptional circumstances.[112]

[159] While several decisions were brought to this Commission's attention where the notice period had been extended due to the remoteness of operations, the decision arrived at sits squarely upon the facts as presented. The AMOU took no issue with respect to the evidence Solstad adduced to support the provision of an extension to the written notice period. While the AMOU pressed, by way of compromise, four days' notice, submitting effectively that the provision of seven working days would blunt the impact of its industrial action, I am of the view that the exceptional circumstances in this matter justify the period of notice of protected industrial action being longer than three working days, as is prescribed in the Act. The Order issued reflects that such notice would be seven working days.

6 Conclusion

[160] Having had regard to the material before the Commission and considered the submissions made in this matter, I am satisfied that the AMOU has been and is genuinely trying to reach an agreement with Solstad. Accordingly, the requirements of s 443(1)(b) of the Act have been met.

[161] Given my satisfaction that all other statutory prerequisites had been met in relation to this application, I have issued an Order[113] for the conduct of protected action ballot in this matter.

DEPUTY PRESIDENT

Appearances:

Ms T Ellis for the Applicant
Mr S Rogers for the Respondent

Hearing details:

2023.
Perth (by video):
27 and 30 January 2023.

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[1] AE415627.

[2] Witness Statement of Peter John Cooke (**Cooke Statement**), [6].

[3] Ibid.

[4] Ibid.

[5] Ibid annexure PC-15.

[6] Ibid [7].

[7] Ibid.

[8] Ibid [9].

[9] Ibid [73].

[10] Ibid [13].

[11] Ibid [14].

[12] Form F34B – Statutory Declaration of Mark Peter Charles, Industrial Officer of the AMOU (**Charles Declaration**), [2.1(2)].

[13] Ibid [2.1(3)].

[14] Ibid [2.1(4)].

[15] Ibid [2.1(5)].

[16] See Cooke Statement (n 2) annexure PC-15.

[17] Charles Declaration (n 12) [2.1(6)].

[18] Witness Statement of Josh Newman, [5] (**Newman Statement**).

[19] Charles Declaration (n 12) [2.1(7)].

[20] Ibid [2.1(8)–(9)].

[21] Ibid [2.1(10)].

[22] Ibid [2.1(11)].

[23] Cooke Statement (n 2) [15].

[24] Ibid [16].

[25] Ibid [17].

[26] Ibid [18].

[27] Ibid.

[28] Ibid annexure PC-4.

[29] Ibid [23].

[30] Ibid annexure PC-5 is a copy of the log of claims – as at 5 July 2022.

[31] Ibid annexures PC-6 to PC-11.

[32] Ibid [27].

[33] Ibid [28].

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] Ibid [30].

[38] Ibid [31].

[39] Ibid [32].

[40] Ibid.

[41] Ibid.

[42] Ibid [34].

[43] Ibid.

[44] Ibid.

[45] Ibid [35].

[46] Ibid.

[47] Ibid [36].

[48] Ibid [37].

[49] Ibid [37], annexure PC-15.

[50] Ibid [39].

[51] Ibid.

[52] Ibid.

[53] Ibid [48].

[54] Ibid.

[55] Ibid [49].

[56] Ibid.

[57] Ibid [51].

[58] Ibid [52].

[59] Ibid [54].

[60] Ibid [54].

[61] Ibid [57], annexure PC-18.

[62] Ibid [57].

[63] Ibid [58].

[64] Ibid [59].

[65] Ibid [61].

[66] Ibid [32].

[67] Ibid.

[68] See ibid annexure PC-11, a copy of the log of claims as at the conclusion of the Moran Negotiations (27 October 2022) which Solstad asserts reflects the position arrived at between the parties.

[69] Ibid annexure PC-12.

[70] *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* (2015) 247 IR 5, 24 [57] (**Esso**).

[71] *Total Marine Services Pty Ltd v Maritime Union of Australia* (2009) 189 IR 407, 412 [32] (**TMS**); *National Union of Workers (NUW) v Sakata Rice Snacks Australia Pty Ltd* [2016] FWC 6262, [25].

[72] *Esso* (n 70) 23–4 [54].

[73] Ibid 13 [18].

[74] [2022] FWCFB 204, [37] (**Curtin**).

[75] *TMS* (n 71) 412 [32].

[76] *National Union of Workers v Riverland Oilseeds Pty Ltd* [2013] FWC 5914, [16].

[77] [2007] AIRC 469, [46].

[78] Ibid [56].

[79] Ibid [74].

[80] *TMS* (n 71) 412 [32].

[81] Ibid.

[82] See Cooke Statement (n 2) annexure PC-17 row 44.

[83] (2014) 241 IR 35.

[84] [2015] 254 IR 133, 138–9 [27].

[85] (2016) 257 IR 30, 34–5 [15].

[86] Ibid.

[87] *TMS* (n 71) 412 [32].

[88] Digital Hearing Book, 140–1.

[89] Newman Statement (n 18).

[90] *Esso* (n 70) 23 [54].

[91] *Curtin* (n 74) [39].

[92] Ibid [40].

[93] (2010) 194 IR 239 (**John Holland**).

[94] *Curtin* (n 74) [41].

[95] *John Holland* (n 93) 246 [19].

[96] *Curtin* (n 74) [43].

[97] Ibid [42].

[98] Ibid [53].

[99] [2021] FWCFB 1562 (**Prosegur**) (citations omitted).

[100] *Curtin* (n 74) [47].

[101] Ibid.

[102] Ibid [42].

[103] *Prosegur* (n 99) [38].

[104] PR749961.

[105] *Fair Work Act 2009* (Cth) s 443(5).

[106] (2007) 167 IR 4 (**Australia Post**).

[107] *Workplace Relations Act 1996* (Cth) s 463(5).

[108] *Australia Post* (n 106) 8 [10] – [11].

[109] Ibid 10 [21]–[22].

[110] *Australian Federation of Air Pilots v Alliance Airlines Pty Ltd* [2017] FWC 6748, [12].

[111] Ibid.

[112] *Construction, Forestry, Maritime, Mining and Energy Union* [2022] FWC 2685.

[113] PR749961.