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6 September 2016

Vice President Hatcher
Fair Work Commission
80 William Street
Sydney NSW 2011

Dear Vice President Hatcher

**Re. AM2014/196 & AM2014/197 – Casual Employment & Part-time Employment
– Submission on the unions’ casual service recognition claims**

We refer to Ai Group’s submission on the above matter, dated 3 September 2016.

Many of the authorities referred to in the submission have already been provided to the Full Bench. The following additional authorities, as referred to in the submission, are attached:

1. *J.J. Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.
2. *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14.
3. *AMIEU v Golden Cockerel* [2014] FWCFB 7447.
4. *Baytech Trades Pty Ltd v Coinvest Pty Ltd* [2015] VSCA 342.
5. *Canavan Building Pty Ltd* [2014] FWCFB 3202.
6. *Leslie Holland v UGL Resources* [2012] FWA 3453.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy

FEDERAL COURT OF AUSTRALIA

J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53

Citation: J.J. Richards & Sons Pty Ltd v Fair Work Australia
[2012] FCAFC 53

Parties: **J.J. RICHARDS & SONS PTY LTD and
AUSTRALIAN MINES AND METALS
ASSOCIATION INC. v FAIR WORK AUSTRALIA
and TRANSPORT WORKERS' UNION OF
AUSTRALIA**

File number: VID 812 of 2011

Judges: **JESSUP, TRACEY AND FLICK JJ**

Date of judgment: 20 April 2012

Catchwords: **INDUSTRIAL LAW** – protected action ballot order – no
need for bargaining with employer to have commenced

STATUTORY CONSTRUCTION – need to promote
object or purpose of legislation – not a warrant to re-draft
legislation

REMEDIES – refusal in exercise of discretion – lack of
utility

Legislation: *Acts Interpretation Act 1901 (Cth) s 15AA*
Administrative Decisions (Judicial Review) Act 1977 (Cth)
s 16
*Fair Work Act 2009 (Cth) ss 3, 50, 54, 171 – 173, 180 –
182, 185, 186, 228 – 230, 231, 236 – 240, 242, 243, 408 –
411 – 413, 415, 418, 436 – 443, 460, 539, 546, 562, 570*
Federal Court of Australia Act 1976 (Cth) s 20, 22, 23
Migration Act 1958 (Cth) s 424A
Sex Discrimination Act 1984 (Cth)
Industrial Arbitration Act 1940 (NSW)
Infertility Treatment Act 1995 (Vic) s 8

Cases cited: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR
564, cited
*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory
Revenue (Northern Territory)* [2009] HCA 41, 239 CLR
27, cited
Application of The News Corp Ltd, Re (1987) 15 FCR 227,
cited
Australian Boot Trade Employés' Federation v Whybrow

& Co (1910) 11 CLR 311, cited
Carey v President of the Industrial Court of Queensland [2003] QSC 272, considered
Dallikavak v Minister for Immigration and Ethnic Affairs (1985) 9 FCR 98, cited
Doyle v Chief of General Staff (1982) 71 FLR 56, cited
Ex parte Malouf; Re Gee (1943) 43 SR (NSW) 195, cited
Ex parte Metropolitan Meat Industry Board; Re Australasian Meat Industry Employees Union, New South Wales Branch [1972] 1 NSWLR 259, considered
Footscray City College v Ruzicka [2007] VSCA 136, 16 VR 498, cited
Grey v Pearson (1857) 6 HLC 61, considered.
J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia [2011] FWAFC 3377, cited
Jupp v Computer Power Group Ltd (1994) 122 ALR 711, 54 IR 248, cited
McBain, Re; Ex parte Australian Catholic Bishops Conference [2002] HCA 16, 209 CLR 372, considered
Mills v Meeking (1990) 169 CLR 214, considered
Minister for Communication, Re; Ex parte NBN Ltd (1986) 14 FCR 344, 12 ALD 150, cited
Minister for Immigration and Citizenship v Hart [2009] FCAFC 112, cited
Minister for Immigration and Multicultural Affairs v Lim [2001] FCA 512, 112 FCR 589, cited
R v Collins; Ex parte ACTU Solo Enterprises Pty Ltd (1976) 50 ALJR 471, cited
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd (1949) 78 CLR 389, considered
R v Federal Court; Ex parte Western Australian National Football League (Inc) (1979) 143 CLR 190, cited
R v L (1994) 49 FCR 534, cited
R v The Public Service Commissioner; Ex parte Killeen (1914) 18 CLR 586, considered
R v Young [1999] NSWCCA 166, 46 NSWLR 681, considered
Refugee Review Tribunal, Re; Ex parte Aala [2000] HCA 57, 204 CLR 82, cited
Reid v Australian Telecommunications Commission (1988) 23 IR 96, 14 ALD 554, cited
Sasterawan v Morris [2008] NSWCA 70, cited
Skea v Minister for Immigration, Local Government and Ethnic Affairs (1994) 51 FCR 82, cited
SZBYR v Minister for Immigration and Citizenship [2007] HCA 26, 235 ALR 609, considered
SZLDC v Minister for Immigration and Citizenship [2008] FCA 1359, cited
Thompson v Goold & Co [1910] AC 409, considered

Transport Workers' Union of Australia v JJ Richards & Sons Pty Ltd [2011] FWA 973, cited
Transport Workers' Union of New South Wales v Australian Industrial Relations Commission [2008] FCAFC 26, 166 FCR 108, considered
Trevisan v Commissioner of Taxation (1991) 29 FCR 157, cited
Young v Wicks (1986) 13 FCR 85, cited
Zuanic v Gypro-Tech (Australia) Pty Ltd (in liq) [2006] NSWSC 739, 66 NSWLR 206, cited

Tapping, Thomas, *The Law and Practice of the High Prerogative Writ of Mandamus* (1848)
Wade, Sir William and Forsyth, Christopher, *Administrative Law* (10th ed, 2009)

Date of hearing:	20 February 2012
Place:	Melbourne
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	91
Counsel for the Applicants:	Mr S Wood SC with Mr M Follett
Solicitor for the Applicants:	Arnold Bloch Leibler
Counsel for the First Respondent:	The First Respondent entered a submitting appearance save as to costs
Counsel for the Second Respondent:	Mr A Hatcher SC
Solicitor for the Second Respondent:	Maurice Blackburn

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 812 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

**BETWEEN: J.J. RICHARDS & SONS PTY LTD
First Applicant**

**AUSTRALIAN MINES AND METALS ASSOCIATION INC.
Second Applicant**

**AND: FAIR WORK AUSTRALIA
First Respondent**

**TRANSPORT WORKERS' UNION OF AUSTRALIA
Second Respondent**

JUDGES: JESSUP, TRACEY AND FLICK JJ

DATE OF ORDER: 20 APRIL 2012

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.
2. There be no orders as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 812 of 2011

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**BETWEEN: J.J. RICHARDS & SONS PTY LTD
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**AND: FAIR WORK AUSTRALIA
First Respondent**

**TRANSPORT WORKERS' UNION OF AUSTRALIA
Second Respondent**

JUDGES: JESSUP, TRACEY AND FLICK JJ

DATE: 20 APRIL 2012

PLACE: MELBOURNE

REASONS FOR JUDGMENT

JESSUP J

1 This is an application by J.J. Richards & Sons Pty Ltd and Australian Mines and Metals Association Inc for writs of certiorari and mandamus in respect of two decisions made by Fair Work Australia (“FWA”) under the *Fair Work Act 2009* (Cth) (“the Act”) on 16 February and 1 June 2011. The Court has jurisdiction under s 562 of the Act, which jurisdiction is to be exercised by a Full Court pursuant to s 20(2) of the *Federal Court of Australia Act 1976* (Cth) since, in its decision of 1 June 2011, FWA was constituted by members who included a Judge of the Court. FWA filed a submitting appearance, the case in opposition to the relief sought by the applicants being advanced by the Transport Workers’ Union of Australia (“the Union”).

2 On 16 February 2011, a single member of FWA made a “protected action ballot order” under s 443 of the Act. That order activated provisions of the Act which, in effect, permitted employees of the employer represented by the Union to take industrial action free of certain restrictions which the civil law would, or might, otherwise impose. On

1 June 2011, a Full Bench of FWA dismissed an appeal from the making of that order. I shall refer to the terms of s 443 in due course, but the essence of the applicants' point in their applications for certiorari and mandamus is that FWA misconstrued the terms of that section, and regarded itself as subject to a statutory obligation to make the order when, according to the applicants, there was, if the section were properly construed, a statutory prohibition upon the making of the order. Their point was that no such order could be made by FWA unless the employees concerned and their employer had commenced the process of collective bargaining, which had not occurred on the facts of the present case. If the applicants' construction point is correct, they would undoubtedly (subject to such discretionary considerations as may arise) have made good their case for certiorari.

3 According to the applicants' case, the correct construction of s 443 is to be found not merely in the words of the section itself, but in other provisions of the Act which establish the setting in which a protected action ballot order might be sought, and made. They submitted that, only by an understanding of those provisions, and a proper perception of the system of collective bargaining for which they provide, can the true scope, and the limits, of s 443 be ascertained. It is, therefore, useful to commence with a reference to those other provisions, and to the collective bargaining system to which the applicants refer.

4 As identified in s 3 of the Act, the object of the Act includes the following:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

....

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

The goals identified in this para (f) are sought to be achieved in two separate chapters of the Act. The provisions which relate to enterprise-level collective bargaining and good faith bargaining obligations are to be found in Ch 2 of the Act, while those which set out the clear rules governing industrial action are to be found in Ch 3 of the Act.

5 The enterprise agreement, and bargaining, provisions of the Act are set out in Pt 2-4 thereof. The objects of that part are as follows (as stated in s 171):

The objects of this Part are:

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

It is manifest that enterprise agreements are a significant, if not the predominant, means adopted by the Act for the establishment of terms and conditions of employment, and that collective bargaining, required to be in good faith, is the means by which such agreements come to be made.

6 The Act provides for enterprise agreements to be made in various situations, but for present purposes it will be sufficient to note that s 172(2)(a) deals with the situation of an established employer with an established enterprise, and enables that employer to make an enterprise agreement with the employees who are employed at the time the agreement is made, and who will be covered by the agreement. Save in the case of an agreement which relates to “a genuine new enterprise”, there appears to be no scope for an employer to make an enterprise agreement with an employee organisation such as the Union. That circumstance, as it seems to me, immediately gives rise to the need for the Act to address the question of how the employees will be represented in the process which presumptively leads to the making of an enterprise agreement.

7 That need is addressed in Div 3 of Pt 2-4 of the Act, headed “Bargaining and representation during bargaining”. Although concerned predominantly with the representation of employees during bargaining, Div 3 commences with an obligation imposed upon the employer. Subsections (1), (2) and (3) of s 173 of the Act provide as follows:

Employer to notify each employee of representational rights

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

Notification time

- (2) The **notification time** for a proposed enterprise agreement is the time when:

- (a) the employer agrees to bargain, or initiates bargaining, for the agreement;
or
- (b) a majority support determination in relation to the agreement comes into operation; or
- (c) a scope order in relation to the agreement comes into operation; or
- (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

When notice must be given

- (3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

The word “bargain”, and grammatical derivatives of that word as such, are not defined in the Act. Neither, so far as I can see, is there any definition of what constitutes the initiation of bargaining, for the purposes of s 173(2)(a). Content is, however, given to paras (b), (c) and (d) of s 173(2) in other provisions of the Act.

8 Division 8 of Pt 2-4 is headed “FWA’s general role in facilitating bargaining”. The subject of Subdiv C thereof is “Majority support determinations and scope orders”. Section 236(1) provides that a bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to FWA for determination “that a majority of the employees who will be covered by the agreement want to bargain with the employer ...”. Section 237 sets up the circumstances under which FWA must make such a determination. Foremost amongst the matters of which FWA must be satisfied in this regard is that a majority of the employees who are employed by the employer, at a time determined by FWA, and who will be covered by the agreement, want to bargain. FWA must also be satisfied that the employer has not yet agreed to bargain, or initiated bargaining, for the agreement.

9 Sections 238 and 239 of the Act deal with the subject of “scope orders”. A bargaining representative for a proposed single-enterprise agreement may apply to FWA for a scope order if he or she “has concerns that bargaining for the agreement is not proceeding efficiently or fairly” and the reason is that, in the view of the representative, “the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover”. If a case is made out, FWA may make a scope order which specifies the employer, and the employees, who will be covered by the enterprise agreement.

10 Returning to s 173(2) of the Act, para (d) thereof is concerned with low-paid authorisations, a specific area covered by Div 9 of Pt 2-4 of the Act. Under s 242, either a bargaining representative or a relevant organisation may apply to FWA for a low-paid authorisation and, if made, such an authorisation must specify the employers and employees to be covered by the proposed enterprise agreement, and any other matter “prescribed by the procedural rules” (s 243(4)). These provisions were not said to have any relevance to the facts of the case before the Court. So far as I can see, they make no additional contribution to the exercise of construction with which we are presently concerned.

11 Other provisions of Div 3 of Pt 2-4 deal with the appointment of bargaining representatives. Although, as I have said, that subject is central to the operation of Pt 2-4 in the context of an employer in an established enterprise, nothing further needs to be said about it for present purposes.

12 Section 228, in Div 8 of Pt 2-4 of the Act, specifies what are the “good faith bargaining requirements” for those involved in bargaining towards the making of an enterprise agreement. They are:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

13 Under s 229, a bargaining representative may apply to FWA for a bargaining order in relation to a proposed enterprise agreement. Such an order is to be made upon FWA being satisfied of a number of things, including, in s 230(2), that one of the following applies:

- (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
- (b) a majority support determination in relation to the agreement is in operation;
- (c) a scope order in relation to the agreement is in operation;
- (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

It will be seen that these requirements correspond with the provisions of s 173(2) of the Act, set out above.

14 Under s 231 of the Act, a bargaining order must specify –

- (a) the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;
- (b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;
- (d) such matters, actions or requirements as FWA considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

Thus, although “bargaining” is not defined in the Act in terms, s 231 effectively leaves it to FWA, in a case to which the section applies, to specify what will constitute bargaining, and what must be done by the parties who bargain, in any particular situation.

15 The assumption made by the Act is that the outcome of successful bargaining will be the making of an enterprise agreement. By s 182(1), at least relevantly to the facts of the present case, an enterprise agreement is “made” when it is approved by a majority of the relevant employees who cast a valid vote in favour of approval. That process is conditioned upon there first having been a request by the employer under s 181 for the employees to approve the proposed agreement, before which the employer must, under s 180, take all reasonable steps to ensure that the employees to be covered by the agreement are given a copy of the written text of the agreement, and any other material incorporated by reference therein. These provisions also include procedural details and requirements, to which it is not necessary to refer for present purposes.

16 Once an agreement has been made, a bargaining representative must apply to FWA for approval of the agreement, pursuant to s 185. Section 186 sets out comprehensively the facts and matters of which FWA must be satisfied before approving the agreement, the detail of which, again, does not need to be rehearsed. By s 54(1) of the Act, an enterprise

agreement approved by FWA commences to operate seven days after approval, or, if a later day is specified in the agreement, on that later day.

17 By s 50 of the Act, a person must not contravene a term of an enterprise agreement. By item 4 of the table in s 539(2) of the Act, s 50 is a “civil remedy provision” contravention of which is, by s 546 of the Act, subject to a “pecuniary penalty”.

18 According to the heading, Ch 3 of the Act deals with the “Rights and responsibilities of employees, employers, organisations etc”, and Part 3-3 thereof deals with “Industrial action”. Industrial action as such is not proscribed by the Act, but, by s 418, if it appears to FWA that industrial action is happening, is threatened, impending or probable, or is being organised, FWA must make an order that the industrial action stop, not occur or not be organised for a period specified in the order. However, such an order is not to be made in the case of industrial action that is, or would be, “protected industrial action”. Further, by s 415 of the Act, no action lies under any law in force in a state or territory in relation to “protected industrial action” unless that action has involved, or is likely to involve, personal injury, the wilful or reckless destruction of, or damage to, property or the unlawful taking, keeping or use of property. This is not, of course, a complete description of the legislative provisions to which I have referred, it being sufficient for present purposes to note that the status of industrial action as “protected industrial action” has important consequences.

19 What is “protected industrial action” is the subject of s 408 of the Act. Industrial action which is for a “proposed enterprise agreement” and is either “employee claim action for the agreement”, “employee response action for the agreement”, or “employer response action for the agreement”, is protected industrial action. Sections 409, 410 and 411 give content to the terms I have enclosed in inverted commas in the previous sentence. Again, there is no need to refer to the detail of these provisions: it is sufficient for present purposes to note that industrial action will never be “protected industrial action” if it does not relate, in the statutory sense, to a proposed enterprise agreement.

20 Before particular industrial action will qualify as protected industrial action, it must satisfy certain requirements specified in the Act, including the “common requirements” set out in s 413. Amongst those are the requirements set out in subs (3) thereof, as follows:

- (3) The following persons must be genuinely trying to reach an agreement:
 - (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;
 - (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the bargaining representative of the employee.

21 Where the industrial action is “employee claim action” (as was the situation in the present case), “the industrial action must be authorised by a protected action ballot ...”: s 409(2). The conduct and outcome of such a ballot is the subject of Div 8 of Part 3-3 of the Act. The object of that division is set out in s 436 as follows:

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

By s 437, a bargaining representative of an employee who will be covered by a proposed enterprise agreement may apply to FWA for an order requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement. This is referred to as a “protected action ballot order”. Section 437 specifies, in some detail, the matters that must be set out in an application for a protected action ballot order. Section 438 imposes certain restrictions on when an application for such an order may be made. Section 441 requires FWA to determine, so far as practicable, an application for such an order within two working days after the application is made.

22 The obligation of FWA in dealing with an application for a protected action ballot order is set out in s 443 of the Act, as follows:

- (1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:
 - (a) an application has been made under section 437; and
 - (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
- (2) FWA must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
- (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.

- (4) If FWA 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 FWA decides, under subsection 444(1), is to be the protected action ballot agent; and
 - (b) the person (if any) that FWA decides, under subsection 444(3), is to be the independent advisor for the ballot.
- (5) If FWA 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.

It is this provision, and para (b) of subs (1) in particular, which has become controversial in the present case.

23 On the facts of that case, a bargaining representative, regularly attending to the interests of the employees represented, sought to bargain with the first applicant for the making of an enterprise agreement. The first applicant declined to do so. It neither agreed to bargain nor initiated bargaining within the meaning of s 173(2)(a). Neither was there a majority support determination or a scope order in operation, with the consequence that a bargaining order could not be made under s 230 of the Act. In the result, bargaining did not take place.

24 In the circumstances, the bargaining representative of the employees made application for a protected action ballot order under s 437 of the Act and, after an earlier false start to the circumstances of which no further reference needs to be made, FWA made such an order on 16 February 2011. That order was confirmed on appeal by the decision of the Full Bench published on 1 June 2011. At first instance, the Commissioner of FWA held that the bargaining representative had been, and was, genuinely trying to reach agreement with the first applicant, within the meaning of s 443(1)(b) of the Act. The Full Bench held that that finding was open to the Commissioner, and did not disturb it. It was the factual premise by reference to which the present application was prosecuted. The applicants contended, however, that that was not enough. They say that, as a matter of construction, an order under s 443 cannot be made unless bargaining has commenced. They say that the special statutory protections given to industrial action are intended to “underpin” (to use the metaphor in s 3(f)) collective bargaining, and not to be available generally whenever a bargaining representative genuinely wants to reach agreement with an employer.

25 The applicants put the same constructional case to the Full Bench of FWA. That case was rejected. Dealing with s 443(1)(b) of the Act, the Full Bench commenced by taking what it described as “the orthodox approach to the construction of a statute”, namely, “to commence with the words in question, paying regard to their context and such assistance as may be gained from other relevant parts of the enactment and then, possibly, [considering] any extrinsic material”. The Full Bench noted that, on their ordinary meaning, the critical words of s 443(1)(b) required only that the applicant for an order under that section be genuinely trying to reach agreement, and provided no support for the suggestion that the power to make the order was conditioned upon the commencement of bargaining. The Full Bench then canvassed other provisions of the Act which dealt with the subject of bargaining, and noted that the only terms of art used by the Act were of the employer agreeing to bargain, or of the employer initiating bargaining. These two formulae appeared in a number of places in the Act, and, in the view of the Full Bench, it was striking that neither of them appeared in s 443. That was “a strong indication that no such condition is to be applied”.

26 Dealing with the arguments of the first applicant and others then supporting it in relation to the context provided by the legislative scheme generally, the Full Bench saw nothing in that context which would compel a construction of s 443 which conditioned its operation upon bargaining having commenced. In all but one of these respects, the approach which the Full Bench took was conventional, thorough, and, in my respectful view, manifestly correct.

27 One respect in which I have a reservation as to the constructional approach taken by the Full Bench relates to the significance of the good faith bargaining requirements, and of bargaining orders, under Subdiv A of Div 8 of Pt 2-4 of the Act. I have referred to the relevant provisions above. In this regard, the Full Bench said (referring to an argument advanced on behalf of the first applicant):

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

protected action ballot order.

A little later in its reasons, the Full Bench repeated its conclusion that there was “nothing in the legislative provisions to suggest that a bargaining representative should not be permitted to organise protected industrial action to persuade an employer to agree to bargain”.

28 With respect, I would depart from the Full Bench at this point. On my reading of the Act, there is a means by which a party seeking to bring an employer to the bargaining table may achieve that result without taking industrial action. That means is provided in Subdiv A of Div 8. As I have indicated, the legislation eschews any definition of “bargaining”, leaving it to FWA itself to specify what might be required in a particular situation. It is true that, under s 230(2), where the employer has not agreed to bargain or initiated bargaining, there must be a majority support determination or a scope order in operation. These requirements, however, may be seen as a conscious choice by the legislature to introduce a degree of organisation into the representation of employees’ interests, before an unwilling employer might be made the subject of a bargaining order. The important point is that, although limited to an extent, the legislature has, both specifically and in some detail, turned its mind to the means by which an unwilling employer might, to use the Full Bench’s metaphor, be persuaded to come to the bargaining table. Although not so stated in terms, it would be at least consistent with these provisions of Subdiv A of Div 8 to perceive a legislative assumption that recourse to industrial action would not be an available means to oblige an employer, or any other party, to commence bargaining.

29 Additionally to the matters to which I have just referred, I consider there is much to be said for the applicants’ case, as a matter of broad statutory purpose. The Act provides a detailed, carefully-structured, regulatory environment for the making of enterprise agreements, and for the maintenance of the integrity of the system of collective bargaining which conventionally leads to such agreements. In the sense that protected industrial action must, necessarily, relate to a proposed enterprise agreement (see s 408), it is legitimate to point out, as the applicants did in their submissions, that the ability to take protected industrial action is to be seen as part and parcel of the statutory regime for bargaining in pursuit of, or in resistance to, the making of such agreements. This way of looking at the legislation is amply justified by the parliament’s own words in identifying the object of the Act: see s 3(f).

30 However, notwithstanding that perception, and notwithstanding my disagreement, in one important respect, with the reasons of the Full Bench, it is not possible to construe s 443(1)(b) as the applicants would propose. I agree with the Full Bench that the contrast between the references to bargaining in Pt 2-4 of the Act, and the words actually used in s 443(1)(b) is striking. I accept that, under s 15AA of the *Acts Interpretation Act 1901* (Cth), an interpretation should be favoured which would best achieve the purpose or object of the legislation. That is no basis, however, for the introduction of additional requirements or conditions which might have been, but which have not been, enacted. There is every reason to perceive in s 443(1)(b) a departure from the scheme of regulated bargaining set out by Pt 2-4 of the Act and, in that sense, there is a certain tension with the object referred to in s 3(f). Such a perception, however, would relate to the consistency of the implementation of legislative policy. It would contribute little or nothing to the task of construction which confronted the Full Bench.

31 In sum, the applicants' case really amounts to no more than the proposition that the legislature ought, consistent with the structure and policy of the Act as a whole, have conditioned the power to make an order under s 443 upon the circumstance of bargaining having commenced. However, that was a step which the legislature did not take, and it is a step which FWA could not take. There was no jurisdictional error in the protected action ballot order made by FWA on 16 February 2011 and confirmed by the Full Bench on 1 June 2011.

32 For the above reasons, I would dismiss the application. Counsel for the Union having made it clear that no question would arise under subs (2) of s 570 of the Act, there can be no order as to costs.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 20 April 2012

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 812 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

**BETWEEN: J.J. RICHARDS & SON PTY LTD
First Appellant**

**AUSTRALIAN MINES AND METALS ASSOCIATION INC.
Second Appellant**

**AND: FAIR WORK AUSTRALIA
First Respondent**

**TRANSPORT WORKERS' UNION OF AUSTRALIA
Second Respondent**

JUDGES: JESSUP, TRACEY AND FLICK JJ

DATE: 20 APRIL 2012

PLACE: MELBOURNE

REASONS FOR JUDGMENT

TRACEY J

33 I have had the benefit of reading in draft the reasons prepared by Jessup and Flick JJ. I agree with their Honours that, on its proper construction, s 443(1) of the *Fair Work Act 2009* (Cth) cannot, consistently with orthodox principles of statutory construction, be construed in the manner for which the applicants contend. There is simply no warrant to read into the sub-section words of limitation which do not appear. The legislature has required that FWA must make a protected action ballot order if the two conditions prescribed by s 443(1) are satisfied even if bargaining between an employer and employees has not commenced.

34 I also share Jessup J's reservations about the Full Bench's observation that there was "nothing in the legislative provisions to suggest that a bargaining representative should not be permitted to organise protected industrial action to persuade an employer to agree to

bargain.” The other provisions of the Act to which his Honour refers suggest that a less confrontational and more ordered process was available to the Union had it wished to avail itself of it.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 20 April 2012

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 812 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

**BETWEEN: J.J. RICHARDS & SONS PTY LTD
First Applicant**

**AUSTRALIAN MINES AND METALS ASSOCIATION INC.
Second Applicant**

**AND: FAIR WORK AUSTRALIA
First Respondent**

**TRANSPORT WORKERS' UNION OF AUSTRALIA
Second Respondent**

JUDGES: JESSUP, TRACEY AND FLICK JJ

DATE: 20 APRIL 2012

PLACE: MELBOURNE

REASONS FOR JUDGMENT

FLICK J

35 This is an *Application* seeking writs of certiorari and mandamus. The Applicants are J.J. Richards & Sons Pty Ltd (“J.J. Richards”) and the Australian Mines and Metals Association Inc (“AMMA”). The Respondents are Fair Work Australia and the Transport Workers’ Union of Australia (“the Transport Workers’ Union”).

36 The facts giving rise to the litigation are within a narrow compass.

37 On 24 December 2010, the Transport Workers’ Union wrote to J.J. Richards stating that it sought “*to bargain for an enterprise agreement with your company covering your employees on the Canterbury Council contract*”. The “*major elements of the agreement*” were thereafter summarised. On 7 January 2011, J.J. Richards responded stating that it did not “*believe that bargaining for an enterprise agreement is viable ...*”. One of the reasons

cited was that the contract under which the employees were employed was to cease on 26 February 2012.

38 On 1 February 2011, the Transport Workers' Union applied to Fair Work Australia for a protection ballot order under s 437 of the *Fair Work Act 2009* (Cth). A Commissioner made the order which was sought on 16 February 2011: [2011] FWA 973. J.J. Richards filed a *Notice of Appeal* on 7 March 2011. On 9 March 2011, AMMA also filed a *Notice of Appeal*.

39 A Full Bench of Fair Work Australia heard the appeal on 18 April 2011. On 1 June 2011, the Full Bench published its decision: [2011] FWAFB 3377. Both appeals were dismissed. The Full Bench rejected the principal argument sought to be raised by both appellants, namely that a protected action ballot order could not be granted pursuant to s 443 of the *Fair Work Act* unless bargaining has commenced or, if an employer is unwilling to bargain, unless an applicant has exhausted the steps available to it under the Act to force an employer to do so.

40 The writ of certiorari is sought to quash the decisions of Fair Work Australia made on 1 June 2011 and 16 February 2011. Mandamus is sought requiring Fair Work Australia “*to hear and determine the ... application ... according to law*”.

41 Jurisdiction is conferred upon this Court “*in relation to any matter arising under*” the *Fair Work Act*: s 562. The power to grant the writs of certiorari and mandamus is derived from ss 22 and 23 of the *Federal Court of Australia Act 1976* (Cth).

42 The reasons for the decision on 1 June 2011 set out Fair Work Australia's construction of s 443 of the *Fair Work Act* and applied that construction to the facts before it. The primary issue posed for resolution is whether or not that construction of s 443 is correct.

THE FAIR WORK ACT

43 Section 443 is within Division 8 of Part 3-3 of the *Fair Work Act*.

44 Within that Division, s 436 states the “*object*” of the Division as follows:

Object of this Division

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

Section 437 thereafter identifies those who may apply for a protected action ballot order. Sections 438 and 439 respectively impose restrictions on when an application may be made and provide for the making of a joint application. Section 440 requires notice “... *after making an application for a protected action ballot order ...*”. Section 441 requires an application to be determined within 2 days after it is made and s 442 enables Fair Work Australia to deal with multiple applications together in certain circumstances.

45 Section 443 provides in part as follows:

When FWA must make a protected action ballot order

- (1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:
 - (a) an application has been made under section 437; and
 - (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
- (2) FWA must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

The statutory phrase of primary importance is the phrase set forth in s 443(1)(b), namely, the requirement that FWA be satisfied that an applicant is “*genuinely trying to reach an agreement with the employer of the employees ...*”. There is no decision of this Court which has to date construed that provision.

46 The statutory phrase “*genuinely trying to reach an agreement*” is a phrase also used in s 412 of the *Fair Work Act*. That section provides as follows:

Pattern bargaining

Pattern bargaining

- (1) A course of conduct by a person is ***pattern bargaining*** if:
 - (a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and
 - (b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and
 - (c) the course of conduct relates to 2 or more employers.

Exception—genuinely trying to reach an agreement

- (2) The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.
- (3) For the purposes of subsection (2), the factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular

employer, include the following:

- (a) whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;
 - (b) whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees;
 - (c) whether the bargaining representative is meeting the good faith bargaining requirements.
- (4) If a person seeks to rely on subsection (2), the person has the burden of proving that the subsection applies.

Genuinely trying to reach an agreement

- (5) This section does not affect, and is not affected by, the meaning of the expression “genuinely trying to reach an agreement”, or any variant of the expression, as used elsewhere in this Act.

47 The phrase is also employed in s 413. Subsections (1) to (3) of s 413 provide as follows:

Common requirements that apply for industrial action to be protected industrial action

Common requirements

- (1) This section sets out the *common requirements* for industrial action to be protected industrial action for a proposed enterprise agreement.

Type of proposed enterprise agreement

- (2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.

Genuinely trying to reach an agreement

- (3) The following persons must be genuinely trying to reach an agreement:
- (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement--the bargaining representative;
 - (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement--the bargaining representative of the employee.

48 It is the correct construction of s 443(1)(b) which presently assumes importance.

ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION

49 When construing the terms of s 443(1)(b) at least three long-established and fundamental principles of statutory construction are applicable.

50 First, the so-called “*golden rule*” of the common law as to statutory construction is that “*the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther*”: *Grey v Pearson* (1857) 6 HLC 61 at

106 per Lord Wensleydale. See also: *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 341 to 342 per Higgins J. The “golden rule” is not confined to circumstances where a “mistake” has been made in the wording of an Act; the rule is also applied to avoid construing legislation so as to produce patently unintended or absurd results: *Footscray City College v Ruzicka* [2007] VSCA 136 at [16], 16 VR 498 at 505 per Chernov JA (Warren CJ and Maxwell P agreeing).

51 Second, the common law also recognised that “[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do”: *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey. See also: *Dallikavak v Minister for Immigration and Ethnic Affairs* (1985) 9 FCR 98 at 103 per Northrop and Pincus JJ; *Minister for Immigration and Citizenship v Hart* [2009] FCAFC 112 at [6] per Spender J.

52 Third, a construction of a statutory provision is to be preferred “that would best achieve the purpose or object of the Act”: *Acts Interpretation Act 1901* (Cth) s 15AA. The requirement to look to the purpose or object of an Act is more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction; s 15AA requires no ambiguity or inconsistency in a statutory provision before a court is not only permitted, but required to have regard to purpose: *Mills v Meeking* (1990) 169 CLR 214 at 235. Dawson J there went on to observe that the provision there in question, being a provision comparable to s 15AA, “... requires a court to construe an Act, not to rewrite it, in the light of its purposes”. Similarly, in *Trevisan v Commissioner of Taxation* (1991) 29 FCR 157 at 162, Burchett J observed that s 15AA “... is not a warrant for redrafting legislation nearer to an assumed desire of the legislature. It is not for the courts to legislate ...”. See also: *R v L* (1994) 49 FCR 534 at 538 per Burchett, Miles and Ryan JJ; *Skea v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 51 FCR 82 at 85 per Moore J; *Minister for Immigration and Multicultural Affairs v Lim* [2001] FCA 512 at [7], 112 FCR 589 at 592 to 593 per Sundberg J. “In the end the task of the court is to ascertain and to enforce the actual commands of the legislature”: *Re Application of The News Corp Ltd* (1987) 15 FCR 227 at 236 per Bowen CJ.

53 In *R v Young* [1999] NSWCCA 166, 46 NSWLR 681 at 686, Spigelman CJ summarised these principles of statutory construction as follows:

[5] The proposition that a court can introduce words into an Act of Parliament offends a fundamental principle of our constitutional law. It is no part of the function of any judge to amend legislation. The task of the courts is to determine what Parliament meant by the words it used, not to determine what Parliament intended to say ...

[6] In order to construe the words actually used by parliament, it is sometimes necessary to give them an effect as if they contained additional words. This is not, however, to introduce words into the Act. This involves the construction of the words actually used. Judicial statements which appear to have been prepared to countenance something more than this, should be so understood.

[7] The most frequently cited formulations are:

“It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.”

Thompson v Gould & Co [1910] AC 409 at 420, per Lord Mersey; and

“...we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.”

Vickers, Sons & Maxim Ltd v Evans [1910] AC 444 at 445, per Lord Loreburn LC.

To similar effect is the following formulation:

“Additional words ought not to be read into a statute unless they are required in order to make the provision intelligible.”

Wills v Bowley [1983] 1 AC 57 at 78B.

[8] The process by which words omitted by inadvertence on the part of the draftsman may be supplied by the court, must remain capable of characterisation as a process of construction of the words actually used.

54 None of these three principles of statutory construction were put in issue in the present *Application*.

THE ABSENCE OF ANY REQUIREMENT TO BARGAIN

55 The terms of s 443(1) impose only two express statutory constraints upon the mandatory obligation otherwise imposed upon Fair Work Australia to make a protected action ballot order: one constraint is that there must be an application made under s 437 (s 443(1)(a)); the other is that Fair Work Australia must be “... *satisfied that each applicant has been, and is, genuinely trying to reach an agreement ...*” (s 443(1)(b)).

56 It is not considered that any question arises of implying any further constraint into the operation of s 443(1) other than the two which have been expressly identified by the Legislature. Indeed, to attempt to do so would confront the difficulty of reading into a statutory provision words which are not there. Any such attempt would improperly propel the

Court from its accepted role of interpreting the will of the Legislature into the territory of itself redrafting legislation.

57 The difficulty presented is to interpret the phrase employed in s 443(1)(b). Even in the absence of such further difficulties of construction as may be occasioned by the terms of ss 412 and 413, the content of s 443(1)(b) is perhaps not self-evident.

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 Part 2-4, 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).

61 There is no other constraint expressly imposed by the Legislature which would (for example) require bargaining with an employer to have commenced.

62 Nor is any such constraint to be implied. A number of factors dictate this conclusion.

63 First, the express words employed by s 443(1) can be given effect without the need to further qualify its terms such that Fair Work Australia can only make an order if, for example, bargaining has commenced pursuant to s 173. The case for the Applicants would require that s 443(1) should be read (for example) as though the following underlined phrase was also included:

FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:

- (a) an application has been made under section 437; and
- (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted and bargaining has commenced.

There is no warrant for re-drafting s 443(1)(b) in that or any like manner. To do so would be for this Court to impose a constraint otherwise unstated by the Legislature and to do so where the Legislature has obviously itself directed its attention to the constraints upon the mandatory obligation imposed upon Fair Work Australia to make a protected action ballot order. The “*task of statutory construction must begin with the consideration of the text itself*”: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41 at [47], 239 CLR 27 at 46 per Hayne, Heydon, Crennan and Kiefel JJ.

64 Second, to construe the terms of s 443(1) as requiring such a qualification would be inconsistent with – or, at least, a departure from – language used elsewhere in the *Fair Work Act*. Where, for example, the Legislature seeks to direct attention to whether or not bargaining has commenced or been initiated, it expressly so provides. Thus, for example, s 230(2)(a) requires Fair Work Australia to be satisfied that “*the employer or employees have agreed to bargain, or have initiated bargaining, for the agreement ...*”.

65 Third, to construe s 443(1) as requiring attention to be given to whether or not the requirements (for example) of s 173 have been satisfied directs attention away from the matters to which s 443(1) is directed. Provisions such as s 173 direct attention (*inter alia*) to the time when “*the employer agrees to bargain, or initiates bargaining*” (s 173(2)(a)); s 443(1) requires Fair Work Australia to be satisfied that “*each applicant has been, and is, genuinely trying to reach an agreement ...*”.

66 Fourth, to construe s 443(1) in the manner advocated on behalf of the Applicants could have the potential to deprive “*an applicant*”, such as the Transport Workers’ Union, of a valuable right. If s 443(1) were not available to an applicant such as the Transport Workers’ Union, Senior Counsel for the Applicants contended that the other statutory rights open to the union would be for an application to be made pursuant to:

- s 236 for a “*majority support determination*”; or
- s 238 for a “*scope order*”; or

for an application to be made for Fair Work Australia to deal with a bargaining dispute pursuant to:

- s 240.

Why the right to seek a “*protected action ballot order*” pursuant to s 443(1) should not be available merely because of the availability of other remedies may perhaps be left to one side.

67 More fundamental reasons emerge as to why this submission advanced on behalf of the Applicants should be rejected. To the extent that the *Explanatory Memorandum* provides more than equivocal guidance as to the manner in which the Legislature intended s 443 to operate, it may be noted that that *Memorandum* did state in part as follows:

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

The *Memorandum* thus seems to reject the Applicants' reliance upon s 236. And reliance upon s 238 seems misplaced since that section requires there to be in fact "*bargaining*". If there be in fact no "*bargaining*", s 238 would seem not to be available.

68 It is a questionable process of construction to seek to rely upon other statutory provisions as a reason to construe s 443(1) other than in accordance with its terms. That process of construction only becomes more questionable when there is reason to doubt the utility or availability of those other provisions relied upon. Those other provisions relied upon by the Applicants, it is concluded, provide no basis for finding that the Transport Workers' Union was not capable of "*genuinely trying to reach agreement*" with J.J. Richards and thereby attracting the protection of s 443(1).

69 It is also important to bear in mind the manner in which s 443 is to operate. That section imposes a mandatory obligation upon Fair Work Australia to make a protected action ballot order if the stated preconditions are satisfied. The importance perceived by the Legislature in the making of such an order is evident from the terms in which s 443(1) is expressed – "*FWA must make a protected action ballot order ...*". No residual discretion is vested in Fair Work Australia to refrain from making an order. For this Court to imply into s 443 a constraint unexpressed by the Legislature, it is respectfully considered, would be for the Court to trespass well beyond its judicial role and venture into that of the Legislature.

70 In the present statutory context it is thus concluded that there is no "*absurdity*" in confining the constraints imposed by s 443(1) to those expressly set forth in that provision and that there is no "*clear necessity*" for implying further constraints which are not expressly provided. Nor is it considered that any such implication would "*best achieve the object or purpose*" of Division 8. No distinction, for present purposes, was sought to be drawn by the parties between promoting the object or purpose of an Act (cf s 15AA) as opposed to the object and purpose of a Division of an Act.

71 The case as advanced on behalf of the Applicants is rejected.

THE REFUSAL OF RELIEF – THE LACK OF UTILITY

72 The Transport Workers' Union submitted, in the alternative, that any relief should be refused in the exercise of the Court's discretion.

73 The relief sought by the Applicants, it was submitted, now lacks any utility. The industrial action to which the issue was directed has long since come and gone. And there is no suggestion of any sanction being imposed in respect to that action. Moreover, the prospect of any consequences attaching to the industrial action taken in March 2011 is rendered more remote by reason of s 460(1) of the *Fair Work Act* which provides as follows:

Immunity for persons who act in good faith on protected action ballot results

- (1) This section applies if:
 - (a) the results of a protected action ballot, as declared by the protected action ballot agent for the ballot, purported to authorise particular industrial action; and
 - (b) an organisation or a person, acting in good faith on the declared ballot results, organised or engaged in that industrial action; and
 - (c) either:
 - (i) it later becomes clear that that industrial action was not authorised by the ballot; or
 - (ii) the decision to make the protected action ballot order is quashed or varied on appeal, or on review by FWA, after the industrial action is organised or engaged in.
- (2) No action lies against the organisation or person under any law (whether written or unwritten) in force in a State or a Territory in relation to the industrial action unless the action involved:
 - (a) personal injury; or
 - (b) intentional or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (3) This section does not prevent an action for defamation being brought in relation to anything that occurred in the course of the industrial action.

The contract with Canterbury City Council which created the workplace out of which the industrial action arose also came to an end on 26 February 2012.

74 There is no doubting the proposition that the issue of the writs of certiorari and mandamus and the making of an order in the nature of those writs is discretionary: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd* (1949) 78 CLR 389. When addressing the writ of mandamus, Latham CJ, Rich, Dixon, McTiernan and Webb JJ there observed:

... the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be

enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld: (1949) 78 CLR at 400]

These observations have been oft-cited with approval by both the High Court, this Court and other superior courts (e.g., *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 at [56], 204 CLR 82 at 108 per Gaudron and Gummow JJ; *Zuanic v Gypro-Tech (Australia) Pty Ltd (in liq)* [2006] NSWSC 739 at [76], 66 NSWLR 206 at 226 per Hoeben J; *Sasterawan v Morris* [2008] NSWCA 70 at [74] per Tobias JA (Beazley JA and McClellan CJ at CL agreeing); *SZLDC v Minister for Immigration and Citizenship* [2008] FCA 1359 at [46] per Graham J).

75 The bases upon which relief may thus be refused is varied. In some cases, it is the conduct of a party which provides the basis for refusing relief. Such cases arise where a party (for example) delays making an application (e.g., *Ex parte Malouf; Re Gee* (1943) 43 SR (NSW) 195 at 201 to 202) or where he has acted in bad faith. In such cases it may seem unexceptional to refuse relief where it is the conduct of the very party seeking relief which occasions the exercise of discretion. Other cases may focus upon the availability of other means whereby competing rights may be resolved, such as where there are other avenues of review (*R v Federal Court; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 230 to 231). In these cases, a party may not have delayed in seeking to vindicate his rights but the other means of review provide an appropriate means whereby competing rights can be resolved.

76 But to refuse relief on the basis of the remedy being futile may attract different considerations. Such cases may recognise that a party with a sufficient interest to seek relief has not delayed in making his application and that prerogative relief may be the only means whereby he can obtain redress. To refuse relief to such a party on the basis that the granting of relief is futile may be to deny that party the only means whereby a decision which may previously have prejudicially affected his rights can be set aside or quashed. Even to grant declaratory relief may fall short of affording the party justice. To refuse relief upon the basis that a remedy may lack continuing utility to a private litigant may also not sufficiently recognise any wider public importance in correctly identifying the perimeters in which a statutory power is to be exercised. Mandamus, it will be recalled, requires the failure to

perform a “*public duty*”. So much has been long established. Thus, Tapping in his treatise on *The Law and Practice of the High Prerogative Writ of Mandamus* in 1848 wrote (at p. 12):

Formerly the received idea was, that a mandamus would lie only to command the performance of a ministerial duty; but modern cases have gone further, and it is now the constant practice to grant the writ, to command the performance by any inferior jurisdiction or officer, of any public duty for which there is no specific remedy. The duty must be a public one, though the value to the public is not scrupulously weighed; it must also be of a temporal nature, unless jurisdiction be given to the Court by some positive law, as by those acts of Parliament which direct the making and levying of church rates.

More recently, authors have again stressed that mandamus or a mandatory order will only go to enforce the performance of a public duty – as opposed to a private right, such as a contractual right: e.g., Wade and Forsyth, *Administrative Law* at 521 to 527 (10th ed, 2009).

77 The interest being protected by the grant of a writ may thus extend beyond the interests of the particular individual seeking enforcement.

78 A recognition that relief in the nature of the constitutional writs may be refused by reason of the lack of utility in granting such relief is, however, well accepted and may arise in a variety of different statutory contexts. The more distant instances in which the writ of mandamus could be refused were summarised by Tapping in his treatise (at pp. 15 to 16) as follows:

The object of the granting of the writ of mandamus being, as before stated, to prevent a failure of justice, and to provide an immediate and efficacious remedy, it follows that it will not be granted if, when granted, it would be nugatory, in accordance with the maxim, *Lex non cogit ad inutilia*. For the principle upon which alone the Court of B. R. exercises this high prerogative power is, that a strong political necessity for such remedy exists, and that without it the ends of justice must be defeated.

So the Court will refuse it, if it be manifest that it must be vain and fruitless, or useless, or cannot have a beneficial effect. ...

So it will be refused where it is clearly unnecessary, as where, by reason of an offer or concession from the other side, the object of the writ is attained (*a*). So the Court will not grant it to command the performance of anything in future which has always been voluntarily done before. ...

So the Court will refuse it if it see that it must ultimately fail. Thus, to a mandamus to make a sewers’ rate to reimburse an expeditor, it was returned that the writ was not delivered till the 12th February, and that the commission expired four days afterwards, and that therefore the defendants had not time, &c. The Court, on allowing the return, said that a peremptory mandamus could not be granted, it appearing there was then no power in any body to execute the writ.

So the Court will see that the object of the mandamus is for some proper and definite purpose, and not for the gratification of mere curiosity. ...

Nor will the Court grant it where it is sought, merely in order to obtain the opinion of the Court on a point of law.

79 More modern instances of the writ being refused include those circumstances where the grant of the remedy cannot practically achieve the objective being pursued by a party. Thus, for example, in *R v The Public Service Commissioner; Ex parte Killeen* (1914) 18 CLR 586, mandamus was refused. A vacancy had occurred in the Commonwealth Public Service. A number of persons applied, including Mr Killeen, and the position was filled. Mr Killeen sought an order compelling his application for the position to be heard by an Appeal Board. The argument sought to be advanced was said to be misconceived. Griffith CJ, however, also went on to conclude that mandamus would not have been granted in any event. The Chief Justice said:

... But the writ is discretionary, and will not be granted if it would be futile. A mandamus to admit to an office will not be granted if the office is already full: (1914) 18 CLR at 590

See also: (1914) 18 CLR at 597 per Powers J. Mandamus cannot achieve the impossible or the impractical. In another employment case, relief was refused where the applicant sought to be “*re-engaged for perhaps no more than a fortnight*”: *Carey v President of the Industrial Court of Queensland* [2003] QSC 272 at [12]. There, McMurdo J would have refused relief as the “*applicant [had] not demonstrated any utility from the orders sought, beyond some vindication of his stance*”.

80 The lack of utility in granting relief may also arise where the legal error which may otherwise attract the grant of certiorari would not affect the conclusion ultimately reached. Cases arising under the *Migration Act 1958* (Cth) provide a fertile field of examples. Thus, in *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, 235 ALR 609 relief was refused where the Refugee Review Tribunal had failed to comply with s 424A of the *Migration Act 1958* (Cth) but where any relief would have been futile because the Appellants’ “*claims lacked the requisite Convention nexus*”: [2007] HCA 26 at [29], 235 ALR at 618 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ. See also: *Young v Wicks* (1986) 13 FCR 85.

81 Relief in the nature of certiorari may also be refused where the act sought to be quashed has no legal effect or consequences: e.g., *R v Collins; Ex parte ACTU Solo*

Enterprises Pty Ltd (1976) 50 ALJR 471; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580 to 581 per Mason CJ, Dawson, Toohey and Gaudron JJ.

82 Discretionary relief may also be refused where the entity seeking the relief was not a participant in the facts out of which the dispute arose. Relief was thus refused where a declaration had been sought that s 8(1) of the *Infertility Treatment Act 1995* (Vic) was inconsistent with the *Sex Discrimination Act 1984* (Cth): *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16, 209 CLR 372. Relief was there refused notwithstanding the importance extending beyond the interests of the parties to the litigation as to the validity of a State statutory provision. Before concluding that contrary factors led to the refusal of relief, Kirby J outlined those factors in favour of granting relief as follows:

The discretionary issue

[219] *Considerations favourable to relief.* Having come so far in this reasoning, and established, as I have attempted to do, a legal foundation for the exercise by this Court of its original jurisdiction, it would require substantial reasons of a discretionary kind to refuse relief.

[220] In a sense, this proposition also reflects considerations of principle and practicality. As to principle, if a party can demonstrate an error in the interpretation of federal and State legislation that has resulted in an order by a federal judge, purporting to invalidate in large part a public statute of a State, the correction of that error in properly constituted proceedings is not merely a matter of interest to the immediate parties. It is also one that affects all of the people of the Commonwealth living under its *Constitution* and laws. By covering cl 5 of the *Constitution*, all courts, judges and people of every State and of every part of the Commonwealth are bound by the *Constitution* and laws made by the Federal Parliament. If it could be shown that, erroneously, a State law has been held unconstitutional, the sooner that error is corrected, one might say, the better.

[221] Furthermore, the issue presented by the substantive arguments of the moving parties, even if confined for present purposes to those of the relator in the second proceedings, are objectively important. They are important to Ms Meldrum and, by inference, to Dr McBain who originally initiated his test case before Sundberg J. They are important to other persons in the positions of Ms Meldrum and Dr McBain who might wish to be relieved of any doubt concerning the correctness of Sundberg J's decision, and the eventually binding force of the order which gave it effect. On the face of things, the prospect of further and later unsettling litigation by well resourced parties should be removed if it can be by a decision on the substantive question, one way or the other.

Notwithstanding the importance of these factors, His Honour ultimately concluded that relief should be refused by reason of other factors such as the fact that all of the parties to the proceeding were content with the decision of Sundberg J below. It was only those who had not sought to intervene who sought to raise the argument as to inconsistency in the original jurisdiction of the High Court. It was the identification of the right, privilege or immunity under the *Constitution* upon which the applications “*founder[ed]*”: [2002] HCA 16 at [68],

209 CLR at 407 per Gaudron and Gummow JJ. If it was a party to the original proceedings who had sought prerogative relief, it may well be doubted whether relief would have been refused.

83 A lack of utility in making an order in the nature of certiorari or mandamus is but one example of those circumstances in which relief may be refused. Comparable questions arise where it is submitted that relief pursuant to s 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be refused in the exercise of the Court's discretion because relief pursuant to that provision would be futile: e.g., *Doyle v Chief of General Staff* (1982) 71 FLR 56; *Reid v Australian Telecommunications Commission* (1988) 23 IR 96, 14 ALD 554. Instances have arisen where it has been submitted that relief should be refused by reason of an imminent change in the legislation being applied: *Re Minister for Communication; Ex parte NBN Ltd* (1986) 14 FCR 344, 12 ALD 150 (applied in *Jupp v Computer Power Group Ltd* (1994) 122 ALR 711, 54 IR 248).

84 It was not suggested that any different or additional considerations apply where relief is claimed in relation to industrial action. In *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26 at [64] to [65] and [67] to [70], 166 FCR 108 at 136 to 137 and 137 to 138, Gray and North JJ in a joint judgment and Gyles J respectively indicated the circumstances in which relief may be refused. Comparable to the position applicable to the discretionary refusal of mandamus or certiorari in other contexts, Gray and North JJ earlier summarised the principles as follows:

[55] ... Both mandamus and certiorari are remedies to which there is no absolute entitlement. They may be refused, in the discretion of the Court, particularly when it would be futile to grant them, because their grant would achieve nothing, or nothing of sufficient significance to warrant the grant of a remedy. They may also be refused on the ground that some other course exists which would achieve the result sought to be achieved by the remedies.: (2008) 166 FCR at 134.

See also: *Carey v President of the Industrial Court of Queensland* [2003] QSC 272.

85 Instances can also be provided in an industrial law context where relief in the nature of certiorari has been granted and the discretion to refuse relief not been exercised. Thus, in *Ex parte Metropolitan Meat Industry Board; Re Australasian Meat Industry Employees Union, New South Wales Branch* [1972] 1 NSWLR 259 in issue was an order made under the *Industrial Arbitration Act 1940* (NSW). In granting relief, Asprey JA concluded:

... It appears to me that in this case a benefit was derived by the applicant from the grant of the writ, because it removed from him the stigma of a conviction for an offence which he did not commit, no such offence being known to the law: [1972] 1 NSWLR at 263.

Taylor and Hardie JJ agreed.

86 In the circumstances of the present case, and notwithstanding the fact that the industrial action which gave rise to the dispute has long since passed and that there is no real prospect of further consequences flowing from that action, it is concluded that the discretion should not be exercised to refuse relief. Any uncertainty as to the validity of the orders made, and (more importantly) the power of Fair Work Australia to make those orders, should be resolved. The facts giving rise to the making of those orders were not in dispute and the matter has been fully argued. The correct construction of s 443(1), and its ambit of operation, have a potential significance extending beyond the private interests of the parties to the present dispute.

87 There is also much to be said for the ambit of the power conferred by s 443(1) being resolved by a Full Court of this Court. Section 443(1) is a provision which may well be invoked in many and varied industrial contexts.

CONCLUSIONS

88 Both of the decisions made by Fair Work Australia, the first being made by a Commissioner on 16 February 2011 and the second being made on 1 June 2011, were a valid exercise of the power conferred by s 443(1) of the *Fair Work Act*.

89 Section 443(1) is not subject to any limitation such that it can only be invoked where the requirements of Part 2-4 of the *Fair Work Act*, including s 173, have also been satisfied.

90 It was common ground between the parties that there is no power to order costs in the present proceeding.

91 The *Application* as filed on 29 July 2011 should be dismissed.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true

copy of the Reasons for Judgment
herein of the Honourable Justice Flick.

Associate:

Dated: 20 April 2012

HIGH COURT OF AUSTRALIA

McHUGH ACJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

NETWORK TEN PTY LIMITED

APPELLANT

AND

TCN CHANNEL NINE PTY LIMITED & ORS

RESPONDENTS

Network Ten Pty Limited v TCN Channel Nine Pty Limited [2004] HCA 14
11 March 2004
S150/2003

ORDER

- 1. Appeal allowed with costs.*
- 2. Orders of the Full Court of the Federal Court entered on 19 July 2002 set aside.*
- 3. Matter remitted to the Full Court of the Federal Court to determine the remaining issues in the appeal to that Court and to make the appropriate orders consistent with the judgment of this Court and upon its further consideration of the appeal, including orders disposing of the costs of the appeal to the Full Court.*

On appeal from the Federal Court of Australia

Representation:

J M Ireland QC with R Cobden and C Dimitriadis for the appellant (instructed by Blake Dawson Waldron)

A J L Bannon SC with D T Kell for the respondents (instructed by Gilbert & Tobin)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Network Ten Pty Limited v TCN Channel Nine Pty Limited

Copyright – Infringement – Television broadcast – Television programme broadcast by appellant contained excerpts from programmes previously broadcast by respondent – Each excerpt of brief duration – Meaning of the "subject matter" of broadcast copyright – Whether each visual image capable of being observed as a separate image on a television screen and accompanying sounds is "a television broadcast" in which copyright subsists – Whether a "substantial part" of a television broadcast must be copied to constitute infringement.

Statutes – Construction and interpretation – Relevance of legislative history and context – Relevance of legislative history and context of similar United Kingdom statute – *Copyright Act 1968 (Cth)*, ss 25(4), 87.

Words and phrases – "broadcast", "television broadcast", "re-broadcast", "programme", "subject-matter", "substantial part", "fixation".

Copyright Act 1968 (Cth), ss 14(1), 25(4), 87, 91, 101.

Broadcasting Services Act 1992 (Cth), ss 6(1), 14.

1 McHUGH ACJ, GUMMOW AND HAYNE JJ. This appeal is brought from the decision of the Full Court of the Federal Court of Australia (Sundberg, Finkelstein and Hely JJ)¹ which allowed in part an appeal by the respondents against judgments at the trial before Conti J². The issues which arise turn upon the provisions of the *Copyright Act 1968* (Cth) ("the Act") as they stood before the commencement on 4 March 2001 of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) ("the Amendment Act")³.

2 The appellant ("Ten") is the holding company of the Ten Network, and each of the respondents ("Nine") is part of the Nine Network. The relevant corporate actors in the events giving rise to the litigation held the appropriate commercial television broadcasting licences under the *Broadcasting Services Act 1992* (Cth) ("the Broadcasting Act").

3 The litigation concerned alleged infringement by Ten of the copyrights of Nine in certain television broadcasts. The Ten Network broadcast a weekly television programme entitled *The Panel*, which included 20 extracts from programmes previously broadcast by the Nine Network. These were used in 15 different episodes of *The Panel* broadcast in 1999 and 2000. Before that use, each extract (referred to in the judgments in the Federal Court as the "Panel Segments") was placed on an individual video tape.

4 The Panel Segments ranged in duration from eight to 42 seconds. They were taken from programmes of the usual advertised length of 30 minutes to one hour.

5 The programmes of *The Panel* were produced for Ten by a contracted production company, Working Dog Pty Ltd ("Working Dog"). It appears that Working Dog retained ownership of the master tapes and its copyrights therein and for reward granted to Ten the rights to one free-to-air live broadcast on Ten and its affiliates. The litigation instituted by Nine was against Ten, not Working Dog.

6 The injunctive relief sought by Nine was to restrain the re-broadcasting "on the television program 'The Panel' ... of a substantial parts [sic] of any television broadcasts by [Nine] without [its] consent". Nine also claimed a declaration of

1 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

2 *TCN Channel Nine v Network Ten* (2001) 108 FCR 235; *TCN Channel Nine v Network Ten (No 2)* (2001) AIPC ¶91-732.

3 The Act sufficiently appears for the purposes of these reasons in Reprint 8.

infringement of the "broadcast copyright" of Nine in each of the episodes of what were identified as "the television programs known as [for example, *The Today Show*, *A Current Affair*, *Australia's Most Wanted*]" . The Full Court granted declaratory relief and remitted to the primary judge any questions of further relief consequential upon the declaratory relief.

7 At trial, Conti J held that Ten had not taken the whole or a substantial part of any of Nine's broadcasts. Those findings were reversed in the Full Court. Hely J delivered the leading judgment. Sundberg J agreed with Hely J and with additional reasons given by Finkelstein J for the conclusion that Ten had infringed the copyright of Nine in its television broadcasts. There were fair dealing defences under ss 103A and 103B of the Act. These partly succeeded, but do not arise for consideration in this Court.

8 Nine seeks to uphold the Full Court decision in its favour that each visual image capable of being observed as a separate image on a television screen and accompanying sounds is "a television broadcast" in which copyright subsists. The gist of Ten's complaint is that the term "a television broadcast" as it appears in the Act was misread by the Full Court, with the result that the content of that expression is so reduced that questions of substantiality have no practical operation and the ambit of the copyright monopoly is expanded beyond the interests the legislation seeks to protect.

9 Ten's submissions should be accepted and the appeal allowed.

Statutory interpretation

10 The submissions for Nine initially eschewed any detailed consideration of the anterior legal and historical context in the United Kingdom; this was despite the significance of the British legislation which then followed, upon the later Australian legislation. Nine also stressed the significance of what were said to be the plain words of the provisions of the Act immediately in issue and sought to discount any reaction to the decision of the Full Court which emphasised that the construction favoured by the Full Court appeared to be at odds with the overall scheme of the Act. Accordingly, it is convenient now to restate several of the relevant principles or precepts of statutory interpretation.

11 In *Newcastle City Council v GIO General Ltd*⁴, McHugh J observed:

4 (1997) 191 CLR 85 at 112. See also the observations of Windeyer J in *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 283.

"[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context."

His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*⁵. There, Brennan CJ, Dawson, Toohey and Gummow JJ said⁶:

"It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act* 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure⁷. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy⁸. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*⁹, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative

5 (1997) 187 CLR 384.

6 (1997) 187 CLR 384 at 408.

7 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft* [1975] AC 591 at 614, 629, 638; *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25-26; *Pepper v Hart* [1993] AC 593 at 630.

8 *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315.

9 (1986) 6 NSWLR 363 at 388.

construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent¹⁰."

12 The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability of the result obtained in the Full Court, and a close consideration of the text of various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed.

13 Reference first will be made to two well-established principles, those concerned with the significance of copying, and with the taking of a substantial part of the protected material. Attention then will be given to the legislative context in which the broadcasting right first appeared, and thereafter to the particular issues of statutory construction involved in the appeal.

Copyright and copying

14 Counsel for Nine invoked a well-known statement made in *University of London Press Ltd v University Tutorial Press Ltd*¹¹. This was a case of infringement of copyright in an original literary work and Peterson J applied "the rough practical test that what is worth copying is prima facie worth protecting". But later authorities correctly emphasise that, whilst copying is an essential element in infringement to provide a causal connection between the plaintiff's intellectual property and the alleged infringement¹², it does not follow that any copying will infringe. The point was stressed by Laddie J when he said¹³:

"Furthermore many copyright cases involve defendants who have blatantly stolen the result of the plaintiff's labours. This has led courts, sometimes with almost evangelical fervour, to apply the commandment 'thou shalt not steal'. If that has necessitated pushing the boundaries of copyright protection further out, then that has been done. This has resulted in a body of case law on copyright which, in some of its further reaches, would come

10 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321.

11 [1916] 2 Ch 601 at 610.

12 *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1, §7.08.

13 *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700. See also *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1, §7.31.

as a surprise to the draughtsmen of the legislation to which it is supposed to give effect."

- 15 Professor Waddams, speaking of the use of terms such as "piracy", "robbery" and "theft" to stigmatise the conduct of alleged infringers of intellectual property rights, describes "the choice of rhetoric" as "significant, showing the persuasive power of proprietary concepts"¹⁴. He also remarks¹⁵:

"Against the merits of enlarging the property rights of one person or class of persons must always be set the loss of freedom of action that such enlargement inevitably causes to others."

- 16 In another English decision, Jacob J¹⁶ identified Peterson J's aphorism in *University of London Press* as an indication of the dangers in departing too far from the text and structure of the legislation; his Lordship said that the aphorism "proves too much" because if "taken literally [it] would mean that all a plaintiff ever had to do was to prove copying" so that "appropriate subject matter for copyright and a taking of a substantial part would all be proved in one go".

- 17 In Australia, the dangers in the use of the remarks in *University of London Press* were explained by Sackville J in *Nationwide News Pty Ltd v Copyright Agency Ltd* as follows¹⁷:

"[T]he test has a certain 'bootstraps' quality about it. The issue of substantiality, in relation to a literary work, arises only where the work has been reproduced or published, at least in part. If applied literally, the test would mean that all cases of copying would be characterised as reproducing a substantial part of the work. It is therefore unlikely to be of great assistance in determining whether a particular reproduction involves a substantial part of a work or subject matter of copyright."

14 *Dimensions of Private Law: Categories and concepts in Anglo-American legal reasoning*, (2003) at 175-176.

15 *Dimensions of Private Law: Categories and concepts in Anglo-American legal reasoning*, (2003) at 174.

16 *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] Fleet Street Reports 275 at 289. See also the decision of Pumfrey J in *Cantor Fitzgerald International v Tradition (UK) Ltd* [2000] RPC 95 at 133.

17 (1996) 65 FCR 399 at 417-418.

"Substantial part"

18 All the species of copyright enjoy a protection which is not limited to infringement by the taking of the whole of the protected subject-matter. The taking of something less will do. That lesser degree of exploitation is identified in s 14(1) by the phrase "a substantial part". The decision in *Data Access Corporation v Powerflex Services Pty Ltd*¹⁸ with respect to infringement of the literary works in computer programs provides a recent example of the operation of s 14(1). The sub-section states:

"In this Act, unless the contrary intention appears:

- (a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and
- (b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be."

19 The effect of the interpretation given by the Full Court to the term "television broadcast" and related expressions in the Act is to go beyond s 14(1) and provide that, with respect to any given period of broadcasting, however brief, the copyright owner has the exclusive right to re-broadcast *any* of the images and accompanying sounds broadcast.

20 The term "substantial part" has a legislative pedigree. It appeared in s 1(2) of the *Copyright Act 1911* (Imp) ("the 1911 Act"). The 1911 Act was repealed in 1956 by the *Copyright Act 1956* (UK) ("the UK Act") and later excluded from further operation in Australia by s 5(1) of the Act. The inclusion of the term in the 1911 Act had reflected judicial interpretation of earlier copyright legislation¹⁹.

18 (1999) 202 CLR 1.

19 *Bramwell v Halcomb* (1836) 3 My & Cr 737 at 738 [40 ER 1110 at 1110]; *Chatterton v Cave* (1878) 3 App Cas 483 at 492; cf *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593 at 605-606.

21 The scheme of the 1911 Act, as with the UK Act and the Australian legislation which succeeded it, keeps separate the concepts of substantial part and fair dealing. Accordingly²⁰:

"acts done in relation to insubstantial parts do not constitute an infringement of copyright and the defences of fair dealing only come into operation in relation to substantial parts or more".

It would be quite wrong to approach an infringement claim on the footing that the question of the taking of a substantial part may be by-passed by going directly to the fair dealing defences.

The legislative context

22 In 1968, at the time of the enactment of the Act, the predecessor of the Broadcasting Act, the *Broadcasting and Television Act 1942* (Cth) ("the 1942 Act"), was in force. As it stood in 1968, s 99(1) of the 1942 Act required the holder of a commercial television station licence to "provide programmes ... in accordance with standards determined by the [Australian Broadcasting Control] Board". With respect to what was then the Australian Broadcasting Commission²¹, s 59 of the 1942 Act required the Commission to "provide, and ... broadcast or televise from transmitting stations made available by the Postmaster-General, adequate and comprehensive programmes". Section 121 of the 1942 Act prohibited the broadcasting of programmes of other stations, and s 132 rendered an offence the contravention of any provision of the 1942 Act²².

20 Ricketson, *The Law of Intellectual Property*, (1984), §10.3.

21 Constituted by s 30 of the 1942 Act.

22 Section 121 (later repealed by s 86 of the *Broadcasting and Television Amendment Act 1985* (Cth)) stated:

"(1) Except with the consent of the owner or licensee of the broadcasting station whose programme it is desired to broadcast and, in the case of a broadcast which is a re-broadcast, with the approval of the Board –

(a) the Commission shall not broadcast the whole or any part of the programme of a broadcasting station (whether situated in Australia or elsewhere) other than a national broadcasting station; and

(b) the licensee of a commercial broadcasting station shall not broadcast the whole or any part of the programme of any
(Footnote continues on next page)

23 The Act was preceded by the Report ("the Spicer Report") delivered in 1959 of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations were desirable in the copyright law of the Commonwealth ("the Spicer Committee"). The Spicer Report had said it was significant that neither the Brussels Convention nor the Universal Copyright Convention recognised a copyright in sound broadcasts or television broadcasts (par 285)²³. In the end, the Spicer Report concluded (pars 288, 289) that protection for broadcasters could properly be included in the copyright law with an adaptation of the provision then recently made by s 14 of the UK Act.

24 The introduction by s 14 of the UK Act of the new species of copyright protection followed Recommendation 31 in the *Report of the Copyright Committee*²⁴ ("the Gregory Report") which had been presented in 1952. Recommendation 31 had been:

"That a broadcasting authority should have the right to prevent the copying of its programmes either by re-broadcasting, or by the making of records for sale and subsequent performance. (Paragraph 117)"

Paragraphs 116 and 117 of the Gregory Report state the policy and objectives which were subsequently to find expression in the provisions of the Australian legislation upon which this appeal turns. Accordingly, pars 116 and 117 should be set out in full²⁵:

"116. We now turn to the question whether a new right should be given to the broadcasting organisations in their own programme, additional to any copyright there may be in the individual items which go to make up those programmes, and we deal at this stage solely with a right to prevent other persons from copying the programme either by way of again

other broadcasting station (whether situated in Australia or elsewhere).

(2) In this section, 're-broadcast' means the reception and re-transmission of a broadcast."

23 See Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (1987), §6.77.

24 Great Britain, (1952), Cmd 8662 at 120.

25 Great Britain, *Report of the Copyright Committee*, (1952), Cmd 8662 at 41.

broadcasting a programme (in the event of there being more than one broadcasting authority in the future) or by way of recording such programmes for subsequent performance in some other way.

117. On the question of copyright in the ordinary sense, *the position of the [British Broadcasting Corporation ('the BBC')], as we see it, is not, in principle, very different from that of a gramophone company or a film company. It assembles its own programmes and transmits them at considerable cost and skill. When using copyright material it pays the copyright owner, and it seems to us nothing more than natural justice that it should be given the power to control any subsequent copying of these programmes by any means.* It has been represented to us that the absence of such a right has already caused considerable embarrassment to the BBC. Apparently, indifferent reproductions both of sound and television programmes have been made, and sold to the public, to the detriment alike of the [BBC] and of those taking part. We consider that a right should be given to the BBC or any other broadcasting organisation to prevent this happening again. Any right so conferred would be additional to the right of the author or composer to prevent mechanical recording where copyright material is broadcast. It would also extend to prevent the mechanical recording of a broadcast of material which is either non-copyright, or of a nature in which a right to prevent recording may not, under the present law, subsist at all, eg news, talks, music-hall 'gags'." (emphasis added)

25 In Australia, the Spicer Committee stressed the significance of the new head of copyright protection, saying (par 282):

"The conception of copyright which has hitherto been accepted is one which extends protection against copying and performing in public any work insofar as it is reduced to a permanent form. Copyright has not been extended to confer such protection in relation to a mere spectacle or performance which is transitory of its very nature."

In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*²⁶, the High Court had rejected the submission that by the expenditure of money the plaintiff had created a spectacle at its racecourse so that it had "a quasi-property in the

²⁶ (1937) 58 CLR 479. See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 444-445; *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 54-55 [4]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 248-250 [106]-[111], 320-322 [313]-[317].

spectacle which the law would protect"²⁷ by enjoining the broadcast of a race-meeting there. The issue before the Spicer Committee was a different one, namely the protection of broadcasts themselves.

26 The Spicer Committee added (par 284):

"It is true that in many cases the broadcast will be recorded on tape or film, in which case the record or film will enjoy its own copyright protection, but the copyright here being considered is one which attaches to the broadcast itself."

27 In the second reading speech on the Bill for the Act, the Attorney-General, Mr N H Bowen QC, said that the matters of records and broadcasts were dealt with in the UK Act and that it was appropriate to deal with them in the Bill²⁸. He also referred to the provisions of the Rome Convention²⁹ which had postdated the UK Act but to which Australia was yet to accede. The Rome Convention also provided for the grant of "neighbouring rights" to various persons including broadcasters. Article 13 of the Rome Convention provided that "[b]roadcasting organisations [were to] enjoy the right to authorise or prohibit", among other things, "the rebroadcasting of their broadcasts", "the fixation of their broadcasts" and "the reproduction ... of fixations, made without their consent, of their broadcasts".

28 Conti J noted³⁰ that the Gregory Report had spoken of the right to prevent the copying of the "programmes" of broadcasting authorities, and the broadcasting systems established by the 1942 Act spoke of the provision of "programmes" broadcast or televised from transmitting stations, and the Spicer Report spoke both of the protection of "broadcasts" and (in par 286) of "the programme received". The Rome Convention, like the Act, used the term "broadcast". There was no

27 (1937) 58 CLR 479 at 496.

28 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1528.

29 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, 26 October 1961. This, with some reservations, was acceded to by Australia with effect from 30 September 1992: [1992] *Australian Treaty Series* No 29.

30 (2001) 108 FCR 235 at 267.

significant step taken with this shift in language. At this time, the use of "broadcast" as a noun indicated³¹:

a Broadcasting as a medium of transmission.

b The material, music, or pictures broadcast; also, a single program of such material".

29 The policy and objective in the recommendations of both Committees was to protect the cost to, and the skill of, broadcasters in producing and transmitting their programmes, in addition to what copyrights may have subsisted in underlying works used in those programmes. There is no indication, as Nine would have it, that, with respect to television broadcasting, the interest for which legislative protection was to be provided was that in each and every image discernible by the viewer of such programmes, so as to place broadcasters in a position of advantage over that of other stakeholders in copyright law, such as the owners of cinematograph films or the owners of the copyrights in underlying original works.

The television broadcasting right

30 Part III (ss 31-83) of the Act provides for copyright in original literary, dramatic, musical and artistic works. Part IV (ss 84-113) provides for copyright in subject-matter other than works, namely sound recordings, cinematograph films, television broadcasts and sound broadcasts, and published editions of works. Of Pt IV copyrights, it is accurately observed³²:

31 *Webster's New International Dictionary*, 2nd ed (1958), vol 1 at 339. *The Australian Oxford Dictionary*, (1999) at 170 distinguishes between uses of "broadcast" as a verb, noun, adjective and past participle; it gives for its meaning as a noun "a radio or television programme or transmission" and as a verb "transmit (programmes or information) by radio or television". *The Macquarie Dictionary*, 3rd ed (1997) for "broadcast", and beside the sub-classification "*Radio*", states at 274:

"**a** the broadcasting of radio messages, speeches, etc. **b** a radio program. **c** a single period of broadcasting".

The Oxford English Dictionary, 2nd ed (1989), vol 2 at 568 cites the statement in the *Westminster Gazette*, 19 October 1922:

"The British Broadcasting Company will broadcast news, information, concerts, lectures, educational matter, speeches, weather reports, and theatrical entertainments."

32 Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, 2nd ed (rev) (2002), §8.0.

"In general, these subject matters receive a lower level of protection than works, with shorter terms and more restricted exclusive rights."

As indicated above, this case concerns copyright in television broadcasts.

31 Copyright subsisting by virtue of Pt IV is in addition to and, with an immaterial qualification³³, is independent of copyright subsisting by virtue of Pt III (s 113(1)). Further, as to Pt IV copyrights, the subsistence of copyright under one provision of Pt IV does not affect the operation of any other provision of Pt IV under which copyright can subsist (s 113(2)). For example, there may be copyrights under Pt IV in a cinematograph film which is the subject of a television broadcast, and the film may utilise the copyrights under Pt III in, for example, original dramatic and musical works.

32 There are various points of contact made in the Act between the copyrights conferred by Pt III in respect of original works and the newer forms of copyright provided for in Pt IV. These contacts were described in the judgment of the majority in *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations ("PPCA")*³⁴. What is significant for present purposes is that the exclusive rights with respect to original literary, dramatic and musical works include the right to broadcast the works (s 31(1)(a)(iv)) whether by way of sound broadcasting or television (s 25(1)), and the exclusive rights with respect to original artistic works include the right to include the works in television broadcasts (s 31(1)(b)(iii))³⁵. The result is that a television broadcast may be more than a broadcast of some event or spectacle; it also in some cases may reproduce one or more works in which copyright subsists under Pt III and is vested in a different ownership to that of the broadcast.

33 Any copyright otherwise still subsisting under Pt III is not infringed by the public viewing of a cinematograph film, the copyright in which has expired (s 110(2)).

34 (1998) 195 CLR 158 at 162-163 [3]-[6].

35 The Amendment Act substituted in pars (b)(iii) and (a)(iv) the right "to communicate the work to the public" and introduced in s 10 a definition of "communicate" as meaning:

"make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter".

13.

33 Copyright subsisted in "a television broadcast" made by Nine from a place in Australia (s 91) and was vested in Nine (s 99), and subsisted for 50 years thereafter (s 95(1)).

34 Section 101 is the primary provision dealing with infringement of Pt IV copyrights. Sub-section (1) states:

"Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright."

The reference to "any act comprised in the copyright" is to be read as a reference to any act that, under the Act, the copyright owner has the exclusive right to do; this includes the exclusive right to authorise a person to do that act (s 13). Sub-sections (3) and (4) of s 101 provide:

"(3) Subsection (1) applies in relation to an act done in relation to a sound recording whether the act is done by directly or indirectly making use of a record embodying the recording.

(4) Subsection (1) applies in relation to an act done in relation to a television broadcast or a sound broadcast whether the act is done by the reception of the broadcast or by making use of any article or thing in which the visual images and sounds comprised in the broadcast have been embodied."

35 The reference in s 101(4) to "reception" is to reception from the transmission by which the broadcast is made or from a simultaneous transmission made by other means (s 25(2)). The distinction drawn in s 101(4) between infringement by reception and by fixation, using embodiments of the broadcast, reflects the mischief perceived in par 116 of the Gregory Report, and Recommendation 31, which have been set out above at [24].

36 The acts comprised in the broadcasting copyright are specified in s 87, the text of which will be set out below. Two particular paragraphs of s 87 were in issue in this litigation. The first, s 87(a), specifies as a violation of the exclusive right in the case of the visual images in a television broadcast, the making of a cinematograph film or a copy thereof. The second, s 87(c), specifies the re-broadcasting of a television broadcast. The Full Court held that Ten was guilty of each species of infringing activity.

37 However, for this appeal there is a necessarily anterior question. It is what is comprehended by the "subject-matter" of the protection under Pt IV given to "a

television broadcast". That is the phrase used in ss 91, 95, 99 and 101(4). It should be observed that s 101(4) uses the phrase "the visual images and sounds comprised in the broadcast". Likewise, for the purposes, for example, of fixing the commencement of the 50 year period specified in s 95(1), the television broadcast is treated by s 22(5) as having been made "by the person by whom, at the time when, and from the place from which, the visual images or sounds constituting the broadcast ... were broadcast"³⁶. The decision which Ten challenges appears to discount the force of that phrase, redolent of plurality and interconnection of images and sounds, by treating as "a television broadcast" that which is capable of being observed as a separate image and (in an unexplained fashion) that capable of being heard and distinguished as the accompanying sounds (if any).

The medium of communication

38 Where the "subject-matter" of copyright protection is of an incorporeal and transient nature, such as that involved in the technology of broadcasting, it is to be expected that the legislative identification of the monopoly (eg, by s 87) and its infringement (eg, by s 101) of necessity will involve reference to that technology. But that does not mean that the phrase "a television broadcast" comprehends no more than any use, however fleeting, of a medium of communication. Rather, as the Gregory Report indicated, protection was given to that which had the attribute of commercial significance to the broadcaster, identified by the use of the term "a broadcast" in its sense of "a programme". In the same way, the words, figures and symbols which constitute a "literary work", such as a novel, are protected not for their intrinsic character as the means of communication to readers but because of what, taken together, they convey to the comprehension of the reader.

39 In fixing upon that which was capable of perception as a separate image upon a television screen and what were said to be accompanying sounds as the subject-matter comprehended by the phrase "a television broadcast", the Full Court appears to have fixed upon the medium of transmission, not the message conveyed by its use.

40 Because the medium is ephemeral, it is necessary to capture what a television broadcaster transmits if any practical use is to be made of the signal that is broadcast. For many purposes, it is necessary not only to capture the signal, but also to translate it so that the images and sounds which the signal conveys can be seen and heard. The most common method of doing that is, of course, the television set, but other devices, such as various forms of video recorder, may be used. According to the device that is used, what is captured and translated may be

36 See also s 25(5).

only so much of a signal broadcast as has previously been, or can at the time of transmission of the signal be, translated into a single image or moment of sound. But in the ordinary course, what is captured and translated can, and will, be a faithful reproduction of all, or substantially all, that the broadcaster's signal permits.

41 Section 87 of the Act, in pars (a) and (b), identifies the nature of copyright in a television broadcast by reference to two methods by which what is transmitted can be captured and recorded in permanent or semi-permanent form. One method (s 87(a)) is to take a still visual image of what otherwise appears on a television set as part of a continuous visual transmission. In that context it may be sensible to speak of a single visual image that is broadcast. However, it by no means follows that it is sensible to confine the understanding of "a television broadcast" by basing the meaning that is given to the expression upon the capacity to capture and record singular visual images. Especially is that so when it makes little sense to speak of a single "moment" of sound accompanying that image. The instantaneous fixing of single visual images is familiar, but the instantaneous fixing of single sounds is not. When it is further observed that s 87(c), with its reference to re-broadcasting, at least encompasses the capture and simultaneous retransmission of a television broadcaster's signal, it is apparent that to understand "a television broadcast" as a singular and very small portion of the signal which a broadcaster transmits virtually continuously, and a person receiving is intended to receive continuously, is to give the expression a very artificial meaning. Yet that is what the Full Court did.

The reasoning of the Full Court

42 The conclusion of the Full Court with respect to s 87(a) rested largely upon a view taken of the significance of s 25(4). That sub-section treats the reference in s 87(a) to the making of "a cinematograph film" of "a television broadcast" as "including a reference to a cinematograph film ... of any of the visual images comprised in the broadcast". In that regard, Hely J held³⁷ that "the expression 'any of the visual images' encompasses any one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast". His Honour concluded³⁸:

"As the videotapes of the Panel Segments made by Ten are cinematograph films of the visual images comprised in the source television

37 (2002) 118 FCR 417 at 433.

38 (2002) 118 FCR 417 at 435.

broadcasts in terms of s 25(4), it follows that, subject to the fair dealing defences, Nine has established contravention of its s 87(a) copyright in the source broadcasts. *That conclusion follows from the application of s 25(4) to the facts, without the need to determine what constitutes a television broadcast.* However, that issue has to be confronted in relation to s 87(c)." (emphasis added)

However, the primary task had been to identify that television broadcast in which copyright subsisted in Nine under s 91. This was a matter of visual images and sounds and the primary task was not performed, and could not properly be avoided, by reasoning from a provision concerned with fixation in a cinematograph film.

43 As to s 87(c), Hely J observed that in the Act there was no definition of "re-broadcast"³⁹. However, it should be noted that Art 3(g) of the Rome Convention states:

"'[R]ebroadcasting' means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation."

If s 87(c) of the Act be read in the same way, the use by Ten of its previous "fixations" of the Nine programmes would not have contravened s 87(c)⁴⁰. However, neither side has submitted to this Court that s 87(c) is to be read in the same way as the re-broadcasting right given by the Rome Convention. It might be added that it would be difficult to read Art 3(g) as applying to a simultaneous re-broadcast of one image and accompanying sound.

44 Hely J concluded the consideration of s 87(c) by saying⁴¹:

"When is a television broadcast made? A television broadcast is made when the transmission of visual images and any accompanying sounds begins. A television broadcast continues to be made as the transmission of visual images and any accompanying sounds continues. Visual images and accompanying sounds as they are broadcast, themselves

39 (2002) 118 FCR 417 at 435.

40 See Stewart, *International Copyright and Neighbouring Rights*, 2nd ed (1989), §8.32.

41 (2002) 118 FCR 417 at 435-436.

satisfy the definition of 'television broadcast'⁴². *One does not have to wait until there has been a transmission of enough of the images and sounds to constitute a programme, or any other subject matter, before concluding that a television broadcast has been made.*

...

I conclude that a television broadcast in which copyright may subsist is made whenever visual images and accompanying sounds are broadcast by way of television. Re-broadcasting of any of the actual images and sounds so broadcast is an infringement of copyright under s 87(c), whether or not the subject matter of the re-broadcast is characterised as a programme, a segment of a programme, an advertisement, a station break or a station logo, or as a substantial part of any of those things.

Accordingly, I do not agree, with respect, with the primary judge's conclusion that whether or not there has been 're-broadcasting' of a television broadcast is to be measured against those benchmarks." (emphasis added)

45 The critical step in this reasoning was to identify "a television broadcast" as the broadcast of a singular visual image with accompanying sound. In essence, the reasoning depended upon giving controlling force to s 25(4) in construing and applying the meaning of "a television broadcast". It is not right to give s 25(4) that place. As these reasons seek to show, s 25(4) is explanatory or epexegetical of an aspect of one of the three species of rights with which s 87 is concerned. The expression "a television broadcast" must be understood in a way which is consistent with all of the rights mentioned in s 87.

46 Conti J had favoured the "television broadcaster's program, or respective segments of a program, if a program is susceptible to subdivision by reason of the existence of self-contained themes" and added that "in the case of commercial television, an advertisement should logically be treated in the same way as a separate program"⁴³. However, in the Full Court, Hely J took a contrary view, saying⁴⁴:

42 cf the observations of Buckley LJ in *Spelling Goldberg [Productions Inc v BPC Publishing Ltd]* [1981] RPC 283] at 296.

43 (2001) 108 FCR 235 at 272.

44 (2002) 118 FCR 417 at 436.

"It may be that in the mid-1950s a television broadcast would be seen as consisting of a series of discrete programmes of comparatively short duration. But today there is a continuous television broadcast, although the subject matter of that broadcast may be so arranged as to be of interest to different sections of the public at different times in the day. There may be some spectacles or events, for example, the Gulf War, which might be the subject of a television broadcast continuing for more than a day."

Hely J explained the role for principles of substantiality upon his construction of the phrase "a television broadcast" by saying⁴⁵:

"If a broadcast consists of visual images and sounds, but the re-broadcast is of one, rather than the other, or if the re-broadcast is of images which have been cropped, then issues of substantiality may arise."

47 As already emphasised in these reasons, the requirement that an infringer who takes less than the whole of the protected subject-matter must take at least a substantial part thereof plays a well-established and central part in copyright law. Questions of quality (which could include the potency of particular images or sounds, or both, in a broadcast) as well as quantity arise both in respect of Pt IV copyrights and those copyrights in original works to which Pt III applies⁴⁶.

48 The outcome of the decision of the Full Court now under appeal is that the interests of broadcasters are placed by the Act in a privileged position above that of the owners of copyright in the literary, dramatic, musical and artistic works which may have been utilised in providing the subject of the images and sounds broadcast. This is because the diminished requirements in respect of infringement of television broadcasts for the taking of a substantial part of the subject-matter facilitate the proof of infringement there while leaving the owners of copyrights under Pt III with a heavier burden. Ten points to this apparent incongruity as favouring a construction of the Act contrary to that adopted by the Full Court.

Section 87(a) and s 25(4)

49 The construction given by Hely J to s 87(c), the re-broadcasting right, appears to have proceeded from the construction given to the visual "fixation" right conferred by s 87(a). That, in turn, depended upon the construction and

45 (2002) 118 FCR 417 at 436-437.

46 See *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 65 FCR 399 at 418-419; *Newspaper Licensing Agency Ltd v Marks & Spencer plc* [2003] 1 AC 551 at 561.

significance of s 25(4). Ten emphasises in its submissions on the appeal that the limitation of s 25(4) and s 87(a) to the fixation of the visual element in "a television broadcast" provided no necessary or sufficient support for an interpretation of the re-broadcasting right where no fixation is involved but both image and sound are received and broadcast in infringement of the copyright. Nor, Ten submitted, was the process of construction whereby s 87(a) drove the construction of s 87(c) indicated by his Honour. Those submissions should be accepted.

50 It is convenient then to make further reference to s 25(4). That requires that there first be some examination of the building blocks which the Act supplies in a complex set of definitions and explanatory provisions.

51 The category in Pt IV of copyright in subject-matter other than works falls into four divisions: sound recordings; cinematograph films; television broadcasts and sound broadcasts; and published editions of works. The first three are related. Each is the subject of definitions in s 10 of the Act, as follows:

- (i) A "**sound recording** means the aggregate of the sounds embodied in a record" and "**record** means a disc, tape, paper or other device in which sounds are embodied". The term "embodied" reflects the introduction into some of the Pt IV subject-matter of the "fixation" principle of copyright law that copyright does not subsist in a work unless and until the work takes some material form, so that protection does not extend to the ideas or information contained in the work and a balance is struck between the interests of authors and those of society in free and open communication⁴⁷. This notion of "fixation" receives further explanation in s 24. This states:

"For the purposes of this Act, sounds or visual images shall be taken to have been embodied in an article or thing if the article or thing has been so treated in relation to those sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing."

Further, s 23(1) marks off the definition of sound recording from that of "cinematograph film" by providing:

⁴⁷ *Copinger and Skone James on Copyright*, 14th ed (1999), vol 1, §3.74. See also *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 67 [45]-[46]; *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336 at 353-354, 397-398; Loughlan, "Copyright Law, Free Speech and Self-Fulfilment", (2002) 24 *Sydney Law Review* 427 at 428-431.

"For the purposes of this Act, sounds embodied in a sound-track associated with visual images forming part of [a] cinematograph film shall be deemed not to be a sound recording."

This Court held in *PPCA*⁴⁸ that (i) the operation of s 23(1) was to deny any separate copyright as a sound recording to the sounds embodied in the soundtrack which forms part of a cinematograph film, but (ii) it did not follow that, when a film, with its soundtrack, was broadcast, there was no infringement of copyright in earlier sound recordings (in *PPCA*, of various songs) which had been reproduced in that soundtrack.

- (ii) A "***cinematograph film*** means the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing:
- (a) of being shown as a moving picture; or
 - (b) of being embodied in another article or thing by the use of which it can be so shown;

and includes the aggregate of the sounds embodied in a sound-track with such visual images".

Again, s 24 operates to explain the use of "embodied". It will be observed that what is protected is not merely an aggregation of visual images, but an aggregation capable of "being shown as a moving picture"; that expression is not defined.

- (iii) References to "broadcasting", subject to the appearance of a contrary intention, are to be read as references to "broadcasting whether by way of sound broadcasting or of television" (s 25(1)); and "***broadcast*** means transmit by wireless telegraphy to the public". In turn, "***wireless telegraphy*** means the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy".
- (iv) The phrase "***sound broadcast*** means sounds broadcast otherwise than as part of a television broadcast"; the phrase "***television broadcast*** means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images", so that the phrase "television broadcast" has visual and auditory elements but only the former need be present for the definition to apply.

48 (1998) 195 CLR 158.

52 The definitions of "sound recording" and "cinematograph film" are drafted so as to avoid overlapping. But both definitions differ in a significant respect from those of "television broadcast" and "sound broadcast". The former turn upon the notion of "fixation" and the existence of a material embodiment, as explained by s 24. The latter do not. Rather, as foreshadowed in par 284 of the Spicer Report, set out in these reasons at [26], they turn upon the activity of broadcasting to the public by wireless telegraphy and by way of television. Further, television broadcasting involves the two elements of visual images and sound. These distinctions between the incorporeal and the corporeal, and between the sound and visual elements of television broadcasting, are vital to an understanding of the relationship between ss 85 and 86 on the one hand and s 87 on the other.

53 Sections 85 and 86 identify the exclusive rights conferred by copyrights in sound recordings (s 85) and cinematograph films (s 86). One of the former is "to make a copy of the sound recording" (s 85(1)(a)); one of the latter is "to make a copy of the film" (s 86(a)). Each category of infringing act in these categories will involve copying to produce a material embodiment where there was an anterior material embodiment.

54 Television and sound broadcasts do not have that character. The reception of a broadcast by "pulling it down" may itself be sufficient (as s 101(4) recognises) for infringement by re-broadcasting (s 87(c)). However, in drafting the Act, some care was needed in identifying the translation of the incorporeal into a fixed form if that translation were to be treated as an infringing act. That was done by pars (a) and (b) of s 87. Section 87 states:

"For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a television broadcast or sound broadcast, is the exclusive right:

- (a) in the case of a television broadcast in so far as it consists of visual images – to make a cinematograph film of the broadcast, or a copy of such a film;
- (b) in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds – to make a sound recording of the broadcast, or a copy of such a sound recording; and
- (c) in the case of a television broadcast or of a sound broadcast – to re-broadcast it."

55 Section 25(4) is epexegetical or explanatory of par (a) of s 87, providing the following detail:

"In this Act:

- (a) a reference to a cinematograph film of a television broadcast shall be read as including a reference to a cinematograph film, or a photograph, of any of the visual images comprised in the broadcast; and
- (b) a reference to a copy of a cinematograph film of a television broadcast shall be read as including a reference to a copy of a cinematograph film, or a reproduction of a photograph, of any of those images."

56 Where, as in the present case, both visual images and the sounds of a television broadcast are captured on video tape, s 87 identifies the exclusive right of the broadcaster in a striking fashion. It distinguishes between the capture of the visual images (s 87(a)) and the recording of the sounds (s 87(b)). In each case, the exclusive right in respect of the ephemeral activity of broadcasting is identified by reference to fixed embodiments.

57 At first blush, it may have been more straightforward for the statute to have settled in s 87(a) solely upon the making of "a cinematograph film" of the television broadcast as the relevant exclusive entitlement of the broadcaster. But to do so would have given rise to textual difficulty. If s 87(a) had referred, in its closing phrases and without more, to the making of a cinematograph film of the broadcast, that would have made a nonsense of the opening words of s 87(a). These take as the subject-matter of the cinematograph film only so much of the broadcast as consisted of visual images. But the definition in s 10 of "cinematograph film", set out above, takes two aggregates, that of the visual images and that of the sounds, each as found in a distinct fixed embodiment.

58 That definition of "cinematograph film" is subjected by s 10 to the presence of a contrary intention. That is found in s 25(4) which takes the composite expression "a cinematograph film of a television broadcast" and permits its limitation to a peculiar cinematograph film, one limited to visual images comprised in the television broadcast. In this way, there is effectuated the drafting method adopted in s 87 to deal with sound broadcasts and the sound element of television broadcasts together (in par (b)), and separately (in par (a)), with the visual element of television broadcasts. But it should be noted that there is not removed from the necessary character of the "cinematograph film" spoken of in par (a) the definitional requirement that the aggregate of visual images be capable, by use of the material embodiment, "of being shown as a moving picture".

Section 25(4) and "substantial part"

59 Section 25(4) does not answer the next question which may arise, namely, whether this cinematograph film represents a substantial part of the images comprising the television broadcast in question. Paragraph (a) of s 14(1) requires references to the doing of infringing acts to be read as including references to infringing acts in relation to a "substantial part" of Pt IV subject-matter, in this case, television broadcasts.

60 Section 14, like s 25, is contained in Pt II (ss 10-30A), which is headed "Interpretation". Section 14 does not affect the references in other provisions of the Act (ss 32, 177, 180, 187 and 198) to the publication of a work or to the absence of publication of a work. Sub-section (2) of s 14 so states. It should be noted here that, to a significant degree, questions of the subsistence and duration of copyright turn upon the classification of works as published or unpublished. Section 14(1) is expressed to be subject to the appearance of a contrary intention. The immediately following s 14(2) is a detailed instance of this. Another is s 29(2). This states that s 14 does not apply in determining whether reproductions of a work or an edition of a work have been supplied to the public and are therefore to be classified as published works.

61 Section 25(4) does not display a contrary intention to displace the operation of s 14. In particular, s 25(4) does not further favour the interests of broadcasters by decreasing the burden they carry in establishing infringement of television broadcasting copyright below the requirement of a taking of a substantial part of the subject-matter. Rather, s 25(4) gives a special meaning to the term "a cinematograph film of the broadcast" in s 87(a), but leaves outstanding the issue whether there has been taken at least a substantial part of the images aggregated in the television broadcast in question. In this way, effect is given to each provision, while maintaining the unity of the statute in the sense discussed in *Project Blue Sky Inc v Australian Broadcasting Authority*⁴⁹.

Additional matters of construction of s 25(4)

62 Four points should be made here in support of the above reading of s 25(4). First, as observed earlier in these reasons, it would be a curious method of construction of the Act to take s 25(4) as flowing upstream and as dictating the content of the phrase "a television broadcast". Secondly, s 25(4) is not addressed to that part of the "fixation" right in s 87 which is concerned with sound. In so far as "a television broadcast" consists of sounds, the relevant provision is in par (b) not par (a). It would make little sense and not meet the definition of "sound recording" to speak of a recording of that minimal auditory experience which

49 (1998) 194 CLR 355 at 381-382 [69]-[70].

could be treated as accompanying that single image to provide what Nine contends together constitutes "a television broadcast". Thirdly, s 25(4) can have no application, given its terms, to that exclusive right conferred by s 87(c), ie, that to re-broadcast the television broadcast in question. It would be an odd result if the requirement of at least a substantial taking applied to s 87(c) but not to s 87(a). That suggests s 25(4) operates in the fashion explained in these reasons. Fourthly, there is the significance of the presence in the infringement provision in s 101(4) of the phrase "the visual images and sounds comprised in the broadcast" and the reference in s 135B to the making of a copy of the whole or a part of a "transmission" (being a sound broadcast or a television broadcast).

63 Part VA (ss 135A-135ZA) deals with the copying of "transmissions" by educational and other institutions. The term "transmission" is defined in s 135A so as to include "a sound broadcast or a television broadcast". Section 135B then states:

"In this Part:

- (a) a reference to a copy of a transmission is a reference to a record embodying a sound recording of the transmission or a copy of a cinematograph film of the transmission; and
- (b) a reference to the making of a copy of a transmission is a reference to the making of a copy of *the whole or a part of the transmission.*" (emphasis added)

64 No contrary view of the operation of s 25(4) is required by the treatment of photography as the making of "a cinematograph film of a television broadcast". The Act otherwise distinguishes between photography and cinematography. A photograph is an artistic work by reason of its inclusion in par (a) of the definition of "artistic work" in s 10. Thus, a photograph may be an original artistic work to which Pt III of the Act applies.

65 But "photograph" is so defined in s 10 as to place cinematography elsewhere, namely in Pt IV, with other original works of authorship. In that regard, Judge Learned Hand observed⁵⁰:

"no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike".

50 *Jeweler's Circular Pub Co v Keystone Pub Co* 274 F 932 at 934 (1921); affd 281 F 83 (1922).

25.

The definition states:

"photograph means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and **photographic** has a corresponding meaning".

The effect of s 25(4) is to qualify that disjunction between photography and cinematography. This is achieved in s 25(4) by treating the photographing of visual images in a television broadcast as the making of a cinematograph film of the broadcast, for the purposes of s 87(a). Whether one or more photographs infringe the television broadcast copyright will depend upon the operation of the substantiality provision in par (a) of s 14(1) of the Act.

66 There remains the question of identifying that to which par (a) of s 14(1) speaks in its application to "a television broadcast" spoken of in pars (a) and (c) of s 87. What does that phrase identify in the present case?

What is "a television broadcast"?

67 The definition given in s 10 is "television broadcast", which is drawn in terms of the technology of broadcasting which is to be utilised. But the phrase in the exclusive right provisions of s 87 (as also in ss 91, 95, 99 and 101(4)) is "*a* television broadcast" (emphasis added).

68 In the present case, Hely J focused attention not upon the statutory phrase "a television broadcast", but upon the use of technical language in the definition of "television broadcast". His Honour concluded⁵¹:

"Here the interest protected by the copyright is the visual images broadcast by way of television and any accompanying sounds. It is the actual images and sounds broadcast which constitute the interest protected. The interest protected is not defined in terms of some larger 'whole' of which the visual images and sounds broadcast are but a part. The ephemeral nature of a broadcast, and the fact that copyright protection is conferred by reference to a broadcaster's output, rather than by reference to the originality of what is broadcast, may also help to explain why the interest protected is defined in this way."

51 (2002) 118 FCR 417 at 436.

69 That identification of the interest sought to be protected by the broadcast copyright should not be accepted.

70 The interest sought to be protected by the conferral of the television broadcast copyright was identified by the Spicer Committee with reference to the experience of the BBC and the Independent Television Authority. The latter was established by the *Television Act 1954* (UK) and charged by s 3 to "broadcast ... programmes" of a certain standard. This interest was identified as that in the cost and skill in assembling or preparing and transmitting programmes to the public. That activity of public broadcasting occurred in exercise of statutory authority which required the transmission of programmes of a certain standard or quality identified by their content. The Spicer Committee decided against leaving it to broadcasters to record or film their broadcasts and so depend upon the protection given to sound recordings and cinematograph films (par 287).

71 Further reference should be made to s 91. This limits the identity of those in whom there may subsist copyright in television broadcasts and sound broadcasts. It is sufficient for present purposes to set out pars (a) and (b) of s 91. These state:

"Subject to this Act, copyright subsists:

- (a) in a television broadcast made from a place in Australia by:
 - (i) the Australian Broadcasting Corporation;
 - (ii) the Special Broadcasting Service Corporation; or
 - (iii) any prescribed person, being a person who is, at the time when the broadcast is made, authorised under a licence issued under the *Radiocommunications Act 1992*; and
- (b) in a television broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) made from a place in Australia under the authority of:
 - (i) a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992*; or
 - (ii) a class licence determined by that Authority under that Act".

The result is to render the subsistence of copyright dependent upon the making of "a television broadcast" by the Australian Broadcasting Corporation ("the Corporation"), the Special Broadcasting Service Corporation ("the SBS") and those such as Nine and Ten holding the requisite licences or permits under the Broadcasting Act⁵². What then is contemplated is the exercise by those identified broadcasters of the performance of their statutory powers or duties under their constituent legislation or the exercise of the authority given by their licences under the Broadcasting Act.

72 Under the present legislation, s 14 of the Broadcasting Act defines as "commercial broadcasting services"⁵³ those:

"broadcasting services:

- (a) that *provide programs* that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and
- (b) that *provide programs* that:
 - (i) are able to be received by commonly available equipment; and
 - (ii) are made available free to the general public; and
- (c) that are usually funded by advertising revenue; and
- (d) that are operated for profit or as part of a profit-making enterprise; and
- (e) that comply with any determinations or clarifications under section 19 in relation to commercial broadcasting services".
(emphasis added)

52 The only prescriptions under s 91(a)(iii) were of Satellite Leisure Services Pty Ltd and Sky Channel Pty Ltd by Reg 17A of the Copyright Regulations, now repealed by the Copyright Amendment Regulations 2001 (No 2), Sched 1, Item 3.

53 The Broadcasting Act also provides for and defines "community broadcasting services" (s 15), "subscription broadcasting services" (s 16), "subscription narrowcasting services" (s 17) and "open narrowcasting services" (s 18), but in terms which in each case provide for the provision of "programs".

The term "program" means (s 6(1)):

- "(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
- (b) advertising or sponsorship matter, whether or not of a commercial kind".

The inclusion of par (b) should be noted.

73 The *Australian Broadcasting Corporation Act 1983* (Cth) specifies the functions of the Corporation in s 6. In particular, par (a) of s 6(1) states as a function of the Corporation:

"to provide within Australia innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system consisting of national, commercial and public sectors and, without limiting the generality of the foregoing, to provide:

- (i) *broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and*
- (ii) *broadcasting programs of an educational nature". (emphasis added)*

The phrase "broadcasting service" is defined in s 3 as meaning a service that delivers "programs" to persons having certain reception equipment, and "program" means "a radio program or a television program".

74 The *Special Broadcasting Service Act 1991* (Cth) states in s 6(1):

"The principal function of the SBS is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society."

The SBS is also empowered by s 44(1)(a):

"to produce, promote or present programs or arrange, or provide facilities, for the production, promotion or presentation of programs".

75 There can be no absolute precision as to what in any of an infinite possibility of circumstances will constitute "a television broadcast". However, the programmes which Nine identified in pars 5.1-5.11 of its pleading as the Nine

Programs, and which are listed with their dates of broadcast in the reasons of Conti J⁵⁴, answer that description. These broadcasts were put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title, such as *The Today Show*, *Nightline*, *Wide World of Sports*, and the like, which would attract the attention of the public.

76 However, Conti J was, with respect, correct in adding, with reference to *Copinger and Skone James on Copyright*⁵⁵, that⁵⁶:

"Television advertisements should be treated as discrete television broadcasts, particularly since 'A television or cinema commercial is typically the product of the creative and administrative work of many separate individuals' ... I would reject Ten's submission that because advertising is the 'life blood' of commercial television broadcasting, it is 'impossible for [Nine] to avoid the conclusion that these advertisements are part of that program'."

His Honour added⁵⁷:

"Moreover, where a given program divides into segments, it may be legitimate in the facts of a given case to use a segment of a program for measurement of the television broadcast, rather than the whole of the program."

77 We would reserve consideration of that proposition for a particular case where the point arises. However, the circumstance that a prime time news broadcast includes various segments, items or "stories" does not necessarily render each of these "a television broadcast" in which copyright subsists under s 91 of the Act.

The United States law

78 Reference was made in argument to the position under *The Copyright Act of 1976* ("the US Act") and something should be said to indicate that this system is at odds with the "single image" interpretation of the Australian legislation. Under the

54 (2001) 108 FCR 235 at 240.

55 14th ed (1999), vol 1, §27.341.

56 (2001) 108 FCR 235 at 270.

57 (2001) 108 FCR 235 at 270.

US Act, copyright protection subsists in original works of authorship including "audiovisual works" which are "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (s 102(a)). The situation is said to be⁵⁸:

"Because it is common practice for radio and television broadcasters to simultaneously record live broadcasts, this extension of the concept of fixation would seem to effectively protect virtually all broadcasts."

However, "audiovisual works" are defined in s 101 as:

"works that consist of *a series of related images* which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied". (emphasis added)

Conclusions

79 The appeal should be allowed with costs. However, there remains for consideration by the Full Court the determination of so much of Nine's appeal to that Court as turns upon the challenge to the treatment by the primary judge of the issues of substantiality under s 14(1)(a) of the Act. There also remains the question of what orders the Full Court should make in place of those entered on 19 July 2002 in the light both of the reasons of this Court and of the Full Court's consideration of the appeal to that Court.

80 The orders entered on 19 July 2002 should be set aside and the matter be remitted to the Full Court for determination of the remaining grounds of appeal to that Court and for the making of appropriate orders to dispose of that appeal. The costs of all the proceedings in the Full Court should be for that Court.

58 *Nimmer on Copyright*, (2003), §2.03[B][2]. See further §1.08[C][2] and *Production Contractors Inc v WGN Confidential Broadcasting Co* 622 F Supp 1500 at 1503 (1985).

81 KIRBY J. In this appeal, there is a division of opinion in the Court concerning the extent of copyright protection of a television broadcast within Pt IV of the *Copyright Act 1968* (Cth) ("the Act"). As explained elsewhere, the case concerns the Act in the form in which it appeared before amendments introduced by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). The enactment of copyright protection in a television broadcast is a relatively recent development. It was provided in the United Kingdom in 1956⁵⁹ following a 1952 report of the Gregory Committee⁶⁰. In Australia, legislation to introduce such protection, substantially copying the United Kingdom Act, was first enacted in 1968⁶¹.

A difference over copyright infringement

82 The point over which this Court has divided concerns a question of statutory construction. That point was first exposed in a difference of opinion between the primary judge in the Federal Court of Australia (Conti J)⁶² and the Full Court of that Court⁶³. The latter reversed the primary judge's orders.

83 Upon the matter in issue, I agree in the conclusion reached by Callinan J. In my view, the approach adopted by the Full Court was correct. The reasoning of Hely J in the Full Court is compelling. Sundberg J agreed with it⁶⁴. So, substantially, did Finkelstein J⁶⁵. So do I.

84 The foundation for the difference between the competing judicial opinions is a conclusion, expressed by the Full Court, and repeated by Callinan J, that the contrary result involves distorting, if not ignoring, the language of the Act. That language must be given effect because it has the special legitimacy of the written law endorsed by the Parliament within a head of power granted by the

59 *Copyright Act 1956* (UK).

60 United Kingdom, *Report of the Copyright Committee*, (1952), Cmd 8662.

61 The Act, s 87 ("Nature of copyright in television broadcasts and sound broadcasts").

62 *TCN Channel Nine v Network Ten* (2001) 108 FCR 235.

63 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417.

64 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 419 [1].

65 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 422 [15].

Constitution⁶⁶. The judicial function demands obedience to the provisions of valid enacted law⁶⁷.

85 Upon the clear language of s 87(a) of the Act, the appellant (which never denied copying the respondents' television broadcasts) infringed that provision. It was common ground that the videotapes made by the appellant, including the segments used in *The Panel* programme later broadcast by the appellant, were cinematograph films, as defined⁶⁸. Similarly, upon the clear language of s 87(c) of the Act, the appellant infringed copyright under that provision. It would require an artificially narrow construction of the phrase "a television broadcast" in par (c) of s 87 of the Act to hold that the appellant's undoubted broadcast of excerpts, extracted from the copies it had made of the respondents' broadcasts, did not constitute a "re-broadcast[ing]" of "a television broadcast". Given the terms of the Act, and the purpose of the Parliament in introducing copyright protection in the case of "a television broadcast", it would be surprising indeed if the only infringement for which the Act provided was constituted by a rebroadcast of an entire television "programme" or of some particular segment of such a programme to an extent yet to be specified with acceptable precision. The language of the Act, set out and explained in the reasons of Callinan J, indicates why this interpretation is wrong. It should not be accepted.

Purposive construction within textual limits

86 In some respects, this appeal presents, in a different context, a problem about the meaning of the Act similar to that which this Court faced in *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations*⁶⁹. There, the issue was whether the incorporation of sounds, from a sound recording, in the sound-track of a cinematograph film, resulted in a broadcast of the sound recording when the film was subsequently broadcast. There too this Court divided. The majority⁷⁰ held that there was a

66 Constitution, s 51(xviii).

67 See *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

68 cf *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 8; *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* (2000) 105 FCR 153 at 167-168 [63]-[67].

69 (1998) 195 CLR 158.

70 *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 172 [34] per Gaudron, Gummow and Hayne JJ.

broadcast of the sound recordings when the cinematograph film, including the sound recordings incorporated in the sound-track, was broadcast. McHugh J and I dissented upon the view that we took of the provisions of s 23(1) of the Act expressly deeming "sounds embodied in a sound-track associated with visual images ... not to be a sound recording"⁷¹. On the point in issue in that appeal, the decision of the majority states the law. However, the same problem of interpretation, and many of the same considerations, arise for the interpretation of the provisions of the Act in issue in this appeal.

87 I accept wholeheartedly that the contemporary approach of this Court to the interpretation of contested statutory language is the purposive approach⁷². However, adopting that approach does not justify judicial neglect of the language of the statute, whether in preference for historical or other materials, perceived legal policy or any other reason⁷³. A purposive construction is supported by s 15AA of the *Acts Interpretation Act* 1901 (Cth). But that section also does not permit a court to ignore the words of the Act. Ultimately, in every case, statutory construction is a text-based activity⁷⁴. It cannot be otherwise.

88 In the present case, in the terms of the Act, I find it impossible to construe "a television broadcast" as mentioned in ss 25 and 87 of the Act to exclude those "visual images broadcast by way of television, together with any sounds broadcast for reception along with those images"⁷⁵ of the kind described in the evidence, being the segments from the respondents' earlier television broadcasts recorded by the appellant and rebroadcast as part of its own programme, *The Panel*. Similarly, I find it impossible to read the plain language of s 101(1) and (4) of the Act somehow to confine the meaning of "a television broadcast", so that it does not include segments of the type recorded and then rebroadcast by the appellant.

71 *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 174-175 [42], reasons of McHugh J and myself; cf *Kelly v The Queen* [2004] HCA 12, reasons of McHugh J and myself.

72 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424. See eg *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 130 [143]; 202 ALR 233 at 267.

73 See eg *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

74 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

75 The Act, s 10(1).

89 If one is truly looking for the "purpose" of the Act, that purpose must be found not in some *a priori* view about the merits, or desirability, of the copyright in their television broadcasts which the respondents assert. Ultimately, that purpose must be found in the command of the Parliament, expressed in the Act. Moreover, because, following detailed official inquiries⁷⁶ and the development of an international Convention⁷⁷, the Act afforded new and larger copyright entitlements in Australia, it would be contrary to basic principle and the ordinary canons of statutory construction to restrict those entitlements in a way that conflicted with the language of the Act or that unduly narrowed its operation. Normally, an amendment of an Act to provide new rights of such a kind will be given a beneficial construction so as to ensure that the purpose of the legislature is truly attained⁷⁸. I accept that in the context of the law of copyright, indeed intellectual property law generally, other considerations compete with the protection of private rights⁷⁹. But in the end, it is the statutory text, not generalities or judicial policy judgments, that governs the task in hand and is determinative⁸⁰.

Criticisms of the ambit of copyright protection

90 I reach my conclusion without quite the same enthusiasm as Callinan J appears to feel for it. The opinion of the Full Court has been described as "highly literal"⁸¹. Perhaps it is; but the language of the Act leaves no scope for another approach. The most telling criticism voiced of the Full Court's interpretation is that it makes television broadcast copyright "an extraordinarily strong right, easily the strongest of all copyrights in Australia, able to be infringed by taking less than

76 United Kingdom, *Report of the Copyright Committee*, (1952), Cmd 8662.

77 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961, 1992 *Australia Treaty Series* 29, entered into force for Australia on 30 September 1992. See *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 178-179 [48]-[50].

78 cf *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 69 FCR 268 at 273-274. The need also to adapt the Act to changing technology was emphasised in that decision.

79 cf *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 530-532 [130]-[134].

80 *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 172 [34].

81 Handler, "The Panel Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 394.

a substantial part of the broadcast"⁸². This, it is said, is counterintuitive given the ephemeral nature of television broadcasts and the original reasons for granting copyright in them.

91 If I were free of the constraints of the language of the Act, I would be happy to agree in the conclusion reached in this Court by McHugh ACJ, Gummow and Hayne JJ, whilst feeling anxiety about the lack of precision as to what, in any of an infinite range of circumstances, will constitute "a television broadcast" on that view⁸³. I also have some sympathy for the opinion expressed by Ms de Zwart in a comment upon the Full Court's opinion in these proceedings⁸⁴:

"There are ... many circumstances in which the public interest lies in permitting the use of a work without the permission of the owner of copyright, with or without payment. *The Panel* decision provides a good example of circumstances in which a licence would not be granted (between competitors). ...

It is vital to recognise the public interest element of copyright ... Copyright is not solely concerned with economic returns for the owner. Neither was copyright intended to enable owners to exploit all possible uses and derivations of the work. The public domain is an important legacy of copyright law and its existence should also be protected in the face of the growth of digital capture and licensing of works.

... *The Panel* serves as a vehicle for social comment and criticism, albeit in a relaxed, humorous fashion. ... Copyright is a social as well as a commercial construct and its role in facilitating new creations as well as protecting existing creations should not be forgotten."

92 A further comment of this author appears consonant with the evidence and with my own impression, based on that evidence⁸⁵:

82 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 395.

83 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 394-395.

84 de Zwart, "Seriously entertaining: *The Panel* and the future of fair dealing", (2003) 8 *Media & Arts Law Review* 1 at 16-17.

85 de Zwart, "Seriously entertaining: *The Panel* and the future of fair dealing", (2003) 8 *Media & Arts Law Review* 1 at 17.

"*The Panel* is an irreverent program that seeks to critique the foibles of the television medium. It provides an important forum to review the broadcast programs of the preceding week. It may not itself be free of the constraints of commercialism, but if the right of fair dealing is not available to permit it to demonstrate the points it is making the message is weakened."

Textual difficulties with the propounded limitation

93 It is in this final observation by Ms de Zwart that the clue is provided as to the correct application of the Act in respect of television broadcasts, in the terms in which the Parliament gave expression to its purpose. The Act contemplated a form of copyright apt to the particular technology involved in television broadcasting. It therefore provided that copyright would attach to "the visual images comprised in the broadcast"⁸⁶. Those who conceive the Parliament as confining the scope of the new copyright protection for television broadcasts to entire programmes (or defined and undefined sections and segments of a continuous day's broadcasting) must not watch much television. It is the very power of particular, and often quite limited (even fragmentary) portions of "visual images" on television that makes it such a potent and commercially valuable means of expressing thoughts and ideas: noble and banal, serious and humorous, uplifting and discouraging.

94 Everyone knows that still images or very brief segments in television broadcasts can constitute commercially valuable commodities, standing alone. The acquisition by a broadcaster of comparatively short filmed sequences will sometimes represent very important and commercially valuable rights that exist without the need of a surrounding context, let alone an extended programme or particular segment of a day's broadcast. The parties to the present appeal were in commercial competition with each other. That fact is itself also a consideration that generally favours the claim of a copyright owner⁸⁷.

95 The appellant relied on s 25(4)(a) of the Act in construing s 87(a). It said that the interpretation of that paragraph that it favoured conformed to the purpose of the Parliament as illustrated by the Spicer Report⁸⁸. In my view, the Full Court was right to reject the notion that the "visual images" protected by s 25(4)(a) were

86 The Act, s 25(4)(a).

87 Bently, "Sampling and Copyright: is the Law on the Right Track? – II", (1989) *Journal of Business Law* 405 at 406.

88 Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth*, (1959), par 295. The history is explained in *EMI Music Australia Pty Ltd v Federation of Australian Commercial Television Stations* (1997) 74 FCR 485 at 491-494 per Lockhart J.

only so protected if they constituted a "substantial" part of "a television broadcast". Where does this gloss on the Act come from? Such an approach is inconsistent with the terms of the Act. The Act refers to "any of the visual images"⁸⁹, making it clear that any one or more of those images is in the sights of the statute. There is thus no textual foundation for the importation of the notion of "a substantial part". Moreover, as Hely J pointed out in the Full Court⁹⁰, the very fact that, by s 25(4), the Act provides for copyright protection for a photograph of any visual images comprised in a television broadcast, contradicts any threshold requirement of substantiality, inherent in nothing more than the word "broadcast". The suggested limitation upon the notion of infringement provided by the Act is therefore unsustainable by a conventional analysis of the statutory language.

96 Both Professor Ricketson and Mr Lahore in their texts⁹¹ express the opinion that the taking of a single photograph of any image contained in a television broadcast will fall within the protection provided by the Act to the copyright owner of the broadcast. Their opinions confirm my own approach.

97 I agree with the view expressed by Hely J⁹²:

"[T]here may be many collocations of visual images and accompanying sounds broadcast during the space of a day all of which satisfy the definition of a 'television broadcast'. Thus, for example, the first minute of transmission may be a television broadcast as much as the first five minutes. If there is a re-broadcasting of the first minute by one competitor and of the first five minutes by another, then each has infringed the initial broadcaster's copyright in a television broadcast which is of one minute's duration in the first case, and of five minutes duration in the second.

The fact that there may be thousands of transmissions in any day which are a television broadcast as defined does not lead to any inconvenience or absurdity given that copyright protection is confined to the actual images and accompanying sounds broadcast."

89 The Act, s 25(4)(a).

90 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 432 [60].

91 Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2002) at [8.100], [9.520]; Lahore and Rothnie, *Copyright and Designs*, (2003) at [34,075].

92 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 436 [87]-[88].

The proper approach to the meaning of the Act

98 It follows that the Parliament did not envisage the striking of a balance between public and private interests in the Act by the adoption of an unspecified and ultimately undefinable notion of "a television broadcast" in the sense of a "unit of programming". The Act does not refer to that notion of a "programme" or unit thereof⁹³. It might have done so. But it did not. Instead, the Act provides for copyright to attach to "a television broadcast" that necessarily contains, of its nature, parts of such a programme, including therefore long as well as very short extracts. To strike an acceptable balance between public and private interests, the Parliament looked elsewhere. By s 14(1) it provided, in effect, for a permissible degree of exploitation by introducing the notion that the proscribed act must be in relation to "a substantial part" of the work or subject matter. And if that barrier is passed the defence of fair dealing may be invoked, precisely as the appellant claimed in this case.

99 I would endorse what Finkelstein J said on this point⁹⁴:

"There are exceptions to the monopoly rights given to copyright owners. Fair dealing is one of those exceptions. The *Copyright Act* confers a privilege on third parties to use copyright material without the consent of the owner in certain circumstances. The doctrine developed to resolve the tension between, on the one hand, the monopoly granted to the owner and, on the other hand, the public interest."

100 The text of "substantial part" under the Act imports criteria of "fact and degree"⁹⁵. Commonly, it is bound up with notions of originality. It has been applied restrictively as little more than a *de minimis* threshold. What is a "substantial part" of a television broadcast will not necessarily represent a segment of long duration. The image of a winning ball or a goal in a sporting final; the sight of a catastrophe captured on film by a television crew that arrived there first; the image of events of global significance akin to the collapse of the World Trade Center in New York in 2001 or the crash of the *Concorde* airliner, all illustrate the impossibility of thinking in such purely quantitative terms in the context of this medium.

93 Handler, "The Panel Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 400 citing *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1 at 27.

94 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 420 [7].

95 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 283, 287-288; [1964] 1 All ER 465 at 473-474, 477.

101 The proposition that the excerpts broadcast by the appellant were of comparatively brief duration and that this indicates somehow that the parts copied by the appellant were "not substantial"⁹⁶ overlooks the terms of the Act and the basic nature of television broadcasting in which minutes or seconds, visually captured, especially with sound and images, may tell a thousand stories which the print media or other forms of human communication cannot precisely match.

102 Copyright will not usually subsist in works that are "insubstantial" in quantitative terms⁹⁷. A transmission lasting for a fraction of a second might indeed, in some circumstances, be too insubstantial to be regarded as "a television broadcast" within the Act⁹⁸. In this appeal it is unnecessary to decide what would be the case in such an extreme instance. None of the subject segments broadcast in *The Panel* was of such an insubstantial duration. Accordingly, any such qualification to the notion of "a television broadcast" in the Act can be ignored in this appeal. It is irrelevant to this Court's present task.

103 It is mainly by the operation of the fair dealing defence, and not by the artificial, uncertain and untextual proposition propounded by the appellant, that the battleground of the present dispute was to be fought in the manner contemplated by the Act.

104 Having regard to the grounds of appeal before it, this Court is not concerned to review the decisions which the Full Court made on the fair dealing defence. To the extent that it is suggested that the fair dealing defence under the Act is unduly narrow⁹⁹, that submission should be addressed to the Parliament. It would be an impermissible mode of reasoning for this Court to narrow the ambit of the infringement provided by the Act so as to enlarge the scope of free and unlicensed use of "a television broadcast", contrary to the terms of the Act. In any case, if the broad view of fair dealing adopted by Finkelstein J is correct, much of the sting is taken out of the criticisms of the Act voiced by the appellant in support of its submissions about the ambit of infringement. The correction of any remaining defects is a matter for the Parliament. It is not for this Court.

96 Handler, "*The Panel* Case and Television Broadcast Copyright", (2003) 25 *Sydney Law Review* 391 at 407.

97 Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (2002) at [7.215]. See also the reasons of Callinan J at [151].

98 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 437 [90].

99 de Zwart, "Seriously entertaining: *The Panel* and the future of fair dealing", (2003) 8 *Media & Arts Law Review* 1 at 17.

Conclusion and order

105 I have repeatedly obeyed the rule of the purposive construction of
legislation. However, its application is always subject to textual limits.
Sometimes the propounded construction would exceed those limits. This is such a
case. The appellant's construction must be rejected. The respondents' construction
should be preferred.

106 The appeal should be dismissed with costs.

107 CALLINAN J. The question in this appeal is whether the recording and broadcasting, not by way of fair dealing, by one telecaster of excerpts from the broadcasts of a commercial competing telecaster were infringements by the former of the latter's copyright. As to that the Full Court of the Federal Court was unanimously of the view that they were. In my opinion that view is the correct one.

The facts

108 The interests of the respondents are relevantly the same and they may therefore be treated as one party. The appellant and the first respondent are major commercial telecasters in competition with each other. Each holds a licence under the *Broadcasting Services Act 1992* (Cth).

109 Between August 1999 and June 2000, the first respondent broadcast a variety of television programmes which were recorded on video tape by the appellant. Excerpts from them ("the appropriations") were rebroadcast by the appellant during a programme called *The Panel*. That the appropriations were of real value to the appellant appears, among other things, from their frequency, and in some instances their length, a table of which I reproduce.

Respondents' programme	Date of broadcast by the first respondent	Date of rebroadcast of excerpts by the appellant
<i>The Today Show</i>	10 August 1999	11 August 1999
<i>Midday</i>	26 August 1999	9 September 1999
<i>Wide World of Sports</i>	26 September 1999	29 September 1999
<i>A Current Affair</i>	19 October 1999	20 October 1999
<i>Australia's Most Wanted</i>	11 October 1999	13 October 1999
<i>Pick Your Face</i>	20 August 1999	1 September 1999
<i>Crocodile Hunter</i>	21 August 1999	25 August 1999
<i>Days of Our Lives</i>	19 August 1999	26 August 1999
<i>Days of Our Lives</i>	20 August 1999	26 August 1999
<i>Simply the Best</i>	19 October 1999	20 October 1999
<i>The Inaugural Allan Border Medal Dinner</i>	31 January 2000	8 March 2000
<i>Sunday</i>	19 March 2000	29 March 2000
<i>The 72nd Academy Awards</i>	27 March 2000	29 March 2000
<i>Sale of the New Century</i>	4 April 2000	5 April 2000
<i>The Today Show</i>	4 April 2000	5 April 2000
<i>The Today Show</i>	5 May 2000	10 May 2000
<i>Nightline</i>	15 May 2000	24 May 2000
<i>Newsbreak</i>	22 May 2000	24 May 2000

<i>Who Wants to be a Millionaire</i>	29 May 2000	7 June 2000
<i>The Today Show</i>	28 June 2000	28 June 2000

110 The appellant promoted *The Panel*, which was produced by a production group calling itself "Working Dog", by advertising it as:

"our light entertainment stable', 'chuckle and jibe over the week's events', 'the best homegrown laugh all week', 'produces the best one-liners', 'though once deemed pretentious by some reviewers, it is impossible to imagine anyone else being able to make a round table chat equally successful', and 'musing irreverently over the topical issues of the week'."

111 *The Panel* was first broadcast in early 1998. During each of that and the next year, 42 weekly episodes were produced and broadcast. By November 2000, the month of the trial, a further 36 weekly episodes had been produced. From mid-1998, the appellant claimed that *The Panel* had been the highest rated programme for viewers aged 16 to 39. Its programmes were said to be concerned with current affairs, news, comedy and "chat". The format was of a panel of four people, engaging in what was presented to viewers as unrehearsed conversation in the presence of a studio audience. One or two guests of prominence in, for instance, sport or entertainment, were usually invited to participate in the conversation each evening. Designers and regular panelists met weekly to select recent events and "breaking stories", and to identify prospective guests. The participants also then discussed the use of recent television footage of utility for the next programme. Television footage and material from other media selected for use on *The Panel* included footage of recent television programmes broadcast by each of the major television channels and satellite channels and not merely the respondents' Channel 9.

112 Some other factual matters need mention. Although a broadcast by telecasting usually involves the transmission of a multiplicity of changing images and sounds, a broadcast may be of a still picture or moving images, with or without accompanying sounds. So too a part only, a moment or less of a television broadcast may be isolated, recorded, and reproduced either wholly or in part, whether by cropping or otherwise. "Cropping" was explained, non-controversially during the appeal as, for example, eliminating part of an image or picture and then perhaps magnifying the remainder to give a greater dramatic impact than the whole or the excluded parts might have given.

The proceedings in the Federal Court

113 The respondents brought proceedings in the Federal Court for an injunction against the appellant and damages for infringement of copyright. The appellant denied that it required any licence from the respondents to broadcast the excerpts that it did, and contended that they did not constitute a substantial part of matter in

which the respondents held copyright. Further or alternatively, the appellant asserted, its conduct in relation to 10 episodes of *The Panel* was by way of fair dealing for the purpose of criticism or review, and that a sufficient acknowledgment of any relevant broadcast was made; and, in the further alternative, as to those 10 episodes, the excerpts were broadcast for the purpose of, or associated with, the reporting of news by means of broadcasting. At the trial the appellant introduced evidence that *The Panel* was, if not wholly, certainly to some extent at least, a humorous programme. Whatever relevance if any that might have to a defence of fair dealing, it has nothing to say about the entitlement to copyright of the creator of humorous matter.

114 Issues were singled out by Conti J for separate argument. One of these was whether the appellant had rebroadcast the whole or a substantial part of any of the respondents' programmes. In the event, his Honour held that there was no infringement of copyright under s 87(a) of the *Copyright Act 1968* (Cth) ("the Act") because the appellant had not made a cinematograph film of the whole or a substantial part of any of the broadcasts. His Honour also dealt with the defences of fair dealing, rejecting some and upholding others. Fair dealing is not an issue in this Court which is concerned only with the excerpts not so designated.

The appeal to the Full Court of the Federal Court

115 The Full Court of the Federal Court (Sundberg, Finkelstein and Hely JJ), to which the respondents appealed, unanimously took a different view from the primary judge. The effect of s 25(4) of the Act, the Full Court held, is that a cinematograph film *or photograph of any* of the visual images comprised in a television broadcast, is an exclusive right of the copyright owner, subject to specific statutory exceptions. It is not necessary that an image or images amount to a substantial part of the broadcast. One of the judges, Finkelstein J, said that there is copyright either in each and every still image transmitted, or in each visual image capable of being observed as a separate image on television. The excerpts rebroadcast by the appellant were cinematograph films of the visual images comprised in various of the respondents' broadcasts in terms of s 25(4) of the Act. The appellant therefore infringed the respondents' copyright under s 87(a) subject of course to any defences of fair dealing available to the appellant.

116 In the context of Pt IV Div 2 of the Act, Hely J who wrote the principal judgment, said, and in my view, correctly, "rebroadcast" simply meant the broadcasting of what had already been broadcast by another broadcaster on television¹⁰⁰:

100 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417 at 433-435 [67], [80].

"Section 25(4) applies to both a photograph of any of the visual images comprised in a television broadcast, as well as to a cinematograph film of any of those images. It is true that the present case is not concerned with photographs. But the fact that s 25(4) applies to a photograph of any of the visual images comprised in the broadcast supports the view that the expression 'any of the visual images' encompasses any one or more of those images, without any requirement that the images should amount to a substantial part of the broadcast.

...

When is a television broadcast made? A television broadcast is made when the transmission of visual images and any accompanying sounds begins. A television broadcast continues to be made as the transmission of visual images and any accompanying sounds continues. Visual images and accompanying sounds as they are broadcast, themselves satisfy the definition of 'television broadcast' ... One does not have to wait until there has been a transmission of enough of the images and sounds to constitute a programme, or any other subject matter, before concluding that a television broadcast has been made."

The appeal to this Court

117 Copyright in sound recordings, cinematograph films and television broadcasts is dealt with in Pt IV Div 2 of the Act, the presently relevant provisions of which have existed in the Act in substantially the same form since 1968.

118 The sections of the Act with which the Court is concerned that were in force at the relevant time¹⁰¹ should first be noted, including some of the definitions in s 10(1):

"broadcast means transmit by wireless telegraphy to the public.

...

cinematograph film means the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing:

- (a) of being shown as a moving picture; or
- (b) of being embodied in another article or thing by the use of which it can be so shown;

101 The Act has subsequently been amended, most significantly by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), which commenced on 4 March 2001.

45.

and includes the aggregate of the sounds embodied in a sound-track associated with such visual images.

...

photograph means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and *photographic* has a corresponding meaning.

...

sound broadcast means sounds broadcast otherwise than as part of a television broadcast.

...

television broadcast means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images."

119

Section 13 provides as follows:

"13 Acts comprised in copyright

- (1) A reference in this Act to an act comprised in the copyright in a work or other subject-matter shall be read as a reference to any act that, under this Act, the owner of the copyright has the exclusive right to do.
- (2) For the purposes of this Act, the exclusive right to do an act in relation to a work, an adaptation of a work or any other subject-matter includes the exclusive right to authorize a person to do that act in relation to that work, adaptation or other subject-matter."

120

Section 14 is in the following form:

"14 Acts done in relation to substantial part of work or other subject-matter deemed to be done in relation to the whole

- (1) In this Act, unless the contrary intention appears:
 - (a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and

- (b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be.
- (2) This section does not affect the interpretation of any reference in sections 32, 177, 180, 187 and 198 to the publication, or absence of publication, of a work."

121

Section 25 should also be set out in full:

"25 Provisions relating to broadcasting

- (1) A reference in this Act to broadcasting shall, unless the contrary intention appears, be read as a reference to broadcasting whether by way of sound broadcasting or of television.
- (2) A reference in this Act to the doing of an act by the reception of a television broadcast or sound broadcast shall be read as a reference to the doing of that act by means of receiving a broadcast:
 - (a) from the transmission by which the broadcast is made; or
 - (b) from a transmission made otherwise than by way of broadcasting, but simultaneously with the transmission referred to in the last preceding paragraph;

whether the reception of the broadcast is directly from the transmission concerned or from a re-transmission made by any person from any place.

- (3) Where a record embodying a sound recording or a copy of a cinematograph film is used for the purpose of making a broadcast (in this subsection referred to as *the primary broadcast*), a person who makes a broadcast (in this subsection referred to as *the secondary broadcast*) by receiving and simultaneously making a further transmission of:
 - (a) the transmission by which the primary broadcast was made; or
 - (b) a transmission made otherwise than by way of broadcasting but simultaneously with the transmission referred to in the last preceding paragraph;

shall, for the purposes of this Act, be deemed not to have used the record or copy for the purpose of making the secondary broadcast.

47.

- (4) In this Act:
- (a) a reference to a cinematograph film of a television broadcast shall be read as including a reference to a cinematograph film, or a photograph, of any of the visual images comprised in the broadcast; and
 - (b) a reference to a copy of a cinematograph film of a television broadcast shall be read as including a reference to a copy of a cinematograph film, or a reproduction of a photograph, of any of those images.
- (5) In this section, *re-transmission* means any re-transmission, whether over paths provided by a material substance or not, and includes a re-transmission made by making use of any article or thing in which the visual images or sounds constituting the broadcast, or both, as the case may be, have been embodied."

122 Section 86 is concerned with the nature of copyright in cinematograph films:

"86 Nature of copyright in cinematograph films

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts:

- (a) to make a copy of the film;
- (b) to cause the film, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
- (c) to broadcast the film;
- (d) to cause the film to be transmitted to subscribers to a diffusion service."

123 Section 87 provides as follows:

"87 Nature of copyright in television broadcasts and sound broadcasts

For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a television broadcast or sound broadcast, is the exclusive right:

- (a) in the case of a television broadcast in so far as it consists of visual images – to make a cinematograph film of the broadcast, or a copy of such a film;
- (b) in the case of a sound broadcast, or of a television broadcast in so far as it consists of sounds – to make a sound recording of the broadcast, or a copy of such a sound recording; and
- (c) in the case of a television broadcast or of a sound broadcast – to re-broadcast it."

124

Section 91 should next be noticed:

"91 Television broadcasts and sound broadcasts in which copyright subsists

Subject to this Act, copyright subsists:

- (a) in a television broadcast made from a place in Australia by:
 - (i) the Australian Broadcasting Corporation;
 - (ii) the Special Broadcasting Service Corporation; or
 - (iii) any prescribed person, being a person who is, at the time when the broadcast is made, authorised under a licence issued under the *Radiocommunications Act 1992*; and
- (b) in a television broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) made from a place in Australia under the authority of:
 - (i) a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992*; or
 - (ii) a class licence determined by that Authority under that Act; and
- (c) in a sound broadcast made from a place in Australia by:
 - (i) the Australian Broadcasting Corporation;
 - (ii) the Special Broadcasting Service Corporation; or
 - (iii) any prescribed person, being a person who is, at the time when the broadcast is made, authorised under a

49.

licence issued under the *Radiocommunications Act 1992*; and

- (d) in a sound broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) made from a place in Australia under the authority of:
 - (i) a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992*; or
 - (ii) a class licence determined by that Authority under that Act."

125 Section 95 prescribes the duration of copyright in television and sound broadcasts and s 99 provides as follows:

"99 Ownership of copyright in television broadcasts and sound broadcasts

Subject to Parts VII and X:

- (a) the Australian Broadcasting Corporation is the owner of any copyright subsisting in a television broadcast or sound broadcast made by it; and
- (aa) the Special Broadcasting Service Corporation is the owner of any copyright subsisting in a television broadcast or sound broadcast made by it; and
- (b) a person who is or has been a holder of a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992* or a prescribed person for the purposes of subparagraph 91(a)(iii) or 91(c)(iii) is the owner of any copyright subsisting in a television broadcast or sound broadcast, as the case may be, made by that person; and
- (c) a person who makes a television broadcast or sound broadcast under the authority of a class licence determined by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992* is the owner of any copyright subsisting in the broadcast."

126 Section 101 defines infringement in this way:

"101 Infringement by doing acts comprised in copyright

- (1) Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.
- (2) The next two succeeding sections do not affect the generality of the last preceding subsection.
- (3) Subsection (1) applies in relation to an act done in relation to a sound recording whether the act is done by directly or indirectly making use of a record embodying the recording.
- (4) Subsection (1) applies in relation to an act done in relation to a television broadcast or a sound broadcast whether the act is done by the reception of the broadcast or by making use of any article or thing in which the visual images and sounds comprised in the broadcast have been embodied."

127 One other provision should be noted. It is s 135B:

"135B Copies of transmissions

In this part:

- (a) a reference to a copy of a transmission is a reference to a record embodying a sound recording of the transmission or a copy of a cinematograph film of the transmission; and
- (b) a reference to the making of a copy of a transmission is a reference to the making of a copy of the whole or a part of the transmission."

128 In construing the Act, the text, if not of all importance, is certainly of primary importance. I would, in this connexion, repeat what was said in *Rural Press Ltd v Australian Competition and Consumer Commission*¹⁰²:

"In the past, judges have sought to elucidate the meaning of this concept by examining the legislative history. That process of construction is legitimate, provided it is not taken too far. ... It [resort to parliamentary statements] has also driven courts to the unproductive and inappropriate task of seeking to construe the parliamentary materials and speeches rather than the statute."

102 (2003) 203 ALR 217 at 221 [7] per Gleeson CJ and Callinan J.

129 Although a court is entitled to have regard to the legal and historical context of legislation, and in particular the mischief that it is enacted to cure, care must always be exercised in using all extrinsic material, including in particular assumed historical facts, to ensure that those facts are accurately and relevantly completely stated. Facts of the latter kind are that broadcasting of both radio and television in the United Kingdom was, from the beginning (in 1922) and for a long time afterwards undertaken exclusively by one broadcaster, latterly called the British Broadcasting Corporation ("the BBC")¹⁰³. Although that broadcaster was financed at the outset by a consortium of manufacturers of domestic wireless receiving sets, it was conducted on entirely non-commercial lines. Advertising was not permitted. Emphasis was placed upon the objective dissemination of news, culture, education and entertainment¹⁰⁴. By 1927 control of the broadcaster was in the hands of its governors, who although appointed by the Executive, were expected to be independent of it¹⁰⁵. There was, in consequence, until 1955¹⁰⁶ no commercial competition in broadcasting of any kind except for unlawful broadcasting by "pirate" broadcasters operating from vessels moored or steaming beyond the territorial waters of the United Kingdom¹⁰⁷. In short, for many years, infringement by commercial competitors of the BBC's broadcast matter was non-existent, and not something for which any special or express provision was necessary.

130 Although provision was made for public television by the *Television Act* 1953 (Cth) and by amendments to the *Broadcasting Act* 1942 (Cth) in 1956¹⁰⁸, from the outset of actual telecasting in Australia in that year, there was, unlike in the United Kingdom, commercial competition.

131 The *Broadcasting Act* is of relevance to this discussion, but in these respects only. It, rather than the Act or its precursor¹⁰⁹, was the enactment which, by s 121, prohibited the broadcasting of matter emanating from other stations, and it was programmes of the latter that it thereby protected. "Program" was defined in

103 See Briggs, *The Birth of Broadcasting*, (1961).

104 Briggs, *The Birth of Broadcasting*, (1961) at 357-359.

105 Briggs, *The Birth of Broadcasting*, (1961) at 357-359.

106 Briggs, *The BBC: The First Fifty Years*, (1985) at 288.

107 Briggs, *The BBC: The First Fifty Years*, (1985) at 329.

108 *Broadcasting and Television Act* 1956 (Cth).

109 *Copyright Act* 1912 (Cth).

that Act as including an "advertisement and any other matter"¹¹⁰. Similarly, "program" is defined in s 6 of the *Broadcasting Services Act* as:

- "(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
- (b) advertising or sponsorship matter, whether or not of a commercial kind."

132 The word "programme" nowhere appears in the Act, and this is so despite that the reports to which other members of the Court have referred did use the term¹¹¹. A concept of a programme, as to the nature, content and duration of which there is much room for debate, has in my opinion, no part to play in the resolution of the issues here.

133 In enacting the Act, the Parliament must have been conscious of the different histories of broadcasting in Australia and the United Kingdom, as well as the earlier different provisions of the *Broadcasting Act*. The Act, especially those sections of it with which this appeal is concerned, was avowedly designed to deal with *new* rights, as the Attorney-General in his second reading speech expressly acknowledged¹¹²:

"[T]he Bill confers a number of new rights, particularly in respect of broadcasts, cinematograph films and printed editions of books."

134 The statements made by the Attorney-General also acknowledged that the 1968 Bill represented a significant change from the position that had been adopted on these matters in 1967¹¹³. The Attorney-General was well aware of the different and ephemeral nature of a television broadcast as a medium of communication unless and until it was recorded, and its value once it was, to other broadcasters. In the same speech he said¹¹⁴:

110 *Broadcasting Act*, s 4.

111 See reasons of McHugh ACJ, Gummow and Hayne JJ at [23]-[24].

112 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1528.

113 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1527-1528.

114 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1532.

"Both the Australian Broadcasting Commission and the commercial broadcasting and television organisations had asked for a more extensive right of making what are known as 'ephemeral' records than is given by clause 47 of the Bill. In my opinion, however, the Berne Convention permits only the making of ephemeral records by a broadcaster for the purpose of his own transmissions without any obligation to the copyright owner. But since the Convention also permits the recording of musical works under compulsory licence, on payment of compensation to the copyright owner, it has been thought reasonable to include in the Bill what is in effect a statutory licence for the making of *ephemeral* records by a broadcasting organisation for use by other broadcasting organisations." (emphasis added)

135

And later he said¹¹⁵:

"I turn now to those provisions of the Bill which provide for copyright to subsist in broadcasts, cinematograph films, sound recordings and published editions. These provisions are to be found in clauses 84 to 113 of the Bill. These clauses involve *substantial changes* in the existing law and, in respect of the rights given in sound recordings, substantial differences from the provisions of the 1967 Bill. Broadcasts are not protected at all under the existing copyright law. Some protection against the use of broadcast material is given by the Broadcasting and Television Act. Sub-clause (2) of clause 9 of this Bill specifically preserves the operation of the relevant provisions of that Act. Under the Bill the owner of the copyright in a radio or television broadcast is given the right to control rebroadcasting of that broadcast. In the case of a television broadcast he is given the exclusive right to make a cinematograph film of the broadcast or a copy of such a film. In the case of a sound broadcast, or the sounds accompanying a television broadcast, the rights include the exclusive right to make a record of that broadcast or reproductions of that record. These provisions are contained in clause 87 of the Bill.

A cinematograph film is protected under the existing law in two ways. Inasmuch as an ordinary cinematograph film consists of a series of individual photographs, each frame is protected as an artistic work. But if the arrangement or acting form or the combination of incidents represented in a cinematograph film give the work an original character, the film is protected as a dramatic work. The present Bill establishes a *separate protection* for cinematograph films. The rights given to the owner of the copyright in a cinematograph film are set out in clause 86 of the Bill. The

¹¹⁵ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 May 1968 at 1533-1534.

copyright in a cinematograph film continues until the expiration of 50 years from the end of the calendar year in which the film was first published. For many purposes, ordinary cinematograph film and videotape are interchangeable. Thus a scene may be recorded by a television camera on videotape and the videotape later copied on to an ordinary cinematograph film. The incidents recorded may be seen either by viewing the videotape on a television screen or by viewing the cinematograph film on a cinema screen. The Bill therefore assimilates videotape to ordinary cinematograph film for the purposes of copyright protection and the term 'cinematograph film' appearing in the Bill is defined as including videotape." (emphasis added)

136 What is also of significance is that the Rome Convention¹¹⁶, to which the Attorney-General referred, by Art 13 sought to protect not "programmes", however they might be defined, but broadcasts and to prohibit fixation or the rebroadcasting of fixations of them.

137 There are other matters which suggest that recourse to the United Kingdom experience and learning is unlikely to assist in the resolution of the problem here. The statutory provisions there are quite different, in particular that no separate and special provision is made for copyright in television broadcasts. Section 6(1) of the *Copyright, Designs and Patents Act* 1988 (UK) ("the United Kingdom Act") defines "broadcast" only slightly differently from the Australian Act, to mean a transmission by wireless telegraphy of visual images, sounds or other information which:

- "(a) is capable of being lawfully received by members of the public, or
- (b) is transmitted for presentation to members of the public".

138 But of significance is the fact that there is in the United Kingdom no analogue to s 87 of the Australian Act. Rather, s 16 of the United Kingdom Act is a general provision (applying indiscriminately to all forms of copyright works) that refers to "[t]he acts restricted by copyright in a work". Section 16(1)(a) provides that "to copy the work" is such an act. Infringement of copyright in a work occurs pursuant to s 16(2) of the United Kingdom Act when a person, without licence, does any of the acts protected by the copyright. Copying relevantly for the purposes of the United Kingdom Act is governed by s 17(4) of it:

"Copying in relation to a film, television broadcast or cable programme includes making a photograph of the whole or any substantial part of any image forming part of the film, broadcast or cable programme."

116 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome 1961.

139 The United Kingdom Act therefore is quite differently structured and
worded from the Australian Act.

140 For this reason and the others to which I have referred, statements in
English texts are not capable of automatic application in this country. In Laddie's
The Modern Law of Copyright and Designs, it is suggested that in relation to
s 17(4), "the taking of even a single frame of a film (or the equivalent amount of a
TV broadcast) may be an infringement."¹¹⁷ Other English text writers take a
different view. For example, Garnett, James and Davies write¹¹⁸:

"No further definition of 'copying' in relation to a broadcast is given in the
1988 Act other than that it includes making a photograph of the whole or
any substantial part of any image forming part of the broadcast ... *In the
usual way it will also be an infringement to copy the whole or any
substantial part of the broadcast*, whether directly or indirectly or
transiently or incidentally to some other use." (emphasis added)

141 Similarly, Cornish and Llewelyn observe¹¹⁹:

"The 1988 Act is not so specific as its predecessor about what acts of
'copying' infringe sound recording, film, broadcasting and cable-casting
copyright. Presumably, as before, this includes making recordings or films
that are substantial copies of those things." (emphasis added)

142 The Act falls to be read therefore against the background of these
indisputable facts. The parties compete with each other. The production of any
programme, indeed each and every frame and segment of it, comes at a cost. It is
produced in order to make money by inducing advertisers to pay to have their
activities advertised in association with its broadcast one or more times. Further
value may arise from the isolation, reproduction and broadcasting of an image or
images, with or without sound, from it, and the licensing of it or an isolated image
or images from it, whether by and in a photograph, a film or a video film. What is
clear in this case is that value did lie in the copying, reproduction and
rebroadcasting of segments, albeit generally fairly brief segments, of the
respondents' programmes. That value had two aspects: it enabled the appellant to

117 Laddie et al, *The Modern Law of Copyright and Designs*, 3rd ed (2000), vol 1 at 429.
The authors add later that "anything which is not *de minimis* will be regarded as
'substantial'."

118 Garnett, James and Davies, *Copinger and Skone James on Copyright*, 14th ed
(1999), vol 1 at 446 (footnotes omitted).

119 Cornish and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and
Allied Rights*, 5th ed (2003) at 434.

gain revenue from advertising associated with *The Panel*; and it relieved the appellant of the cost of buying or producing other matter to occupy the time taken by the rebroadcasting, during *The Panel*, of the copied and reproduced segments. The intention of Pt IV Div 2 of the Act was, as the Attorney-General said, broadly not only to place television footage on at least the same basis as other original work, particularly moving films, protected by the Act, but as appears from the language used in it, with necessary adaptations to suit the medium and the means available to competitors to exploit it, and in consequence to create new rights. Why should, it is reasonable to ask, the appellant, save to the extent that it deals fairly with any of the respondents' valuable broadcasted matter, get it and rebroadcast it for its own commercial benefit, for nothing? The question in this case is whether the Act prevents it from doing that.

143 The use by the appellant of excerpts from the respondents' broadcasts was blatant. And although blatant appropriation of the kind which has occurred here might not be such as to warrant an evangelical fervour¹²⁰ in responding to it, in the nakedly commercial context of television broadcasting in Australia, the test of "what is worth copying is prima facie worth protecting" posed by Peterson J in *University of London Press Ltd v University Tutorial Press Ltd*¹²¹ has much to commend it, and provides at least a reasonable starting point. After all, in recognising the validity of the respondents' copyright in excerpts from their programmes, the Court would not be denying access to the general public of the golden words of a new Shakespeare. This is a case of blatant commercial exploitation, neither more nor less.

144 It has always been the respondents' case that the appellant has infringed both ss 87(a) and 87(c) of the Act. The appellant has never denied that it copied by reproducing in full the respondents' programmes. It has therefore infringed, on any view, s 87(a) of the Act.

145 As to s 87(c) however, the appellant argues that because it did not rebroadcast other than an excerpt from, that is to say, less, indeed much less than, the whole of any of the programmes of the respondents, it did not rebroadcast "a television broadcast" of the respondents. In short the appellant submits that a television broadcast within s 87 of the Act cannot be less than the whole or a substantial part of a television programme, notwithstanding that the relevant sections do not anywhere use that term, and the Act attempts no definition of it. The appellant's proposition, it further argues, is correct because otherwise there is no, or little work for s 14 of the Act to do.

120 See *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700 per Laddie J.

121 [1916] 2 Ch 601 at 610.

146 I am unable to agree. The definition of cinematograph film does not assist the appellant. The aggregate of a few seconds of visual images is, as occurred in this case, capable of being embodied in a video tape, or electronically otherwise, by the use of which it can be shown. In those few seconds, there were, and there always will be, except perhaps when a "still" is shown, certainly more than one, and almost certainly a multiplicity of images and sounds. The test cannot be simply whether the images and sounds captured and fixated last a millisecond or half an hour. In aggregate they still constitute a "broadcast".

147 Nor can the existence of a broadcast be denied because it is not possible to speak of a single moment of sound. Perceptions of visual images and sound are different. It is no more correct to say that a single television image is not a broadcast because its accompanying sounds are unintelligible, than it is to say that a silent film shown on television is not a broadcast because it has no accompanying sounds at all.

148 That the appellant thought a few seconds of the respondents' broadcast worth rebroadcasting provides some indication of the understanding in the industry of what is sufficient to constitute a broadcast. Hely J was right to hold that "any of the visual images", the expression used in s 25(4) of the Act, means a visual image, that is something that can be isolated and fixated. The Act was not enacted in a vacuum of awareness as to how the industry operated, or without regard to practicalities. Those practicalities include the certain knowledge that one television licensee would only seek to use what would be of real value to it: it would have no interest, commercial or otherwise, in anything less than something complete enough in itself to be viewed, in short, a broadcast. In that sense the term "broadcast" is almost self-defining.

149 To regard a broadcast differently, as for example, a "programme", is not only to introduce a concept not reduced to concrete language or even implied anywhere in the Act, but is also to create a deal of uncertainty about its operation. The view adopted at first instance by Conti J is, with respect, incapable of any certain application. On his Honour's view the programme can be the whole programme "or respective segments ... if [it] is susceptible to subdivision by reason of the existence of self-contained themes."¹²² To say that is not to say of what a programme consists. Is it the "menu" of the channel or programme for the next twenty-four hours, or the forthcoming week, or for a month, or a year, or however long it schedules its broadcasts? What is a self-contained theme? There may be many threads and indeed themes to a television story, coming together only at the end to make a self-contained theme, but before that point providing valuable snippets of utility to competitors. In any event, none of these,

122 *TCN Channel Nine v Network Ten* (2001) 108 FCR 235 at 272 [43].

"programme", "segments of a programme", or "self-contained theme" is the language of the Act.

150 The Act can be read harmoniously with the conclusion that the Full Court reached. I have already referred to the definition of a cinematograph film and need only make the further point that its emphasis is upon use, in particular, capability of use, and not duration of the matter used. The further relevant concept which the legislators have chosen to define is the concept of "television broadcast" and not a television programme. The legislature having eschewed such a definition and therefore the relevance of a concept of it for the purposes of the Act, I would not regard it as appropriate to import either a definition of it from another Act, for example the *Broadcasting Services Act*, or an understanding, assuming a common one could be identified, of it by participants in the industry. In any event an importation from the former would not assist the appellant. Unlike in *Newspaper Licensing Agency Ltd v Marks & Spencer plc*¹²³ where it was demonstrated that a particular undefined term "published edition" had a clear and well-established meaning in the publishing trade, "broadcast" is defined by the Act, and programme, its suggested synonym, was not shown to have any accepted meaning in the television industry.

151 The presence of s 14 of the Act compels no different conclusion. Its opening words make it clear that it must be read subject to the appearance elsewhere in the Act of any contrary intention. The combination of ss 25, 86, 87, 91 and 101 manifest such an intention. Even if they did not, s 14 can stand alone to perform useful work. One type of such work is the ultimate prevention of rebroadcasting of reduced, blended, adapted, altered or otherwise cropped images or an aggregation of images previously broadcast by a television channel. I would accept that a question of substantiality may in some circumstances require consideration of the quality, importance, relevance and duration of part of a work in an appropriate case, but that it may, does not mean that the recording and rebroadcasting of a very brief segment of a broadcast is not an infringement of the broadcaster's copyright.

152 It is noteworthy that s 25(2) speaks of the reception of a television broadcast. Indeed the Act speaks of three different processes: broadcast, transmission and reception. Each is different. The copyright arises at the first point, of broadcast, and does not depend upon its reception.

153 Section 25(4) is also important. The words "of any of the visual images", whether by reference to other sections of the Act or otherwise, admit of no meaning other than either a singularity *or* multiplicity of images. To make a copy therefore of *any* image comprised in a broadcast is to make a copy of a

123 [2003] 1 AC 551 at 558 per Lord Hoffmann.

cinematograph film within s 86(a) of the Act just as to broadcast the image is to broadcast a film of it within s 86(c) of the Act. So too, s 87 affords the protection of copyright to the image because the reference there to a cinematograph film must be read, pursuant to s 25(4) as a reference to any of the images comprised in the broadcast.

154 Section 91 makes no reference to a programme. It refers not to "television broadcasting" or to "television broadcasts". It relevantly throughout uses the words "a television broadcast" as does s 99. And finally, s 135B, not only uses the words "cinematograph film" but also, in par (b) refers to a copy of the whole or "*a part of the transmission*".

155 Nothing turns, in my opinion, upon any perceived differences between the quality or nature of the copyright afforded by the Act to television broadcasts and other copyright holders. It was and was intended to be a new and unique right. The medium is very different from others. To exploit it, different and perhaps more expansive infrastructures, fees, techniques and resources are required. The industry is, and has always been in this country, a highly competitive, and, as this case shows, a highly commercialised one. There may have been good reason for the legislature to single it out for special treatment. It is for the Court to give effect to the language of the Act and not to speculate about that.

156 I would dismiss the appeal with costs.



DECISION

Fair Work Act 2009
s.604—Appeal of decision

The Australasian Meat Industry Employees Union

v

Golden Cockerel Pty Limited

(C2014/5226)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER JOHNS

MELBOURNE, 27 NOVEMBER 2014

Appeal against decision [[2014] FWC 3974] of Senior Deputy President Richards at Brisbane on 19 June 2014 in matter number C2014/3197 - principles of construction of agreements - no appellable error - no public interest - permission to appeal refused.

Introduction

[1] The Australasian Meat Industry Employees Union (Appellant) applied to the Fair Work Commission (Commission) under s.739 of the *Fair Work Act 2009* (the FW Act) for the Commission to deal with a dispute in accordance with the dispute settlement procedure in the *Golden Cockerel Certified Workplace Agreement 2012* (Agreement).¹ The dispute concerned a decision by Golden Cockerel Pty Ltd (Respondent) to alter working hours' arrangements, in particular those affecting Mr Tony Menz and Mr Ian Shaw,² consequent upon changes made to distribution processes by Coles Supermarkets Australia Pty Ltd, a major client of the Respondent.³

[2] The central issue in the resolution of the dispute was the competing constructions of the effect of clauses 1.10, 3.71 (e) and (f), 4.1.3, 4.1.6, 4.1.7 and 4.4 of the Agreement.⁴ A further issue raised by the dispute concerned whether the Respondent had complied with its obligations under the model consultation term as set out in schedule 2.3 of the *Fair Work Regulations 2009* which is taken to be a term of the Agreement.⁵

[3] The dispute was determined by Senior Deputy President Richards in favour of the Respondent for the reasons set out in his Honour's decision of 19 June 2014 (Decision).⁶ In summary the Senior Deputy President concluded that on a proper construction of the relevant provisions of the Agreement the Respondent:

- was entitled to alter the start time of Mr Menz and Mr Shaw in accordance with the Agreement;
- can direct an employee to perform reasonable overtime;

- has no obligation to maintain an employee's shift rosters and allowances where operational or business reasons necessitate changes; and
- had conformed to the requirements of the consultation clause in the Agreement in explaining the changes to the employees likely to be affected.⁷

[4] By notice of appeal lodged in the Commission on 2 July 2014 the Appellant seeks permission to appeal the Decision.

Nature of the appeal

[5] An appeal of a decision is not as of right and permission to appeal must first be obtained.⁸ Subsection 604(2) *requires* the FWC to grant permission to appeal if satisfied that it is '*in the public interest to do so*'. The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.⁹ The public interest is not satisfied simply by the identification of error, or a preference for a different result.¹⁰ In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of Fair Work Australia identified some of the considerations that may attract the public interest:

“... the public interest might be attracted where a matter raises issue of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters...”¹¹

[6] Other than the special case in s.604(2), the grounds for granting permission to appeal are not specified but examples of considerations which would usually justify the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration; and that substantial injustice may result if leave is refused.¹²

[7] The nature of the decision that is the subject of this appeal depends on a consideration of the determinations the Commission was required to make. In this case the Senior Deputy President was resolving a dispute by arbitration by answering questions that involved interpreting the Agreement. There is no discretion involved in such a task. It follows therefore that, if permission to appeal is granted, we must determine whether the interpretation of the Agreement adopted by the Senior Deputy President is correct.¹³

[8] Insofar as the Decision resolved a dispute about whether the Respondent consulted with employees in accordance with the model consultation term, that part of the Decision was one in which the Senior Deputy President was required to be satisfied of a particular state of affairs. It required the decision maker to form a particular opinion, albeit by reference to the facts and circumstances of the case. Therefore that part of the Decision may be described as a discretionary decision,¹⁴ and is amenable to appeal on grounds of the kind identified in *House v King*.¹⁵

Appeal grounds

[9] We do not propose to reproduce the many grounds of appeal advanced by the Appellant. It is sufficient that we summarise them as follows.

[10] Grounds 1, 3, 4, 6, 7 and 10 are concerned with the construction of the Agreement preferred by the Senior Deputy President, the application by him of relevant principles and authorities concerning the construction of such instruments and his application and use of extrinsic material as an aide to construction.

[11] Ground 2 is concerned with the Senior Deputy President's conclusion that the Respondent had met its obligation under the Agreement to consult.

[12] Ground 5 is concerned with an alleged failure to take into account relevant considerations, namely that the Senior Deputy President did not take into account the impact of the change on the employees or whether the Respondent had acted reasonably and fairly in implementing the change having regard to the bounds of "legitimate managerial prerogative and discretion".

[13] Ground 8 is concerned with criticisms of the Senior Deputy President's fact finding in relation to both the construction of certain provisions of the Agreement and as to consultation. Specifically it is said that particular findings were contrary to the evidence, against the weight of evidence and made in a perverse and capricious manner without regard to the material before the Senior Deputy President.

[14] Ground 9 alleges a failure to take into account and correctly apply the status quo provision of the dispute settlement clause of the Agreement.

[15] Ground 10 is a procedural fairness ground and alleges a failure by the Senior Deputy President to accord the Appellant a "due hearing".

[16] Ground 11 is concerned with a failure by the Senior Deputy President to address the issues of law and the arguments advanced in relation to those issues.

[17] Ground 12 alleges that the Senior Deputy President unreasonably exercised the statutory power conferred on the Commission.

[18] Before turning to the decision at first instance we propose to consider the general approach to the construction of enterprise agreements.

Principles of construction of agreements

General approach

[19] The general approach to the construction of instruments of the kind at issue here is set out in the judgment of French J, as he then was, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*¹⁶ (*Wanneroo*):

"The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the

context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to ‘...the entire document of which it is a part or to other documents with which there is an association’. It may also include ‘... ideas that gave rise to an expression in a document from which it has been taken’ - *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518 (Burchett J); *Australian Municipal, Clerical and Services union v Treasurer of the Commonwealth of Australia* (1998) 80 IR 345 (Marshall J).”¹⁷

[20] To this we add the oft-quoted observations of Madgwick J in *Kucks v CSR Limited*¹⁸ that a narrow pedantic approach to interpretation should be avoided, a search of the evident purpose is permissible and meanings which avoid inconvenience or injustice may reasonably be strained for, but:

“... the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some interiorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.”¹⁹

[21] Although their Honours were each dealing with the proper interpretation of an award, the same principles are apt to apply to the interpretation of enterprise agreements²⁰. For example, similar observations were made in *Ancor Limited v CFMEU*²¹ (*Ancor*):

“Clause 55.1.1 must be read in context. It is necessary, therefore, to have regard not only to the text of cl 55.1.1, but also to a number of other matters: first, the other provisions made by cl 55; secondly, the text and operation of the Agreement both as a whole and by reference to other particular provisions made by it; and, thirdly, the legislative background against which the Agreement was made and in which it was to operate.”²²

[22] The fact that the instrument being construed is an enterprise agreement is itself an important contextual consideration. As French J observed in *Wanneroo*:

“It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities - *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned - see eg *George A Bond and Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):

“Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.”²³

Use of extrinsic material as an aide to interpretation

[23] As is often the case in disputes that involve the construction of an enterprise agreement, parties will seek to place reliance of a variety of extrinsic material as an aide to interpreting the provisions of an agreement in issue. The use to which extrinsic material of the surrounding circumstances may be put to assist in the interpretation of an instrument is set out in the judgement of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*²⁴ (*Codelfa*). In *Codelfa* his Honour said:

“The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.

Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties’ presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.”²⁵

[24] Although Justice Mason’s reasoning in *Codelfa* has commonly been applied as meaning that ambiguity in an instrument must first be identified before extrinsic material may be admitted as an aide to interpretation, this has not been universally accepted. So much is apparent from the following discussion of *Codelfa* by Nicholson J in *BP Australia Pty Limited v Nyrax Pty Limited*:²⁶

“In *Ray Brooks Pty Ltd v NSW Grains Board* [2002] NSWSC 1049 Palmer J said the effect of dicta from the majority in *Royal Botanic* is to leave it to inferior Courts to puzzle out whether the decision in *Codelfa* is consistent or inconsistent with the contextual approach adopted in *West Bromwich*. Palmer J had earlier drawn a distinction between ‘the two competing schools of thought’ as to the point in time at which the Court may look at extrinsic evidence in order to construe a contract. One, ‘the literal approach’, gives primacy to the words of the document so that the starting point in the task of construction is always the text. The competing approach he described as ‘the contextual approach’ which holds that the words of a document, being no more than symbols of language, can never be reliably understood in isolation from the context in which the words were used. After analysing the reasoning of Mason J in *Codelfa*, Palmer J

concluded that the approach of Mason J would be in complete sympathy with the contextual approach promoted by Lord Hoffman in *West Bromwich*. He said at par [59]:

‘His Honour is not saying: evidence of surrounding circumstances is admissible only if it first appears that the language of the contract is ambiguous. His Honour is saying: evidence of surrounding circumstances is admissible only for the purpose of explaining ambiguous language in the contract and not for the purpose of changing the meaning of clear words.’

On the issue of the point of time in the exercise of construction at which reference to extrinsic evidence is permissible, Palmer J was of the view that Mason J agreed with Lord Wilberforce’s approach in *Prehn v Simmonds* [1971] 1 WLR 1381 and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 51, the pith of which he considered was that the time has passed when contracts are isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. Palmer J also referred to the trend of authority on the issue in New Zealand which he considered showed an endorsement and application of the approach in *West Bromwich*: cf. DW McLauchlan, ‘A contract contradiction’, *Victoria University of Wellington Law Review*, vol 30, 1999, p 175.

I am unable to agree with Palmer J that *Codelfa* and the passages in *West Bromwich* can be viewed as entirely consistent. That is not the way in which I understand the relevant portions of *Codelfa* have been understood and applied in relation to the issue of whether ambiguity is not to be found until the contract in issue has been considered in the matrix of facts in which it is set. In *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 the New South Wales Court of Appeal accepted that Australia had kept while England had discarded the concept that ambiguity is necessary to be shown before one looks at the surrounding circumstances: per Young CJ in Eq, Meagher JA and Hodgson JA agreeing. Academic writing has regarded *Codelfa* as falling far short of Lord Wilberforce’s apparent position in *Prehn* on the issue of admission of surrounding circumstances to determine ambiguity: H King, ‘The admissibility of extrinsic evidence as an aid to contract interpretation: pushing objectivity to absurd limits’, *Corporate and Business Law Journal*, vol. 6(2), 1994, p 187. Yet the law on this is arguably not clear-cut given that in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 185 ALR 152 at 155 at par [11] Gleeson CJ, Gummow and Hayne JJ relied upon the statement by Lord Hoffman in *Investors Compensation* at 912 that the interpretation of a written contract involves ‘the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’ and referring by footnote in that context to the reasons of Mason J in *Codelfa* at 350-352 and Lord Bingham in *Bank Credit* at 739. Furthermore, it has been said by one Australian text author that ‘the practice of the courts is to have regard to surrounding circumstances in the form of the factual matrix in virtually all cases’ on the ground that most English words are susceptible of more than one meaning so that difficulty of interpretation is sufficient for that reference to be made: JW Carter, *Carter on Contract*, Butterworths looseleaf, 2002 at p 28,096 at 12-050.

In *LMI* the Court of Appeal accepted, however, that the *Codelfa* doctrine appeared ‘to be not only that a court uses the surrounding circumstances to aid its interpretation and to put itself in the armchair of the parties to look to see what each knew when it was making the contract, but also that inferences can be drawn from the surrounding circumstances virtually to add terms’: at par [45] citing *Codelfa* at 353. Of such circumstances the Court of Appeal stated at [44] that ‘the approach in the *Royal Botanic Gardens* case itself shows that there is, in fact, a tendency to glean much more from negotiations as surrounding circumstances in Australia than would be permitted in England.’ It may be that there is good reason for the approach in *Codelfa* to be re-examined both in terms of the appropriateness of the approach and in the light of developments in other common law jurisdictions on the issue. However, given the unequivocal

statement by the majority in the High Court in *Royal Botanic* and the factors I have just referred to, I consider I should proceed on the basis there is not consistency between *Codelfa* and *West Bromwich*.”²⁷

[25] His Honour then summed up the relevant principles to be distilled from *Codelfa* as follows:

“At the risk of repeating what is said in *Codelfa*, it follows that the issues arising in this matter should be approached in the following manner.

It is necessary firstly to determine whether the contract has a plain meaning or contains an ambiguity. If the contract has a plain meaning, evidence of ‘surrounding circumstances’ will not be admissible to contradict the language of the contract. If the language of the contract is ‘ambiguous or susceptible of more than one meaning’ evidence of ‘surrounding circumstances’ is admissible to assist in the interpretation of the contract.

The concept of ‘surrounding circumstances’ is to be understood to be a reference to ‘the objective framework of facts’. It will include evidence of prior negotiations so far as they tend to establish objective background facts known to both parties and the subject matter of the contract. It will also include facts so notorious that knowledge of them is to be presumed. Additionally it will include evidence of a matter in common contemplation and constituting a common assumption. From the evidence of that setting the parties’ presumed intention may be taken into account in determining which of two or more possible meanings is to be given to a contractual provision. What cannot be taken into account is evidence of statements and actions of the parties which are reflective of their actual intentions and expectations. Objective background facts can include statements and actions of the parties which reflect their mutual actual intentions. That is, evidence of the mutual subjective intention of the parties to a contract may be part of the objective framework of facts within which the contract came into existence. It is the mutuality which makes the evidence admissible.”²⁸

[26] That the view of Nicholson J about the proper application of *Codelfa* and its binding of authority was correct seemed to be confirmed by the High Court of Australia in its refusal to grant special leave to appeal in *Western Export Services Inc v Jireh International Pty Ltd*²⁹ (*Jireh*). The decision in *Jireh* concerned an application for special leave to appeal. In refusing special leave the High Court said:

“The primary judge had referred to what he described as “the summary of principles” in *Franklins Pty Ltd v Metcash Trading Ltd*. The applicant in this Court refers to that decision and to *MBF Investments Pty Ltd v Nolan* as authority rejecting the requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and object of the transaction. The applicant also refers to statements in England said to be to the same effect, including that by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service*.

Acceptance of the applicant's submission, clearly would require reconsideration by this Court of what was said in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* by Mason J, with the concurrence of Stephen J and Wilson J, to be the “true rule” as to the admission of evidence of surrounding circumstances. Until this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts.

The position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five Justices in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* and it should not have been necessary to reiterate the point here.” [Endnotes omitted]³⁰

[27] However, more recently in *Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd*³¹ (*Woodside*) the High Court made the following observation in relation to the construction issue before the Court:

“Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding ‘of the genesis of the transaction, the background, the context [and] the market in which the parties are operating’. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption ‘that the parties ... intended to produce a commercial result’. A commercial contract is to be construed so as to avoid it ‘making commercial nonsense or working commercial inconvenience’.”³² [Endnotes omitted]

[28] A Full Court of the Federal Court of Australia in *Stratton Finance Pty Limited v Webb*³³ (*Stratton*) very recently considered whether there was any inconsistency between *Jireh* and *Woodside*. In so doing the Full Court said:

“The above reasons are presupposed upon legitimate contextual surrounding circumstances being available for consideration in the process of contractual construction and interpretation before ambiguity is demonstrated from the words of the agreement alone. That proposition was denied as legally permissible by three justices of the High Court in remarks in the disposition of an application for special leave in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45; 86 ALJR 1. In those remarks, criticism was made of the reasons in *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603, and in particular the reasons at [14]-[18] concerning the lack of need for ambiguity before resort to legitimate surrounding circumstances in the above-mentioned task. The articulated criticism was that the Court in *Franklins* (and the courts in the other intermediate appellate decisions referred to at [16] in *Franklins*) had failed to follow the judgment of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; 149 CLR 337, especially at 352.

As the reasons in *Franklins* stated, the conclusion that ambiguity need not be discovered before any resort to legitimate surrounding circumstances in the relevant task was drawn only from existing High Court authority: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; 210 CLR 181 at 188 [11]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at 461 [22]; *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; 218 CLR 530 at 559 [82]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at 179 [40] and *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; 234 CLR 151 at 160 [8] and 174 [53]. The Court’s view was reached in the light of the totality of Sir Anthony Mason’s judgment in *Codelfa*, and considering the clear words of those later binding High Court authorities.

After *Jireh*, and until this year and the publishing by the High Court of reasons in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 306 ALR 25; 88 ALJR 447,

there was a degree of uncertainty as to whether courts (trial courts and intermediate appellate courts) should follow a clearly articulated position expressed by a number of intermediate courts of appeal around the country as to the proper content and significance of binding High Court authorities, or the view of three justices of the High Court in remarks on a special leave application. In 2013, McLure P called it a “heated controversy” in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; 298 ALR 666 at [107]; and see also the remarks of Pullin JA in *McCourt v Cranston* [2012] WASCA 60 at [14]- [22], and the article by the Hon K Lindgren: ‘The ambiguity of “ambiguity” in the construction of contracts’ (2014) 38 *Australian Bar Review* 153.

In the notice of appeal, Stratton relied, in effect, on the essential proposition from *Jireh*: see para 3. This was confirmed at a directions hearing. *Jireh* however, played no substantive part of the argument, because the question, by the time of submissions being filed, had been settled by the High Court in *Woodside*. This most recent statement by French CJ, Hayne, Crennan and Kiefel JJ of the principles of contractual construction and interpretation was as follows at [35]:

Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding ‘of the genesis of the transaction, the background, the context [and] the market in which the parties are operating’. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption “that the parties ... intended to produce a commercial result’. A commercial contract is to be construed so as to avoid it ‘making commercial nonsense or working commercial inconvenience’. (Footnotes omitted)

Recently, in *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, the New South Wales Court of Appeal (Leeming JA, with whom Ward JA and Emmett JA agreed) expressed the view (at [71]) that [35] of *Woodside* was inconsistent with *Jireh*. We agree with that conclusion, and with the reasons in elaboration at [72]-[86], and in particular with the comments concerning *Codelfa* at [78]-[80].

The resolution of this issue, in the terms of [35] of *Woodside*, may not, however, resolve all issues as to what are legitimate surrounding circumstances: see, for example, the argument dealt with in *QBE Insurance Australia Ltd v Vasic* [2010] NSWCA 166 at [20]- [35]; and the comments in *Kimberley Securities Ltd v Esber* [2008] NSWCA 301 at [4]- [5].³⁴

[29] As is apparent from the above, the Full Court in *Stratton* concluded that *Woodside* was inconsistent with *Jireh* at least to the extent that *Jireh* supports the proposition that ambiguity can be evaluated without regard to the surrounding circumstances and the commercial purpose or objects of the instrument being constructed. In doing so, the Full Court expressly endorsed the explanation of *Codelfa* by the NSW Court of Appeal in *Mainteck Services Pty Ltd v Stein Heurtey SA*.³⁵ It is worthwhile therefore to set out that explanation below:

“To the extent that what was said in *Jireh* supports a proposition that ‘ambiguity’ can be evaluated without regard to surrounding circumstances and commercial purpose or objects, it is clear that it is inconsistent with what was said in *Woodside* at [35]. The judgment confirms that not only will the language used “require consideration” but so too will the surrounding circumstances and the commercial purpose or objects. Although the High Court in *Woodside*

did not expressly identify a divergence of approach, *Jireh* was notoriously controversial in precisely this respect. In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; 298 ALR 666 at [107] McLure P referred to the “heated controversy” created by *Jireh*; see further Kevin Lindgren’s analysis in ‘The ambiguity of “ambiguity” in the construction of contracts’ (2014) 38 *Aust Bar Rev* 153 at 161-167. It cannot be that the mandatory words ‘will require consideration’ used by four Justices of the High Court were chosen lightly, or should be ‘understood as being some incautious or inaccurate use of language’: cf *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96 at [45].

The general issue is important, such that it may be useful to state the position in some little detail.

First, in principle, every legal text requires legal interpretation, in order to ascertain its legal meaning, although there is no real scope for dispute about the interpretation of many legal texts. Professor Wigmore long ago wrote that ‘the process of interpretation, then, though it is commonly simple and often unobserved, is always present, being inherently indispensable’: JH Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed 1940, Little Brown & Co, Boston), Vol 9 p 180; see now §2459 Chardourne Revision, 1981. Lord Steyn said, in the first John Lehane Memorial Lecture, that ‘it is a universal truth that words can only be understood in relation to the circumstances in which they are used’: J Steyn, ‘The Intractable Problem of The Interpretation of Legal Texts’ [2003] *SydLawRw* 1; (2003) 25 *Syd L Rev* 5 at 5. His Lordship regarded this as a ‘fundamental principle of linguistic jurisprudence and legal logic’. I do not think there is any understatement in that statement. McHugh J made substantially the same point in *Manufacturers’ Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cas 60-853 at 75-343:

‘Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means.’

Lord Hoffmann, in a passage adopted by the joint judgment in *Marley v Rawlings* [2014] UKSC 2; [2014] 2 WLR 213 at [20], had said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKPC 6; [2005] 1 All ER 667 at [64] that:

‘No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.’

Secondly, very often, language when considered in its context will have a single, clear meaning. Very often, there is no dispute as to the ordinary grammatical or literal meaning of a sentence, and no dispute that that is the legal meaning. Very often, nothing in the context will come close to displacing the ordinary grammatical meaning of the legal text. ‘But not always’: *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [78]; *Taylor v Owners - Strata Plan No 11564* [2014] HCA 9 at [65].

The legal meaning may diverge from its literal or grammatical meaning, especially in the (self-selectingly contestable) cases that reach courts. Words do not have a ‘natural’ meaning that can be determined in isolation. As Lord Hoffmann said in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 391, approved in *Campbell v R* [2008] NSWCCA 214; 73 NSWLR 272 at [48] (Spigelman CJ, Weinberg AJA and Simpson J agreeing) and *Dale v The Queen* [2012] VSCA 324 at [73] (Weinberg, Harper and Whelan JJA):

‘[I]n some cases the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many

contexts they will have that meaning. In other contexts, their meaning will be different but no less natural.’

What is the legal meaning of a promise to sell ‘my Dürer drawing’, if the vendor’s wife owns a Dürer drawing which is on display in their home, and the vendor keeps another secretly in his study? What is the meaning of a gift ‘to my niece Eliza Woodhouse during her life’ in a will, if the testator had no such niece, but a grandniece of that name, and another grandniece, who was illegitimate, who lived with him: cf *In re Fish; Ingham v Rayner* [1894] 2 Ch 83? What is the meaning of cl 7 of the Wild Dog Destruction Regulation 1999, which provided ‘The Wild Dog Destruction Regulation 1994 is repealed’? Contracts, wills and statutes are very different legal texts, to the process of ascertaining whose legal meaning different rules apply, yet all are based on language, and language is unavoidably contextual. If I may repeat what I wrote of the uncertain meaning of the Wild Dog Destruction Regulation in *Resolving Conflicts of Laws* (Federation Press 2011), p 13, ‘The meaning of even the seemingly clearest legal text can be unclear, hence the importance of attending to context in the first instance.’

For those reasons, to say that a legal text is “clear” reflects the *outcome* of that process of interpretation. It means that there is nothing in the context which detracts from the ordinary literal meaning. It cannot mean that context can be put to one side; otherwise the three legal texts mentioned in the previous paragraph would be “clear”.

Thirdly, I would not regard anything in the foregoing as inconsistent with the passage in Mason J’s reasons in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24; (1982) 149 CLR 337 at 352 (which was the focus of *Jireh*):

‘The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.’

There is no inconsistency because whether contractual language has a ‘plain meaning’ is (a) a conclusion and (b) a conclusion which cannot be reached until one has had regard to the context. That accords with what was said by Allsop P in *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; 76 NSWLR 603 at [17]:

‘the phrase used by Mason J in *Codelfa Construction* (at 352) ‘if the language is ambiguous or susceptible of more than one meaning’ does not mean that the susceptibility of the language to more than one meaning must be assessed without reference to the surrounding circumstances ...’

Mason J was indicating that there are very real limits to the extent to which grammatical meaning can be displaced by contextual considerations. However, in order to determine whether more than one meaning is available, it may be necessary first to turn to the context.

Fourthly, what I have called “context” was formerly described as the ‘surrounding circumstances’, and then, influenced by Lord Wilberforce in decisions such as *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384 and *Rearidon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997, as the ‘matrix of facts’. See *Byrnes v Kendle* [2011] HCA 26; 243 CLR 253 at [98]- [100] (Heydon and Crennan JJ) and J Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013), pp 8-9.

Although Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98 at 114 referred to a ‘fundamental change’ in the approach espoused by Lord Wilberforce, the “modern” contextual approach had nineteenth century precursors, at least in relation to commercial contracts. Without seeking to be

exhaustive, the Earl of Selborne had deprecated and rejected the ‘extreme literalism’ in the mercantile contract construed in *McGowan v Baine* [1891] AC 401 at 403 (contrast the (dissenting) speech of Lord Bramwell, who had required ‘necessity, or [something] approaching to it’ in order to displace the ‘primary and natural meaning of the words’: see at 409). To the same effect was Lord Herschell’s rejection of a process of construction by reference to dictionary meaning, and insistence that contractual language must be ‘construed in a business fashion’ and “interpreted in the way in which business men would interpret them” in *Southland Frozen Meat and Produce Export Company Ltd v Nelson Brothers Ltd* [1898] AC 442 at 444. The approach adopted by Lords Selborne and Herschell anticipated what was popularised by Lord Wilberforce in the following century. Professor Carter has examined the evolutionary process at pp 17-20 of his book referred to in the previous paragraph.

Fifthly, the approach endorsed in *Woodside* avoids the difficulty of identifying what is meant by ‘ambiguity’, itself an ambiguous term, whose perception ‘differs from one judicial eye to the other’: *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 234. The various meanings of ‘ambiguity’ in this context are described by M Walton, ‘Where now ambiguity?’ (2011) 35 *Aust Bar Rev* 176 and D Wong and B Michael, ‘Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?’ (2012) 86 *ALJ* 57 at 67-69.

Sixthly, the approach to construction of written commercial contracts reflected in *Woodside* at [35] accords with what had been said in familiar passages in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at [22] (construction “requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction”); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40] (‘The meaning of the terms ... normally requires consideration not only of the text but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction’); and the endorsement in *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; 221 CLR 522 at [15] of the proposition that ‘Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure’. It means also that the Australian approach mirrors that adopted in England, New Zealand, Singapore and Hong Kong: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27; 3 SLR(R) 1029 (where the Court’s reasons delivered by V K Rajah JA for the Court survey much of the English decisions and academic literature); *Fully Profit (Asia) Ltd v Secretary for Justice* [2013] HKCFA 40; 6 HKC 374.

Seventhly, although evidence of context and purpose expands the scope of the litigation, none of the foregoing should be seen as opening the door to lengthy litigation in commercial causes. As will be seen below, the evidence of ‘surrounding circumstances’ sought to be relied on by Mainteck was lengthy, contested, vague, and divorced - by many months in time, and a markedly different commercial position - from the execution of the Second Consortial Agreement. This makes it quite distinct from evidence which is apt to assist the process of construction. Indeed, I would infer that the primary reason for adducing the evidence was to support Mainteck’s (now abandoned) misrepresentation case, rather than so as to assist in construction.³⁶

[30] Regard may therefore be had to evidence of the surrounding circumstances before the existence of ambiguity in an agreement is identified as an aide to interpreting the agreement for the purposes of determining whether an ambiguity exists. If thereafter ambiguity is not identified extrinsic material cannot be used to contradict the language of the instrument. If

ambiguity is identified the material may be used as contextual material to aide in the interpretation of the instrument. In this context we would make the observation that the law in relation to the interpretation of commercial contracts (*Codelfa; Metcash and Stratton*) has now aligned with the approach to the construction of awards and enterprise agreements as espoused by Burchett J in *Short v FW Hercus Pty Ltd*³⁷ and confirmed by French J, as he then was, in *Wanneroo*.

Application of the Acts Interpretation Act 1901 to enterprise agreements approved under the Act

[31] Both at first instance and before us the Appellant maintained that the Agreement must be interpreted in accordance with the *Acts Interpretation Act 1901* (AI Act).³⁸ That proposition is made on the basis that an enterprise agreement is an agreement that is made by the Commission pursuant to a power conferred by the Act to make the agreement.³⁹ To make good the proposition the Appellant at first instance relied on the following passage from the judgement of French J in *Wanneroo*:

“The interpretation of legislative instruments is dealt with in the *Legislative Instruments Act 2003* (Cth). Awards and agreements made under the Act are declared, by s 7(1) of the *Legislative Instruments Act*, not to be legislative instruments – see Item 18 in the table set out in s 7(1). This leaves such awards and agreements within s 46 of the *Acts Interpretation Act 1901* (Cth) which provides, inter alia:

‘(1) *If a provision confers on an authority the power to make an instrument that is neither a legislative instrument within the meaning of the Legislative Instruments Act 2003 nor a rule of court, then, unless the contrary intention appears:*

(a) this Act applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act; and

(b) expressions used in any instrument so made have the same meaning as in the enabling legislation; and

(c) any instrument so made is to be read and construed subject to the enabling legislation, and so as not to exceed the power of the authority.

An award is an instrument made by an authority, in this case the Australian Industrial Relations Commission, and so attracts the application of the *Acts Interpretation Act* for the purposes of its interpretation.”⁴⁰

[32] The decision in *Wanneroo* does not support the proposition contended by the Appellant. In *Wanneroo* Justice French was concerned with the construction of an award under the *Workplace Relations Act 1996* (WR Act) and not an enterprise agreement made under the Act. Relevantly, the award in question was an instrument that was not a legislative instrument but was an instrument made by the Australian Industrial Relations Commission pursuant to a power under the WR Act to make the instrument. Consequently French J concluded that the award was “an instrument made by an authority, in this case the Australian Industrial Relations Commission, and so attracts the application of the *Acts Interpretation Act* (AI Act) for the purposes of its interpretation”.⁴¹

[33] The Appellant also relied on a decision in *Cape Australia Holdings Pty Ltd v Construction, Forestry, Mining and Energy Union*⁴² (*Cape Australia*). In *Cape Australia* the issue whether the AI Act applied was not in contention and the parties proceeded on the basis that the AI Act applied.⁴³

[34] Similarly in *DP World Brisbane Pty Ltd v Maritime Union of Australia*⁴⁴ a Full Bench of the Commission made *obiter* observations based on the parties' acceptance that the AI Act applied to the relevant agreement. The Full bench observed that if the AI Act applied it would allow the consideration of particular extrinsic material, but ultimately proceeded to decide the construction question without regard to the AI Act as no relevant extrinsic material had been identified.⁴⁵

[35] It follows that the question of whether the AI Act applies to the interpretation of enterprise agreements has not been the subject of a previous Full Bench decision in which the issue has been contested and determined. It is also relevant to observe that the two Full Bench decisions to which we have referred were decided prior to the recent decision of the Full Court of the Federal Court in *Toyota Motor Corporation Australia Limited v Marmara*⁴⁶. We refer to that decision later.

[36] It seems to us that the Act does not confer a power on the Commission to make an enterprise agreement. An enterprise agreement is made in the circumstances described in sections 172 and 182, which are reproduced below;

172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

(1) An agreement (an *enterprise agreement*) that is about one or more of the following matters (the *permitted matters*) may be made in accordance with this Part:

- (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
- (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- (d) how the agreement will operate.

Note 1: For when an enterprise agreement *covers* an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement will be covered by the agreement if the organisation notifies the FWC under section 183 that it wants to be covered.

Single-enterprise agreements

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a *single-enterprise agreement*):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of *enterprise* in section 12).

Multi-enterprise agreements

(3) Two or more employers that are not all single interest employers may make an enterprise agreement (a *multi-enterprise agreement*):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and

(ii) the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of *enterprise* in section 12).

Greenfields agreements

(4) A single-enterprise agreement made as referred to in paragraph (2)(b), or a multi-enterprise agreement made as referred to in paragraph (3)(b), is a *greenfields agreement*.

Single interest employers

(5) Two or more employers are *single interest employers* if:

(a) the employers are engaged in a joint venture or common enterprise; or

(b) the employers are related bodies corporate; or

- (c) the employers are specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

Requirement that there be at least 2 employees

- (6) An enterprise agreement cannot be made with a single employee.

182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

- (1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is **made** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

- (2) If:

- (a) a proposed enterprise agreement is a multi-enterprise agreement; and
- (b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and
- (c) those employees have voted on whether or not to approve the agreement; and
- (d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is **made** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

- (3) A greenfields agreement is **made** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

[37] An application to the Commission for the approval of an enterprise agreement must be made within the period specified in section 185(3) or (4) of the Act. The period within which an application is made is reckoned only after the agreement is made. The Commission's role is in approving, subject to satisfaction of the statutory criteria, the enterprise agreement already made but there is no power conferred on the Commission by the Act to make an enterprise agreement.

[38] Where the statute intends to confer power on Commission to make an instrument it expressly so provides.⁴⁷ The power conferred on the Commission by the Act is limited to approval of agreements that have already been made. Although enterprise agreements made under the Act rely for their legal enforceability on the Commission's approval, this is not the same as the Commission having power to make the enterprise agreement. An enterprise agreement is therefore not an instrument of a kind described in s.46 of the AI Act.

[39] As mentioned earlier this issue was recently considered by a Full Court in *Toyota*. Relevantly the Full Court said the following:

“Toyota’s final argument on the construction of cl 4 of the Agreement (ie aside from those that were interwoven with its case on the repugnancy point) was based on the provision of the Agreement that made it an objective to attain cost structures similar to those of other members of the Toyota group worldwide. It was contended that, pursuant to ss 46 and 15AA of the *Acts Interpretation Act 1901* (Cth) (“the AI Act”), an interpretation of the Agreement which would best achieve that objective is to be preferred to each other interpretation. We do not, however, accept the premise from which this argument proceeds. Section 46 of the AI Act applies where ‘a provision confers on an authority the power to make an instrument’. There is no provision of the FW Act which confers on the Commission the power to make an enterprise agreement. Such an agreement is made by the employer and the relevant employees under ss 172(2) and 182(1). We consider, therefore, that the constructional questions which arise for resolution in this appeal must be addressed without assistance from the AI Act.”⁴⁸

[40] It follows that an enterprise agreement approved by the Commission must be interpreted without recourse to the AI Act.

Summary

[41] From the foregoing, the following principles may be distilled:

1. The AI Act does not apply to the construction of an enterprise agreement made under the Act.
2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.
3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.
4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.
5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.
6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:
 - (a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
 - (b) notorious facts of which knowledge is to be presumed;
 - (c) evidence of matters in common contemplation and constituting a common assumption.
7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.
8. Context might appear from:

- (a) the text of the agreement viewed as a whole;
 - (b) the disputed provision's place and arrangement in the agreement;
 - (c) the legislative context under which the agreement was made and in which it operates.
9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.
10. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.

[42] We now turn to the proper construction of the Agreement.

Proper construction of clauses 1.10, 3.71 (e) and (f), 4.1.3, 4.1.6, 4.1.7 and 4.4 of the Agreement

Provisions of agreement at issue

[43] Clause 1.10 contains definitions of various terms used in the Agreement and defines "early morning shift" as follows:

"Early Morning Shift" means a shift commencing at or after 2:00am and before 4:00am

[44] Clause 3.7 deals with allowances and relevantly provides the following:

(e) An employee, who is employed by the Company before 1 July 2003 and is engaged to work afternoon or night shift and as a result does not rotate with day work then the employee shall not be regarded as working a fixed shift for the purposes of the Agreement. In such circumstances a shift loading of 25% shall be payable on night and afternoon shift.

(f) An employee, who is employed by the Company before 1 September 2012, shall be paid 20% for a fixed early morning shift. This does not apply if the employee requests to be placed on an early morning shift.

[45] Ordinary working hours of the employees covered by the Agreement are set out in clause 4.1 which relevantly provides as follows:

4.1 Ordinary Working Hours

4.1.1 Except as otherwise provided in this Agreement 38 hours shall constitute a full week's work to be worked by agreement between the Employees and the Company. Management shall retain the discretion to set such hours failing agreement in each establishment concerned, with the following alternatives being available:

- (a) 7 hours 36 minutes per day.
- (b) 4 days of 8 hours and one day of 6 hours.
- (c) 4 hours off per fortnight.
- (d) One day off per 4-week cycle.

4.1.2 Subject to agreement with the Employees at the enterprise level, up to 10 ordinary hours per day may be worked.

4.1.3 Departmental starting times may be altered at the Company's discretion with 36 hours notice or without such notice if by agreement with the Employee.

...

4.1.6 Employees, employed prior to 1 September 2012, may be required to perform their ordinary working hours within a spread of 14 hours between 5.00 am/7.00 pm. An employee (other than Delivery Drivers) may agree to commence ordinary working hours at 4.00am. Any time worked between 4:00am and 5:00am will be paid for at overtime rates but will be included as ordinary hours worked.

4.1.7 Employees, employed after 1 September 2012, may be required to perform their ordinary working hours within a spread of 15 hours between 4:00am / 7:00pm. This clause will also apply to any employee, employed prior to 1 September 2012, that requests a start time prior to 5:00am.

[46] Clause 4.4 contains overtime provisions and relevantly provides that the Respondent may require an employee to work reasonable over time at overtime rates as follows:

4.4.1 The Company may require an Employee to work reasonable overtime at overtime rates. When requiring an Employee to work overtime the Company will consider the interests of the Employee and the Company and in particular the following:-

- (i) any risk to the Employee's health and safety;
- (ii) the Employee's personal circumstances including any family responsibilities;
- (iii) the needs of the workplace or enterprise;
- (iv) the notice (if any) given by the employer of the overtime and by the Employee of his or her intention to refuse it

4.4.2 Except where otherwise provided, all time worked in excess or outside of the Ordinary Working Hours shall be deemed to be overtime. Such overtime shall be paid for as follows and each day shall stand alone:

- (a) In the case of shift workers- at double time.
- (b) In the case of day workers- at the rate of time and a-half for the first 3 hours, and double time thereafter:

Provided that where such overtime continues past midnight, double time shall continue to be paid until ordinary starting time next day, subject to clause 4.4.3.

Competing constructions

[47] The Appellant submits that the provisions clauses 4.1.6 and 4.1.7 operate as "grandfathering" provisions the effect of which is to prevent the Respondent from making changes to the shift arrangements that operate for employees whose employment falls within the description in those clauses without their consent.⁴⁹ Thus, as Mr Menz and Mr Shaw are both employees protected by the grandfathering provisions, they cannot be required to change their starting times from 3:00 am and 3:30 am respectively to 4:00 am. The change to starting times may only be procured with the consent of Mr Menz and Mr Shaw respectively.

[48] The Appellant submitted that once the Senior Deputy President concluded that the Respondent did not have power to alter the starting times of Mr Menz and Mr Shaw under the Agreement so as to require them to commence work at 4:00 am without their consent, that should have been the end of the matter and the Senior Deputy President erred in determining

that the Respondent could direct the employees to perform reasonable overtime between 4:00 am and 5:00 am notwithstanding the grandfathering provisions.⁵⁰ The Senior Deputy President's construction, so it was submitted, was contrary to the industrial purpose and context relating to the Agreement and was one that deprived clause 4.1.6 of its intended effect.⁵¹ The intended purpose becomes clear when regard is had to the extrinsic material relied upon by the Appellant.⁵²

[49] The Respondent submits that clause 4.1.6 deals with starting times for working of ordinary hours. Clauses 3.7(e) and (f) deal with allowances and do not preserve or enshrine particular hours of work. Clause 4.4 allows the Respondent to require employees to work reasonable overtime. Mr Menz and Mr Shaw were required to work reasonable overtime between 4:00 am and 5:00 am. This is permitted by the Agreement and clause 4.1.6 does not preclude this. Consequently the Senior Deputy President was correct in resolving the dispute in favour of the Respondent.⁵³

Extrinsic material

[50] The Appellant relied on a range of materials prepared by or passing between the Appellant and the Respondent during the period leading to the approval of the Agreement by a valid majority of employees. In an email from Elliot Dalglish an Industrial Officer with the Appellant to Victoria Scriven the Group Manager – Human Services of the Respondent dated 20 September 2012, the following provision was proposed by the Appellant for inclusion in the Agreement:

“Clause 3.9 Employee Protection – “An employee’s roster or level may not be changed with the intent of avoiding payment of penalties or loadings, or other benefits applicable. Should such circumstances arise, that employee shall be entitled to such penalty, loading or benefit, as if their roster or level had not been changed.”⁵⁴

[51] On 25 September 2012 Ms Scriven replied to the Appellant’s email and said of the proposed employee protection clause that she believed “that this is covered adequately by the grandfather clauses that were placed in the Agreement”.⁵⁵ The proposed employee protection clause was not included in the Agreement.

[52] These emails are of no assistance in resolving the competing constructions and do not provide any basis for suggesting that the provisions of the Agreement at issue are ambiguous. The emails disclosed no more than that the parties did not agree to include the employee protection clause sought by the Appellant.

[53] In any event it seems clear to us that the above exchange of emails, so far as is relevant, is concerned with the preservation of an employee’s roster or level from changes which are brought about with the intention of avoiding the payment to those employees of penalties or loadings or other applicable benefits. There is no suggestion that the parties were discussing let alone that they reached an agreement or came to an understanding that particular provisions of the Agreement would enshrine hours of work or shift arrangements for a particular class of employee, irrespective of other provisions in the Agreement.

[54] The Appellant also relied on a document given to employees by the Respondent during negotiations, which is titled “spread of hours”.⁵⁶ That document contains information

about current spread of hours and proposed spread of hours and contains the following statements:

No ones (sic) roster will change because of the change in spread of hours
No one will lose money under this proposal.⁵⁷

[55] Self-evidently, the document is dealing with the proposed change in the spread of hours and in that context makes the representation that rosters will not change because of the proposed in the spread of hours. It clearly does not say that hours of work or rosters will not change at all or through the proper exercise of rights under the Agreement. The document does not assist the Appellant nor does it identify any ambiguity in the provisions of the Agreement that are at issue.

[56] The Appellant also relies on a document dated 18 September 2012 entitled “EBA – Update”.⁵⁸ That document merely provides that early morning shifts, which involve a starting time of between 2:00 am and 4:00 am will only apply to new starters and that current arrangements will apply to all employees. The document provides the same information in relation to the introduction of the new spread of hours.⁵⁹ The document explains to employees the effect of these changes on current arrangements. It is not in terms or by implication indicated that “current arrangements” will not change if a change is otherwise permitted through a proper application of other terms of the Agreement. The document does not assist the Appellant nor does it identify any ambiguity in the provisions of the Agreement that are at issue.

[57] The other material relied upon by the Appellant,⁶⁰ or otherwise referred to,⁶¹ is similarly of no assistance and does not identify any ambiguity in the provisions of the Agreement that are at issue.

[58] In our view the provisions of the Agreement at issue have a plain meaning and the extrinsic material does not make good any of the propositions advanced by the Appellant and nor does that material identify any ambiguity in the relevant provisions of the Agreement. The dispute was capable of being resolved, by reference to the plain language of the Agreement.

Was the Respondent entitled to alter the starting times of Mr Menz and Mr Shaw under the Agreement?

[59] Before the change to starting times, Mr Menz and Mr Shaw commenced work at 3:00 am and 3:30 am respectively. Clause 4.1.3 allows the Respondent to alter departmental starting times to its discretion with 36 hours notice or without such notice if by agreement with the Employee. Clause 4.4.1 allows the Respondent to require an employee to work reasonable overtime at overtime rates. The alteration to the hours of work as concerns Mr Menz and Mr Shaw was to the effect that their starting time for working ordinary hours would be 5:00 am. This is permitted by clause 4.1.3 and is not prohibited by any of the grandfathering provisions identified by the Appellant.

[60] The Respondent also required Mr Menz and Mr Shaw to work overtime between 4:00 am and 5:00 am for which they would be paid overtime rates. Subject to the overtime being reasonable, and the Appellant has not suggested otherwise, this is permitted by clause 4.4.1 and is not prohibited by any of the grandfathering provisions identified by the Appellant.

[61] There is nothing ambiguous about these provisions or about the grandfathering provisions identified by the Appellant. In our view the words of the provisions are clear. Clauses 4.1.6 and 4.1.7 deal with starting times for working of ordinary hours. This is clear from the words and from the context in which those appear, namely in a clause dealing with ordinary hours of work. To the extent that these clauses preserve particular hours of work for some employees, they do so only to the extent of preventing ordinary hours being worked before 5:00 am without the employee's consent. As the Respondent's change to the starting times of Mr Menz and Mr Shaw results in these employees commencing to work ordinary hours at 5:00 am, their consent is not required.

[62] Clauses 3.7(e) and (f) deal with allowances, they do not deal with a prescription of working hours. This is also clear from the words and from the context in which those words appear, namely in a clause which deals with allowances. Clauses 3.7(e) and (f) do not preserve or enshrine particular hours of work. They preserve, for a limited class of employees, allowances for working particular kinds of shifts.

[63] Clause 4.4.1 allows the Respondent to require employees to work reasonable overtime. Mr Menz and Mr Shaw were required to work reasonable overtime between 4:00 am and 5:00 am. That time was outside the spread of ordinary hours set out in clause 4.1.6 and by reason of clause 4.4.2 is overtime. This is permitted by the Agreement and the grandfathering clauses discussed above do not preclude this. Consequently, the Senior Deputy President was correct in concluding that the Respondent was entitled to alter the starting times of Mr Menz and Mr Shaw and that Mr Menz and Mr Shaw could be directed to perform reasonable overtime.

Has any appellable error been identified?

[64] Returning then to the grounds of appeal advanced by the Appellant. As should be apparent from our analysis above we agree with the Senior Deputy President's construction of the relevant provisions of the Agreement. It is clear from the reasons for decision that the Senior Deputy President arrived at this view having regard to the plain language of the agreement.⁶²

[65] The Senior Deputy President considered the evidence of the surrounding circumstances and concluded that it was not of any assistance to the case advanced by the Appellant or to the task of construing the relevant provisions of the Agreement.⁶³ For the reasons we give earlier above we have concluded that the extrinsic material does not make good any of the propositions advanced by the Appellant, does not assist in identifying any ambiguity in the Agreement and that the dispute was capable of being resolved, and should properly be resolved by reference to the plain language of the Agreement.

[66] It follows that the Senior Deputy President was correct in his analysis of the evidence of the surrounding circumstances. He ultimately resolved the disputed construction by reference to the plain language of the Agreement. This was undoubtedly correct. It follows that Grounds 1, 3, 4, 6, 7 and 10 have no substance.

[67] Ground 5 of the appeal is misconceived. The question of whether the Respondent was entitled to do what it did because it was within its managerial prerogative simply does not

arise. On a proper construction of the Agreement, the Respondent was entitled to implement the change.

[68] We agree with the Respondent's submission that Ground 8 contains nothing more than a bald assertion. Factual findings to resolve the disputed construction were not necessary. As to factual errors said to have been made by the Senior Deputy President in reaching his conclusion that the consultation obligation under the Agreement had been complied with by the Respondent, we deal with that issue separately further below.

[69] As to Ground 9, the alleged failure to take into account and correctly apply the status quo provision of the dispute settlement clause of the Agreement, we observe that this was not a matter that was the subject of the application that was before the Senior Deputy President. The submission of the Appellant before the Senior Deputy President was simply that the Respondent had not adhered to the status quo provision of the Agreement but did not seek any particular outcome. The submission seems to have been put on the basis of providing justification for the employees' refusal to comply with the Respondent's direction to work the altered hours.⁶⁴ To the extent that the Appellant suggests the Senior Deputy President ought to have taken into account this factor in determining the disputed construction of the Agreement, that is rejected.

[70] As to Ground 10, it seems to us clear from a review of the Decision that the Senior Deputy President took into account and assessed the submissions, evidence and other material advanced by the Appellant. It was not necessary for the Senior Deputy President to recite each and every one of the multiplicity of arguments advanced by the Appellant below in the Decision.

[71] As to Ground 11, it seems to us that the Senior Deputy President considered the relevant legal principles as they applied to construction of an industrial instrument and applied those principles in what appears to us to be a regular fashion. That the Appellant asserted below that certain questions of law arose and advanced arguments in support of those questions does not mean that the questions arose or that the Senior Deputy President was required to deal with questions that did not arise.

[72] As to Ground 12, there is no basis in our view for asserting that the Senior Deputy President unreasonably exercised the statutory power conferred on the Commission. This ground has no substance.

[73] As to Ground 2, the resolution of the question whether the Respondent complied with its consultation obligations under the Agreement turned on the evidence. The Senior Deputy President preferred the evidence of Ms Shannon to that given by Mr Menz and Mr Shaw. His Honour therefore concluded that Ms Shannon's evidence established that the Respondent had consulted employees about the changes consistently with its obligation.⁶⁵ Ms Shannon's evidence was supported by contemporaneous notes made by her about the consultation. The Senior Deputy President was able to observe each witness and also had concerns about the accuracy of the evidence given by Mr Menz and Mr Shaw. There was in our view a sufficient basis for the Senior Deputy President to prefer Ms Shannon's evidence. In our view His Honour's conclusion was reasonably open on the evidence. No appellable error has been identified.

[74] That said, we would observe that consultation provisions in agreements create substantive and important rights. The approach to consultation is not mechanical or formulaic. These provisions give employees likely to be affected by a change the opportunity to influence the decision, to modify the outcome or its impact on affected employees. Consultation must be real. It involves more than just advising employees of a change and allowing for questions to be asked. These issues are dealt with in more detail in the Full Bench decision dealing with the consultation clause in modern awards.⁶⁶

Disposition of the appeal

[75] The decision of the Senior Deputy President was in our view correct. The Appellant has not identified any appellable error and there are no public interest considerations apparent to us that would warrant the grant of permission to appeal. Nor are we persuaded that there is any other basis upon which permission to appeal should be granted. We refuse permission to appeal.

PRESIDENT

Appearances:

E. Dalglish for The Australasian Meat Industry Employees Union

C. Murdoch for Golden Cockerel Pty Ltd

Hearing details:

Brisbane,

2014

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¹ See Attachment A to Outline of Submissions for the Respondent dated 29 September 2014

² See AB157 – AB160

³ AB214 – AB216 at [3] – [9]

⁴ AB236 at [3], AB256 – AB257 at [3], [6] – [7], AB291, AB299, AB302 and AB304

⁵ AB286

⁶ See decision at [2014] FWC 3974; AB1 – AB18

⁷ [2014] FWC 3974 at [101]; AB18

⁸ Section 604(1)

⁹ *O'Sullivan v Farrer* (1989) 168 CLR 210; *Coal & Allied v Lawler* [2011] FCAFC 54 at [44]-[46]

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- ¹⁰ *GlaxoSmithKline Australia Pty Ltd v Making* [2010] FWAFB 5343 at [26]-[27]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; *Ferryman Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025; and *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663
- ¹¹ (2010) 197 IR 266 at [27]
- ¹² Also see *CFMEU v AIRC* (1998) 89 FCR 200; and *Wan v AIRC* (2001) 116 FCR 481. Also see the Explanatory Memorandum to what is now s.604, at para 2328.
- ¹³ *Pawel v AIRC* (1999) 94 FCR 231, in particular at 238-239
- ¹⁴ *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at 205
- ¹⁵ (1936) 55 CLR 499; Note also the reference in the Explanatory Memorandum (EM) to the *Fair Work Bill 2008* at [2320] to the decision in *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 referring to the application of *House v King* to appeals in the AIRC, and the intention expressed in the EM to maintaining this jurisprudence in relation to FWA appeals.
- ¹⁶ (2006) 153 IR 426
- ¹⁷ *Ibid* at 438
- ¹⁸ (1966) 66 IR 182
- ¹⁹ *Ibid* at 184
- ²⁰ See *Swire Cold Storage Pty Ltd v TWU* [2008] AIRCFB 397 at [29] and *AMWU v Silcar Pty Ltd* [2011] FWAFB 2555 at [11]
- ²¹ (2005) 222 CLR 241
- ²² *Ibid* at 253 per Gummow, Hayne and Heydon JJ
- ²³ (2006) 153 IR 426 at 440
- ²⁴ (1982) 149 CLR 337
- ²⁵ *Ibid* at 352
- ²⁶ [2003] FCA 520
- ²⁷ *Ibid* at [28]-[31]
- ²⁸ *Ibid* at [32]-[34]
- ²⁹ [2011] HCA 45 per Gummow, Heydon and Bell JJ
- ³⁰ *Ibid* at [2] -[4]
- ³¹ [2014] HCA 7
- ³² *Ibid* at [35]
- ³³ [2014] FCAFC 110
- ³⁴ *Ibid* at [36]-[41]
- ³⁵ [2014] NSWCA 184
- ³⁶ *Ibid* at [71]-[85]
- ³⁷ (1993) 40 FCR 511 at 518
- ³⁸ AB268-AB271 and Transcript PN271- PN280.
- ³⁹ See section 46 of the AI Act
- ⁴⁰ (2006) 153 IR 426 at 438 [52]
- ⁴¹ *Ibid*
- ⁴² See AB268; [2012] FWAFB 3994
- ⁴³ [2012] FWAFB 3994 at [10]
- ⁴⁴ (2013) 237 IR 180
- ⁴⁵ *Ibid* at 191
- ⁴⁶ [2014] FCAFC 84
- ⁴⁷ See for example section 157 (1) (b) which provides that the Commission may make a modern award, s. 243 (1) which provides that the Commission must make a low-paid authorisation in particular circumstances and s. 269(1) which provides that the Commission must make a bargaining related workplace determination in particular circumstances.

⁴⁸ Ibid at [58]

⁴⁹ Outline of the submissions for the appellant at [88]

⁵⁰ Ibid at [81] – [82]; see [2014] FWC 3974 at [14]-[17]

⁵¹ Ibid at [83]-[85]

⁵² Transcript PN222 - PN223

⁵³ Outline of Submission for the Respondent at [11]-[18]; Transcript PN404 – PN416

⁵⁴ AB143

⁵⁵ AB146

⁵⁶ AB189

⁵⁷ Ibid

⁵⁸ AB190

⁵⁹ Ibid

⁶⁰ AB148 - AB156

⁶¹ AB191 - AB200

⁶² [2014] FWC 3978 at [14] - [17]

⁶³ Ibid at [18] - [90]

⁶⁴ AB252

⁶⁵ [2014] FWC 3978 at [91] - [100]

⁶⁶ [2013] FWCFB 10165

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0134

BAYTECH TRADES PTY LTD (ACN 147 997 788)

Appellant

v

COINVEST LTD (ACN 078 004 985)

Respondent

JUDGES: MAXWELL P, TATE JA and JOHN DIXON AJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 3 June 2015
DATE OF JUDGMENT: 17 December 2015
MEDIUM NEUTRAL CITATION: [2015] VSCA 342
JUDGMENT APPEALED FROM: [2014] VCC 1555 (Judge Kennedy)

EMPLOYER AND EMPLOYEE - Long service leave - Casual employment - Construction industry - Labour hire - Appellant labour hire company supplied specialist electricians to switchboard manufacturer - Whether 'work of a kind' covered by Electrical Contracting Industry Award 1992 - Whether provision of 'electrical services' - Whether appellant 'electrical contractor' - Manufacturing work distinguished - Long service leave charge not payable - Appeal allowed - *Construction Industry Long Service Leave Act 1997 s 4.*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr S J Wood QC with Mr B Jellis	AI Group Workplace Lawyers Pty Ltd
For the Respondent	Mr N Green QC with Mr J D'Abaco	Maddocks

Summary

1 The respondent, Coinvest Ltd (the ‘trustee’), is the trustee of the Construction Industry Long Service Leave Fund (the ‘Fund’). The Fund was established by the *Construction Industry Long Service Leave Act 1997* (the ‘Act’), and under a trust deed executed by the trustee (the ‘Trust Deed’). The purpose of the Fund is to provide portable long service leave benefits to Victorian workers who perform ‘construction work in the construction industry’ in Victoria,¹ and who would otherwise not be able to access long service leave because they are casually employed by different employers.

2 The appellant (‘Baytech’) is a labour hire company. One of its clients was NHP Electrical Engineering Products Pty Ltd (‘NHP’), which builds electrical switchboards and electrical panel boards. The work of building switchboards was mostly performed by NHP’s own workforce, but NHP engaged Baytech to supplement its workforce on a casual basis. The Baytech employees, who were skilled and qualified electrical fitters, built switchboards in accordance with drawings prepared by NHP. The completed switchboards were sent to NHP’s customers, where they were installed for use.

3 The question for determination was whether Baytech was obliged under s 4(1) of the Act to pay to the trustee a long service leave charge in respect of the work done by its employees for NHP (the ‘NHP contract work’). That liability would attach to Baytech only if those workers were employed ‘to perform construction work in the construction industry’.

4 As will appear, the terms ‘construction work’ and ‘construction industry’ are defined in the Construction Industry Long Service Leave Fund Rules (the ‘Rules’),

¹ The Act s 4(1).

which were made by the trustee pursuant to cl 5 of the Trust Deed. Because the work was electrical work, the Rules in turn required consideration of definitions in the *Electrical Contracting Industry Award 1992* (the ‘Electrical Contracting Industry Award’).

5 Specifically, the Court had to decide whether the NHP contract work was ‘work of a kind’ for which the Electrical Contracting Industry Award fixed a rate of pay. The judge at first instance concluded that it was, on the basis of her findings that:

- (a) the NHP contract work constituted the provision of ‘electrical services’; and
- (b) in supplying the services of its employees to NHP to do that work, Baytech was an ‘electrical contractor’, that is, an ‘entity which contracts to provide electrical services’.

6 On appeal, Baytech challenged both of those findings. The focus of attention, however, was on the first finding. Baytech all but conceded that, if the NHP contract work did constitute the provision of ‘electrical services’ within the meaning of the Electrical Contracting Industry Award, then its contract with NHP could properly be characterised as a ‘contract to provide electrical services’. That is, Baytech did not seek to maintain (other than formally) that it was merely a generic supplier of labour. It accepted that it contracted with NHP to provide workers with the specialist electrical skills necessary to meet NHP’s particular requirements.

7 Baytech’s central argument was that, although the NHP contract work involved the application of electrical skills, it did not constitute the provision of ‘electrical services’ as defined. Baytech submitted that, properly construed, the relevant provisions of the Electrical Contracting Industry Award distinguished between the performance of work as an electrician as part of, and for the purpose of, a manufacturing business – on the one hand – and the performance of work as an electrician as part of a business of supplying electrical services under contract, on the other. NHP was clearly in the business of manufacturing, so it was said, and the NHP contract work was work done in the course of and for the purposes of that

manufacturing process.

8 On this analysis, it was not the kind of work which ‘electrical contractors’ do when they send electricians on-site to perform particular tasks. Rather, it was ‘work of a kind’ performed by employee electricians as part of a manufacturing process. It was not, therefore, ‘work of a kind’ for which the Electrical Contracting Industry Award fixed a rate of pay.

9 For reasons which follow, we would uphold that submission, and allow the appeal. In place of the orders made below, we would declare that Baytech is not liable for the long service leave charge.

The relevant definitions

10 The relevant definitions in the Rules are these:

Construction Work means:

- (a) Building trades work, Electrical trades work, Metal trades work and Other trades work; ...

Electrical Trades Work means work:

- (a) performed in the ‘construction industry’ in Victoria, being:
 - (i) work of a kind for which a rate of pay is fixed by the prescribed Electrical Contracting Award

...

Metal Trades Work means work:

- (a) performed in the ‘construction industry’ in Victoria, being:
 - (i) work of a kind for which a rate of pay is fixed by a prescribed Metal Industry Award;

...

but does not include any work [which] involves the manufacture of any structures, fixtures, fittings, chattels or works which are not manufactured specifically for a particular building ... For the avoidance of doubt:

- (c) any manufacture of structures, fixtures, fittings, chattels or works in a permanently established factory or

workshop is excluded from this definition of Metal Trades Work;

...

- (e) any mass manufacturer of structures, fixtures, fittings, chattels or works is excluded from this definition of Metal Trades Work.

Electrical Services means:

- (a) the maintenance of electric power distribution lines and all associated work; and/or
- (b) the installation of electric light and power, all classes of assembly, wiring, repair and maintenance of electrical installations and appliances ...

by Workers for Employers and/or by Working Sub-Contractors who contract to provide such services for which a rate of pay is prescribed under the Electrical Contracting Industry Award.

- 11 The relevant part of the Electrical Contracting Industry Award is in these terms:

INCIDENCE, SCOPE AND APPLICATION

- 5.1 This award shall apply to the provision of electrical services by electrical contractors.
- 5.2 For the purpose of this clause:
 - 5.2.1 'electrical contractor' means any entity who or which contracts to provide electrical services.
 - 5.2.2 'electrical services' includes:
 - 5.2.2.1 the maintenance of electric power distribution lines and all associated work; and/or
 - 5.2.2.2 the installation of electric light and power, all classes of assembly, wiring, repair and maintenance of electrical installations and appliances including, without in any way limiting the generality of the foregoing, the assembling, installing, diagnosing, servicing and rectifying of faults in any of the following:
 - 5.2.2.2.1 electronic products (eg television receivers, video cassette recorders, audio equipment/systems, home computers, etc) and any combination of these products together with ancillary devices and/or equipment;

- 5.2.2.2.2 radio and television transmitting devices (including LF, HF, VHF and UHF), CB radios;
- 5.2.2.2.3 telemetry systems and ancillary equipment;
- 5.2.2.2.4 multiple access television distribution systems;
- 5.2.2.2.5 computers and their peripherals;
- 5.2.2.2.6 microwave and associated equipment;
- 5.2.2.2.7 electrically operated refrigeration and air conditioning equipment;
- 5.2.2.2.8 telephone communication devices;
- 5.2.2.2.9 fibre optic transmission lines and associated equipment;
- 5.2.2.2.10 public address systems;
- 5.2.2.2.11 domestic satellite television receivers;
- 5.2.2.2.12 maritime electronic equipment (including depth sounders, radars, etc.);
- 5.2.2.2.13 security alarm systems;
- 5.2.2.2.14 fire alarm systems;
- 5.2.2.2.15 superconductivity systems and associated equipment;
- 5.2.2.2.16 electromagnetic devices.

5.3 Providing that the award shall not apply to the manufacturing section of the business of the employers who are manufacturers or vendors of plant or equipment who install or maintain the said plant and equipment in high and low tension power stations and/or substations for the generation and/or transmission of electric power.²

12 Part B of the Electrical Contracting Industry Award defines 'Electrical Fitter' to mean:

an Electrical Fitter employed by an Electrical Sub-Contractor normally engaged in making, repairing or maintaining electrical machines, instruments or appliances, *but does not include electrical fitters employed in the manufacturing*

² *Electrical Contracting Industry Award* pt A, cls 5.1–5.3.

*section of a contractor's business.*³

- 13 The issues for determination, therefore, were as follows:
- (i) whether, giving the words their natural and ordinary meaning, the phrases 'construction work' and 'construction industry' excluded the work of manufacturing switchboards in a factory;
 - (ii) whether the work undertaken by the Baytech workers in the manufacture of switchboards fell within the scope of 'assembly, wiring, repair and maintenance of electrical installations and appliances', in the definition of 'electrical services' in the Electrical Contracting Industry Award; and
 - (iii) whether, in its capacity as a provider of specialist electrical fitters to NHP, Baytech was an 'electrical contractor' within the meaning of the Electrical Contracting Industry Award.

The decision at first instance

14 The judge held that Baytech was liable to pay the long service leave charge. In her Honour's view, the work undertaken by Baytech's workers for NHP, involving the assembly and/or wiring of electrical switchboards and panel boards, was 'construction work' performed in the 'construction industry' for the purposes of the legislation. Her findings may be summarised as follows.

15 As a labour hire company, Baytech prepared job descriptions based on information provided by its client, which were then provided to candidates. Once candidates were placed with the client, Baytech invoiced on the basis of the hours and times that its employees worked. Its client, NHP, built electrical switchboards and electrical panel boards at its premises in Laverton North, which were used in commercial and industrial applications. Baytech and NHP had a written contract that provided for NHP to request that Baytech provide on-hired workers (and

³ Ibid pt B, cl 4.4 (emphasis added).

recruitment services) in accordance with various terms and conditions to perform work at NHP's premises.

16 In her Honour's view, the work performed by Baytech's workers for NHP was electrical and the workers provided 'electrical services' to, or for, NHP. They were described as 'electrical fitters' and their work was described as applying specialised electrical theory and practical knowledge to assemble operational industrial electrical control switchgear and power distribution equipment. There was no real difference between the two terms, 'switchboards' and 'panel boards', which could be used interchangeably. (We will simply refer to switchboards).

17 Switchboards were designed to a specification that identified the needs of a specific installation, typically in a large commercial building. NHP then prepared drawings for the switchboard that were approved by the customer. The Baytech workers were given a folder containing drawings and built the particular switchboard from those drawings. The switchboard was then fixed inside a metal enclosure with a door. After the board was finished and tested, it was sent to NHP's customer for on-site installation. The judge found that the work was skilled work that required electrical qualifications.

18 The judge reasoned that the mischief which the Act sought to remedy was to provide portable long service leave benefits to workers in the 'construction industry' who would otherwise be unable to qualify by reason of the itinerant nature of their employment. Given this purpose in providing benefits for a category of the workforce, the scheme was generally entitled to a beneficial construction. This approach was adopted by the judge in considering the concepts of 'construction work' and 'construction industry'.

19 The judge concluded that the workers were normally engaged in the assembly and wiring of electrical installations and appliances. Her Honour said:⁴

⁴ *Baytech Limited v Coinvest Pty Ltd* [2015] VCC 1555 [71]–[78] ('Reasons').

I accept that the work undertaken by the Workers at NHP constitutes the assembly and wiring of various electrical components. Thus each of the workers need to 'assemble' various parts and then 'wire' them together resulting in an electrical switchboard or panel board.

[The Managing Director of Baytech] accepted that the core task performed by the electrical fitters employed by the defendant at NHP was to assemble components and general wiring. [A Director of NHP] also agreed that the services provided involved assembly and wiring of electrical components to form electrical switchboards.

It is true, as [Baytech] highlighted, that the workers did not actually engage in the 'installation' of the switchboards. However, the term 'assembly' is important and suggests a broad concept beyond the actual act of 'installation' (as used in the first line of the definition). Thus, the acts contemplated go beyond the act of 'installing' and extend to 'assembly' and 'wiring'. In fact, an 'assembly of an electrical installation' is actually contemplated by the clause and is to be given some meaning.

The Macquarie Dictionary defines an installation as 'a system of machinery or apparatus placed in position for use' while the Merriam-Webster Dictionary defines it as including 'something (such as a piece of equipment) that is put together and made ready for use'.

Although it is true that the switchboards were not formally placed in position at NHP's premises, they were certainly 'assembled' there according to specifications which would enable them to be installed at a particular premises. Seen in this light, I consider that the workers were engaged in the assembly and wiring of an electrical installation. The reference to 'all classes' and the beneficial construction to be utilised also support such a finding.

Although I consider that 'installation' and 'appliances' are, in context, used disjunctively, I am also of the view that a switchboard can be properly characterised as an 'appliance'. The Macquarie dictionary defines appliances as including an 'instrument, apparatus or device' while the Oxford Dictionaries Online definition includes 'a device or piece of equipment designed to perform a specific task'.

I consider such words are broad enough to include the electrical switchboards which would be incorporated within the terms 'apparatus', and/or 'device or piece of equipment' designed to regulate and distribute electricity'.

Accordingly I am satisfied that the workers were engaged in the assembly and wiring of electrical installations and appliances.

20 Further, on the basis of the true character of the services provided by the workers established on the evidence, Baytech was contracting to provide electrical services. The judge reasoned that the exclusion in cl 4.4 – for electrical fitters in the manufacturing section of an electrical contractor's business – did not apply, as there

was no evidence that Baytech had a manufacturing section. It was solely a labour-hire company.

21 The judge rejected Baytech's contention that the term 'construction industry' had a natural and ordinary meaning which did not include manufacturing work carried out in a factory. That the term extended beyond what might be thought 'natural' was evident from the concept of 'allied' industries, which included 'electrical services'. The judge reasoned that, although manufacturing work was excluded from the definition of 'metal trades work' in the Rules, this was not the case with 'electrical trades work'. If the makers of the Rules had wished to exclude manufacturing work from the concept of electrical trades work, it would have been relatively easy for them to do so, a fact that weighed against any general exclusion of manufacturing work.

22 Baytech had relied on a Memorandum of Understanding, made in conjunction with the Electrical Contracting Industry Award, which discussed potential problems arising out of an overlap between the Electrical Contracting Industry Award and the Metal Industry Award. Her Honour concluded that this was not relevant, saying:⁵

[A]s indicated already, the task before the court is whether the workers were performing work 'of a kind' for which a rate of pay was fixed by the [Electrical Contracting Industry Award]. The question is not posed as to whether the Award itself would be 'used' to actually prescribe the terms and conditions of the workers' employment. In any event the fact that an 'overlap' was cited suggests that the classifications in the [Electrical Contracting Industry Award] may otherwise have application to workers also covered by the [Metal Industry Award].

23 The judge concluded that the definition of 'construction industry' in the Rules had to be applied, rather than some general 'ordinary' meaning of the phrase. The NHP contract work entailed the assembly or wiring of an 'electrical installation or appliance'. It was carried out in the 'Allied Construction Industry', because it was the carrying out of 'electrical services', and was therefore work in the 'construction industry' within the meaning of the Rules.

⁵ Reasons [125].

Issues on appeal

24 Five grounds of appeal were raised. The appellant proposed, however, that they be regrouped and dealt with as two broad grounds.⁶ Thus it was contended that the judge erred:

- (c) in concluding that the phrase ‘assembly, wiring, repair and maintenance of electrical installations and appliances’ included the building of electrical switchboards at NHP’s factory (revised ground 1); and
- (d) in construing the phrase ‘contracts to provide electrical services’ as including a labour hire agreement (revised ground 2).

25 As already noted, Baytech effectively abandoned the second ground, although it was formally maintained. Baytech sought to develop and rely on an alternative ground (for which leave was required) based on the definition of ‘electrical fitter’ (set out above). The contention was that the NHP contract work was performed by workers ‘employed in the manufacturing section of a contractor’s business’. Baytech submitted that, if it was an ‘electrical contractor’ under the Rules, then it should be viewed as a contractor which had a ‘manufacturing section’, comprising the electrical fitters who did the NHP contract work.

26 Although Baytech had made no such submission at trial, we would grant Baytech leave to rely on the additional ground. The trustee opposed leave being granted, although only faintly. There was no point of procedural fairness, as the trustee was able to deal substantively with the issue raised.⁷ Ground 2 and the alternative ground can be considered together.

⁶ Grounds 1, 2 and 4 were not separately pressed, being subsumed into the grounds being advanced. Grounds 3(b) and 5(c) were abandoned. For ease of reference these grounds will be referred to as ‘revised ground 1’ and ‘revised ground 2’.

⁷ *Coulton v Holcombe* (1986) 162 CLR 1.

Appellant's submissions

27 Baytech's written submission argued that the judge had adopted an incorrect approach to construing the statutory scheme. It contended, generally, that:

- (e) the High Court has emphasised the primacy of the text;
- (f) the legislative history of the Act demonstrated Parliament intended specific limits for the scheme;⁸
- (g) the rules provided, in precise detail, for the scope of their application;
- (h) the drafter of the rules had chosen to pick up and apply the provisions of the Electrical Contracting Industry Award;
- (i) the Act conferred a benefit on some employees but a financial burden on some employers and reflected a compromise;⁹ and
- (j) the relevant context of the Act was that it was addressed to 'construction work' in the 'construction industry'. Those terms had a natural and ordinary meaning which did not include manufacturing work carried out in a factory.¹⁰

Its submissions were developed in connection with its specific grounds.

Revised ground 1

28 Baytech submitted that the definition of 'electrical services', and particularly the phrase 'assembly, wiring, repair and maintenance of electrical installations and appliances', did not extend to the process of manufacture. According to the written submission:

The switchboards were built at the premises of NHP on an assembly line and no worker ever left the factory of NHP. They were built for external clients for industry and commercial use.

⁸ In the Second Primary Reading Speech (Victoria, *Parliamentary Debates*, Legislative Assembly, 7 October 2004, 784 (Robert Hulls, Attorney-General)) Mr Hulls stated 'a number of definitions are clarified to ensure that the scheme applies to workers performing "construction work" in the "construction industry". This will limit the potential for other work groups or industries to seek coverage.'

⁹ *Carr v Western Australia* (2007) 232 CLR 138 [5]–[7] (Gleeson CJ) (*'Carr'*): 'the question is then not: what was the purpose or object underlying the legislation? The question is: how far does the legislation go in pursuit of that purpose or object'.

¹⁰ *EPM Concrete Pty Ltd v B & CL Long Service Leave Payments Corp* (1985) 23 IR 422.

The trial judge held that the workers were engaged in the assembly and wiring of an electrical installation, because the switchboards were *'assembled'* according to specifications that would enable them to be later installed elsewhere.

The trial judge should have found that *'electrical installations and appliances'* has, when read in context, a necessarily on-site character [which] is not satisfied in this case. Her Honour should have adopted the definition in the Macquarie Dictionary of an installation being: *'a system of machinery or apparatus placed in position for use'*. This interpretation is consistent with the ordinary meaning of *'electrical service'*, which is inapposite to describe the manufacture of an electronic product. It also reflects the genus of the words used in cl 5.2.2.

29 That the phrase should be so interpreted was said to be evident from the context of the Rules in seven different respects, three of which arose from matters extraneous to the Rules while the remaining matters were found within the Rules themselves. First, the Act was concerned with imposing a long service leave charge in respect of every worker employed by the employer to perform *'construction work'* in the *'construction industry'*. If manufacturing products in a factory qualified as *'construction work'* in the *'construction industry'*, the common understanding of that concept would be unreasonably strained. The evidence did not support a conclusion that the switchboards were exclusively for use in the commercial building industry. The limiting qualifier on the definition of *'construction work'* was not the definition of *'construction industry'* but the definition of *'electrical trades work'*.

30 Secondly, the question of what constituted *'construction work'* turned on proper construction of the Electrical Contracting Industry Award. The definition of *'construction industry'* required consideration of the meaning of *'electrical services'*, which in turn was a defined term. There was significant overlap between the definitions of *'electrical services'* in the Rules and under the Electrical Contracting Industry Award, and the definition of *'electrical trades work'* in the Rules.

31 The trustee's case at trial was that the relevant workers were engaged in *'work of a kind'* described by the classification of *'electrical fitter'* under the electrical

Contracting Industry Award.¹¹ As noted earlier, the definition was in these terms:

An electrical fitter employed by an Electrical Contractor normally engaged in making, repairing or maintaining electrical machines, instruments or appliances, but does not include electrical fitters employed in the manufacturing section of a contractor's business.¹²

32 Clause 5.1 of the Electrical Contracting Industry Award provided that the award 'shall apply to the provision of electrical services by electrical contractors.' Clause 5.2 provided that an electrical contractor means 'any entity who or which contracts to provide electrical services'. Baytech submitted that the definition of 'electrical services' in the Electrical Contracting Industry Award must be read in the context in which the award was made, including the textual clues within the award, the Rules and the Act.

33 As noted earlier, cl 5.2.2 provided that electrical services includes
the installation of electric light and power, all classes of assembly, wiring, repair and maintenance of electrical installations and appliances including, without in any way limiting the generality of the foregoing, the assembling, installing, diagnosing, servicing and rectifying of faults in any of the following ...

34 Baytech submitted that electricians were generally covered by either the Metal Industry Award or the Electrical Contracting Industry Award. Moreover, it was said, there was no dispute, at trial or on appeal, that electrical fitters working in manufacturing were covered by the Metal Industry Award and that the work being performed at NHP – whether by Baytech's workers – or by NHP's workers was covered by the Metal Industry Award.

35 Under the Rules, work in the 'construction industry' excluded 'metal trades work' that involved manufacture. By contrast, there was no carve-out for manufacturing in the definition of 'electrical trades work' in the Rules. Baytech submitted that the Rules specifically dealt with electrical fitters working in

¹¹ Reasons [60].

¹² *Electrical Contracting Industry Award 1992* pt B, cl 4.4.

manufacturing and excluded such work from the statutory scheme. It submitted that those specific provisions precluded use of the general provision – the definition of ‘electrical trades work’ and the concept of work of a kind for which a rate of pay was fixed under the Electrical Contracting Industry Award – to include in the statutory scheme work that involved manufacture.¹³

36 According to the Baytech submission, it was not contemplated that ‘electrical trades work’ and ‘metal trades work’ would overlap. The judge wrongly rejected its contention that the context in which the Electrical Contracting Industry Award was made demonstrated that there was no overlap between it and the Metal Industry Award. The judge held that there could be overlap between the two awards and, that accordingly, the exclusion under the Metal Industry Award was irrelevant. Baytech submitted that although, in theory, more than one award can apply to the same work, the Electrical Contracting Industry Award should not be read in this way in respect of electrical fitters working in manufacturing.

37 According to the submission, an overarching interpretative principle, founded on a memorandum that was Appendix 5 to the Electrical Contracting Industry Award, should have been applied. The memorandum evinced a common understanding that the awards not be construed as overlapping, such that the Electrical Contracting Industry Award did not extend to work covered by the Metal Industry Award unless that work was carried out by an electrical contractor.

38 Baytech submitted that the NHP contract work fell within the opening limbs of the definition of ‘metal trades work’ in the Rules, but was then excluded by the manufacturing exemption. Baytech pointed to evidence that the workers placed with NHP were selected on the basis of NHP position descriptions for electrical fitters. The NHP electrical fitters were covered by the Metal Industry Award and the Baytech workers did exactly the same work. There was never intended to be any overlap and the judge was in error when she said:

¹³ *Saraswati v The Queen* (1991) 172 CLR 1.

The task before the court is whether the workers were performing work ‘of a kind’ for which a rate of pay was fixed by the [Electrical Contracting Industry Award]. The question is not posed as to whether the Award itself would be ‘used’ to actually prescribe the terms and conditions of the workers’ employment. In any event the fact that an ‘overlap’ was cited suggests that the classifications in the [Electrical Contracting Industry Award] may otherwise have application to workers also covered by the [Metal Industry Award].¹⁴

39 Baytech pointed out that the coverage of the Metal Industry Award was defined by industry descriptions,¹⁵ whereas the Electrical Contracting Industry Award applied to a class of employers (‘electrical contractors’).¹⁶ According to Baytech, four clues could be identified within the terms of the Electrical Contracting Industry Award which showed that the judge had construed the term ‘electrical services’ too broadly. First, the inclusive definition of ‘electrical services’ was inapt to describe making goods in a factory. Secondly, cl 5.3 maintained, in respect of an electrical installation or appliance, a distinction between installation and maintenance, on the one hand, and manufacture, on the other. That distinction was apposite in understanding the distinction between manufacturing and construction.

40 Whether Baytech was a manufacturer depended on how the contract to provide electrical services was characterised, an issue that ought to be determined by reference to the NHP contract work. The contract between Baytech and NHP provided for Baytech to supply workers to ‘perform work at the principal’s premises and in accordance with the principal’s detailed brief,’ and for ‘the worker to perform tasks to a similar nature to that for which his skills are required ...’. Before the judge there was evidence of the work for which NHP required the workers. The work performed is described above at para 16.

¹⁴ Reasons [125].

¹⁵ See *Metal Industry Award 1984* pt 1, cl 2(b) ‘the industries and callings covered by this award are the engineering, metal working and fabricating industries in all their branches, and all industries allied thereto and include mechanical and electrical engineering ... the manufacture, erection and installation, maintenance and repair of all forms of electrical machinery, apparatus, and appliances ...’.

¹⁶ See *Electrical Contracting Industry Award 1992* pt A, cl 3.2.1: ‘Part B of this award shall ... be binding on the Electrical Contractors Federation Victoria, its officers and its members ...’.

41 Thirdly, the industry allowance payable under the Electrical Contracting Industry Award for disabilities associated with on-site work lacked the usual permanent amenities associated with factory work. Finally, there was the exclusion in the definition of ‘electrical fitter’ for the purposes of electrical contracting work in pt B cl 4.4 of the award, set out above.¹⁷

42 Although none of these four contextual clues was decisive in reading down the phrase ‘assembly, wiring, repair and maintenance of electrical installations and appliances’, the combination was said to give contextual flavour to the types of installations and appliances with which the Electrical Contracting Industry Award was concerned. Because the scheme dealt with ‘construction work’ in the ‘construction industry’, work that was actually the manufacturing of products in a factory, and excluded from metal trades work, should not be considered as electrical contracting work. The NHP work was electrical work in the course of manufacture, indistinguishable from the work performed by NHP’s employees. It was not ‘assembly, wiring, repair, or maintenance’ of a kind to which the Electrical Contracting Industry Award applied.

Revised ground 2 and alternative ground

43 As noted earlier, ground 2 as drafted contended that Baytech was merely a labour hire company supplying workers to a client under an agreement, and could not therefore be characterised as an electrical contractor providing electrical services. As we have said, however, Baytech effectively abandoned this ground and concentrated instead on its alternative ground.

44 According to this alternative argument, if the character of the NHP contract work meant that Baytech was not just a provider of labour hire services but was a provider of electrical services, an equally broad view must be taken of the exclusion in the definition of ‘electrical fitter’. As noted above, that definition excludes

¹⁷ See [20] above.

‘electrical fitters employed in the manufacturing section of a contractor’s business’.¹⁸ On that basis, Baytech contended, the judge should have found that the NHP contract work was performed by Baytech workers employed ‘in the manufacturing section of a contractor’s business’, Baytech being that contractor. Accordingly, the Baytech workers were not ‘electrical fitters’ under the Electrical Contracting Industry Award.

45 Baytech accepted that, as a labour hire business, it did not in a literal sense have a manufacturing section. It submitted, nevertheless, that the exclusion should be viewed as applicable. The NHP contract workers should be regarded as ‘employed in the manufacturing section’ of Baytech’s business, because:

- (k) they were engaged in manufacturing work; and
- (l) when engaged in this work, they were employed in that section of Baytech’s business that was made up of workers engaged in manufacturing work.

46 This interpretation, according to the submission, resulted in a coherent interpretation of the Electrical Contracting Industry Award. It meant that all workers who performed the same kind of work (in this case, manufacturing work in a factory) were treated alike. Taking an approach that focuses on substance rather than form, like work should be treated alike. It was pointed out that, at trial, the trustee had accepted, for the purposes of cl 4.4, that NHP had a manufacturing section and that Baytech’s workers worked alongside NHP’s workers doing the same work.

Respondent’s submissions

47 The trustee submitted that the judge’s focus was rightly on the nature of the work undertaken by the Baytech workers. It was irrelevant that the work was performed under a labour hire agreement between Baytech and its client, and

¹⁸ See [12] above.

equally irrelevant that the work might be characterised as manufacturing work done in a factory.

48 The judge had correctly concentrated on the definitions in the Rules and had rejected Baytech's contention that the phrase 'construction work in the construction industry' had a natural and ordinary meaning which excluded manufacturing work. The judge carefully and correctly analysed the definitions in the Rules of the relevant terms. It was plainly open on the evidence to find that Baytech had contracted to provide electrical services to NHP. If the work answered the description 'electrical services', it mattered not that the workers were employed by a labour hire company or were direct employees. If the work came within the scope of the rule, whether or not it might also be work for the purposes of a manufacturing process, it attracted a long service leave charge under the statutory scheme.

49 In argument, counsel for the trustee accepted that there was a legitimate conceptual distinction between work done in the course of a business of providing electrical services and work done in the course of a manufacturing business. Counsel maintained, however, that this distinction did not govern the outcome. 'Construction work' was defined to include 'electrical trades work', which through the definition of 'allied construction industry' included carrying out 'electrical services'. Carrying out 'electrical services' included 'assembly, wiring, repair and maintenance of electrical installations and appliances'.

50 According to the trustee, the fact that the work might have had a manufacturing aspect was relevant but not conclusive. The trustee accepted that NHP operated a manufacturing business and that the switchboards were assembled at its premises in a process of manufacturing. But this was no more than a factor to be weighed in the balance, as the judge had correctly done.

51 The Baytech workers were highly skilled electricians but their work could not be solely characterised as an integral part of the manufacturing process. It was the particular skills which the Baytech workers brought to the process which attracted

the 'electrical trades' definition in the Rules. The fact that the work met the description of 'metal trades work' did not preclude the work also having the character of 'electrical trades work' under the Rules.

52 The trustee urged the court to reject Baytech's contention that the characterisations were mutually exclusive. It submitted that the definitions sat on a continuum. The question was not whether the work could be characterised as 'electrical services work' but whether it was solely manufacturing work. The judge was entitled to conclude that the work was at the electrical trades end of that continuum and her answer to the narrow question whether the work was of a kind for which a rate of pay was set by the Electrical Contracting Industry Award, not the Metal Industry Award, was correct.

53 The trustee submitted that it was not to the point whether the Electrical Contracting Industry Award would apply to workers covered by the Metal Industry Award. The judge correctly rejected Baytech's contention to the contrary, since all that the Rules required was that the work be 'of a kind' for which a rate of pay was fixed by the Electrical Contracting Industry Award. The trustee pointed out that the definition of 'electrical trades work' did not carve out manufacturing work, while the definition of 'metal trades work' did. This was said to show that, if the work fell within the definition of 'electrical trades work', it was within the statutory scheme. The drafters of the Rules might have easily excluded manufacturing work generally, but did not.

54 The trustee conceded that the Metal Industry Award was capable of applying to Baytech's workers at NHP as well as to NHP's workers performing identical work. Its contention was that Baytech did not have a manufacturing section, and had conceded as much, and that the exclusion found in the definition of 'electrical fitter' in the Electrical Contracting Industry Award was inapplicable.

General principles: approach to interpretation

55 As already noted, the trial judge identified the purpose of the Act as being to provide portable long service leave benefits to workers in the ‘construction industry’ who would otherwise be unable to qualify by reason of the itinerant nature of their employment. In her Honour’s view, given that this purpose was beneficial for a category of the workforce, the scheme was generally entitled to a beneficial construction.

56 With respect, her Honour’s conclusion about the beneficial purpose of the legislation was undoubtedly correct. But the Act also made clear that the beneficial purpose was to be achieved by imposing burdens on employers. The purpose of the very detailed provisions in the Rules was to define, with some precision, the circumstances in which benefits were to be conferred and corresponding burdens imposed. It is by giving primacy to the text that the interpreting court fulfils its task of discerning how far the legislature decided to go in the effectuation of its purpose.

57 We draw attention here to the caution expressed by Gleeson CJ in *Carr*:¹⁹

That general rule of interpretation [that a construction that would promote the purpose of the Act is to be preferred to a construction that would not promote the purpose] may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

58 In *Victims Compensation Fund v Brown*,²⁰ Spigelman CJ observed that it was not appropriate to apply the principle of liberal construction to a clause clearly intended to be one of limitation. His Honour said:²¹

¹⁹ (2007) 232 CLR 138, 143 [5].

²⁰ (2002) NSWLR 668.

²¹ *Ibid* 671-2 [9]-[12].

In a passage that has been frequently cited with approval, the Supreme Court of the United States said in *Rodriguez v United States*, at 525–526:

... No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

In the present proceedings, the Respondent submitted that the purpose was to compensate victims. Even if we were to accept a legislative purpose stated at that level of generality, that would not entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Favelle Mort Ltd v Murray*). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the and not otherwise.

The issue before the Court is the determination of the circumstances in which compensation is payable. The Court is not required to give the most expansive possible interpretation of such circumstances.

Specifically, the Court is not required to give words a meaning other than their primary meaning, unless the context indicates that that should be done.²²

59 On appeal to the High Court, Heydon J (with McHugh ACJ, Gummow, Kirby, and Hayne JJ agreeing) agreed with the approach adopted by Spigelman CJ:²³

The question is a narrow one and it is possible to answer it briefly. It could be answered very briefly, merely by stating that the answer propounded by Spigelman CJ was correct for the reasons he advanced. In deference to the extremely careful judgments of the majority in the Court of Appeal, however, a longer answer is called for.

60 In *MyEnvironment v VicForests*,²⁴ where one of the purposes of the relevant legislation was to protect the habitat of the Leadbeater's Possum, the Court of Appeal was invited to construe the relevant provisions expansively with a view to furthering this legislative purpose. Warren CJ said that, while there was no doubt that the authorities endorsed a purposive approach to statutory construction, the authorities also showed that caution was required before interpreting a particular

²² Citations omitted.

²³ *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 263 [12] (citations omitted).

²⁴ (2015) 42 VR 456.

provision expansively because of an underlying purpose of the legislation. The Chief Justice observed:²⁵

In my view, the authorities can be seen as supporting two related propositions. First, that it is rarely, if ever, the case that legislation pursues a single purpose to the fullest extent possible. Rather legislation is typically the result of a carefully considered attempt at balancing multiple and sometimes competing objectives. To assume that the apparently confined words of a provision must be given an expansive operation on the basis of what is perceived to be the legislation's primary purpose may frustrate rather than effectuate legislative intent.

61 Tate JA said:²⁶

When construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep in mind the observation of Gleeson CJ in *Carr v Western Australia* that the purposive rule of statutory interpretation, embodied in Victoria in s35(a) of the *Interpretation of Legislation Act 1984*, is of limited assistance in construing legislation, or regulatory instruments, that embrace numerous potentially conflicting objectives in relation to which the court has to determine from the language used where the intended balance lies. In that context, he expressly eschewed the adoption of a construction that furthered the pursuit of one of the competing objectives to the greatest extent possible while leaving the other objectives unfulfilled.

62 Drawing on the passage from the judgment of Gleeson CJ in *Carr* set out above, Tate JA concluded that the complexity of the statutory scheme and the competing aims apparent in the regulatory context showed that there had been 'a compromise'. In the legislative scheme before the court, the 'purpose or object' identified did not compel any particular construction, nor was it possible to identify a single purpose or objective. The fact that the legislative scheme was directed at the fulfilment of multiple purposes meant that the 'correct construction ... must depend on the words used', within the relevant context.²⁷

63 Applying these principles, we would uphold Baytech's submission that the Rules provide, in precise detail, for the scope of their application and that some

²⁵ Ibid 462 [14].

²⁶ Ibid 497-8 [148].

²⁷ Ibid 500 [155].

aspects of the Rules limit, rather than expand, the cover provided by the legislative scheme. The Act confers a benefit on some employees but a financial burden on some employers, and reflects a compromise of purposes. In ways relevant to the question at trial, the scope of the legislative scheme is constrained.

64 We turn to consider the question of whether the NHP contract work was ‘work of a kind’ for which a rate of pay was prescribed by the Electrical Contracting Industry Award.

Analysis

65 The question raised by the appeal is one of construction, which must therefore be resolved by application of the ordinary rules of construction. Primacy must be given to the relevant text – in this case, of the Rules and of the Electrical Contracting Industry Award – construed in the context of those instruments read as a whole.

66 The trustee’s contention, which the judge upheld, was that the NHP contract work was ‘electrical trades work’ within the meaning of the Rules, as it was ‘work of a kind for which a rate of pay was fixed’ by the Electrical Contracting Industry Award. This was so because it was ‘work of a kind’ which fell within the definition of ‘electrical services’ in Part 5 of the Electrical Contracting Industry Award.

67 It will assist to set out again the relevant clauses in Part 5 that Award:

5.2.2 ‘electrical services’ includes:

5.2.2.1 the maintenance of electric power distribution lines and all associated work; and/or

5.2.2.2 the installation of electric light and power, all classes of assembly, wiring, repair and maintenance of electrical installations and appliances including, without in any way limiting the generality of the foregoing, the assembling, installing, diagnosing, servicing and rectifying of faults in any of the following:

...

5.3 Providing that the award shall not apply to the manufacturing section

of the business of the employers who are manufacturers or vendors of plant or equipment who install or maintain the said plant and equipment in high and low tension power stations and/or substations for the generation and/or transmission of electric power.

68 Several points may be noted about this definition. First, the common characteristic of the types of electrical services listed in cl 5.2.2 is that they involve the application of electrical skills to the installation or servicing/maintenance of an electrical appliance (whether large or small) in the place where the appliance is to perform – or already performs – its function. Thus the list of services includes:

- the *maintenance* of power lines;
- the *installation* of electric light and power; and
- the *repair* and *maintenance* of electrical installations and appliances.²⁸

69 Secondly, the types of service contemplated are listed in groups, the composition of which also assists in characterising the services. Thus, cl 5.2.2.2 speaks of:

- ‘assembly, wiring, repair and maintenance’; and
- ‘assembling, installing, diagnosing, servicing and rectifying of faults’.

70 Read as a whole, and read together, as they must be, these composite phrases clearly contemplate that the provider of electrical services will, as necessary, perform one or more of those services *in relation to* the relevant appliance. Whether the particular appliance has merely to be installed, or must be assembled before being installed, the character of the work is the same. It is ‘on-site work’, as Baytech submitted. ‘Wiring’ would ordinarily be a part of installation. Servicing, repair and ‘rectifying of faults’ would, of course, be services provided later in the life of the appliance. But all of the service delivery will occur at the place of installation.

71 Thirdly, the phrase ‘electrical installations and appliances’ is itself instructive.

²⁸ *Electrical Contracting Industry Award 1992* pt A, cl 5.2.2.

In its ordinary meaning, the word ‘installation’ means something which has been installed, not something which is to be installed in the future. Thus the standard dictionary definitions of ‘installation’ are as follows:

- ‘system of machinery or apparatus placed in position for use’;²⁹
and
- ‘an apparatus, system etc that has been installed for service or use’.³⁰

72 It follows that, contrary to the judge’s view, the service of ‘assembly’ cannot meaningfully apply to an ‘installation’ because, by definition, it has already been assembled and installed. Accordingly, the NHP contract work of building switchboards could not have constituted the ‘assembly ... of an installation’. Of course, the other electrical services listed in the definition – wiring, repair and maintenance – are all appropriately applied to an installation. More broadly, the character of an ‘installation’ – as something already in place – reinforces what we have said about the character of the services here contemplated. They are services performed in installing an appliance, or servicing it once it is installed.

73 On this view, although the word ‘assembly’ when read literally would cover the work of an electrician in assembling an appliance as part of a process of manufacture, the context shows that it was not intended to have that meaning here. Rather, it was intended to cover an electrician who assembles (and then installs) an appliance on site, not an electrician who assembles it for supply by the manufacturer to a customer.

74 This reading of the definition is reinforced by cl 5.3. As can be seen, an express distinction is there drawn between work done in the manufacturing of a particular item of equipment, on the one hand, and work done in installing or

²⁹ Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009) 864.

³⁰ Lesley Brown (ed), *The New Shorter Oxford English Dictionary* (Clarendon Press, 3rd ed, 1993) vol 1, 1381.

maintaining such plant and equipment in power stations, on the other. The latter is covered by the Electrical Contracting Industry Award, the former is not.

75 That the Electrical Contracting Industry Award recognises a clear distinction between the manufacture of electrical appliances and their installation and maintenance is further reinforced by the definition of ‘electrical fitter’, on which Baytech relied. As previously noted, electrical fitters are covered by the Electrical Contracting Industry Award if they are normally engaged in ‘making, repairing or maintaining electrical machines, instruments or appliances’ but not if they are ‘employed in the manufacturing section of a contractor’s business’.³¹

76 As noted earlier, Baytech’s alternative argument was that, if in respect of the NHP contract it was to be characterised as an ‘electrical contractor’ providing ‘electrical services’ within the meaning of cl 5.1 of the Electrical Contracting Industry Award, then those of its employees who worked at NHP should be characterised as ‘electrical fitters employed in the manufacturing section’ of Baytech’s business. In the event, it is unnecessary to resolve this question. As we have said, the relevance of the definition of ‘electrical fitter’ is that it reinforces the distinction on which Baytech principally relies, between electricians who provide ‘electrical services’ within the meaning of the Electrical Contracting Industry Award, and electricians who work in manufacturing.

77 If, contrary to our view, work done by electricians in the manufacture of electrical appliances did fall within the definition of ‘electrical services’, this would have very wide implications indeed. Clause 5.2.2.2 lists a wide range of electrical appliances, from computers to satellite receivers and radars.³² If the work of electricians in manufacture were included, then it would extend to the manufacture of appliances of all these different kinds.

³¹ *Electrical Contracting Industry Award 1992* pt B, cl 4.4.

³² *Ibid* pt A, cl 5.2.2.2.

78 For these reasons, the NHP contract work was not ‘work of a kind’ to which the Electrical Contracting Industry Award applied. The relevant genus, as we have explained, is the provision of electrical services connected with, and for the purposes of, installation and maintenance of electrical appliances at the premises where they are used or to be used.

79 Accordingly, the appeal must be allowed and the judge’s orders set aside.

[2014] FWCFB 3202
FAIR WORK COMMISSION
DECISION

Fair Work Act 2009

s.185 - Application for approval of a single-enterprise agreement

Canavan Building Pty Ltd
(AG2013/10430)
JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER CARGILL
COMMISSIONER WILSON

MELBOURNE, 29 MAY 2014

Application for approval of the Canavan Building Pty Ltd Enterprise Agreement 2013.

Introduction

[1] Mr Irving Warren, a bargaining representative for Canavan Building Pty Ltd (Canavan), an employer, has applied under s.185 of the *Fair Work Act 2009* (the Act) for approval of the *Canavan Building Pty Ltd Enterprise Agreement 2013* (the Agreement). In order for an enterprise agreement to be approved, the Fair Work Commission must be satisfied of certain matters that are specified in the Act. One of those requirements is that contained in s.186(2)(c) as follows:

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

...

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.);...

[2] Section 55 of the Act relevantly provides:

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

...

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

[3] An issue has arisen as to whether the Agreement contains provisions which exclude those entitlements and provisions of the National Employment Standards (NES) which concern paid annual leave. Because there have been conflicting decisions relevant to this issue, including a decision of a Full Bench of this Commission and a judgment of the Federal Court, Mr Warren's application for approval of the Agreement was on 28 March 2014 referred by the President of the Commission to this Full Bench for determination pursuant to ss.582 and 615 of the Act.

[4] Directions were issued which permitted the Commonwealth and any Peak Industry Council (the ACCI, Ai Group and the ACTU) to file written submissions. The ACCI, Ai Group and the ACTU availed themselves of this opportunity and filed written submissions. The hearing of the application took place on 1 April 2014, and oral submissions were received from Mr Warren, the ACCI, Ai Group and the ACTU. The Commonwealth did not make any submissions and did not appear at the hearing.

Relevant provisions of the Agreement

[5] In broad terms, the Agreement provides that annual leave is to be paid for as a loading upon or incorporated into the hourly rate of pay, so that rather than being paid for annual leave at the time that such leave is taken, annual leave is notionally paid for in advance as a

component of the payment made for work performed. The general concept is described in clause 9.3 of the Agreement as follows:

“9.3 This agreement provides for workers to be engaged on a fixed hourly rate which includes payment in advance for some entitlements arising under the National Employment Standards.”

[6] Clause 41 deals with annual leave entitlements under the Agreement in the following terms:

“41 Annual Leave

41.1 An employee other than a casual is entitled to annual leave in accordance with the National Employment Standards. It is noted that payment for annual leave is made progressively in advance and is incorporated into the wage rate prescribed by clause 35 of this agreement, together with the annual leave loading prescribed by the award.

41.2 An employee is required to take at least two weeks annual leave each year. Unless alternative arrangements are approved in advance, annual leave shall be taken during the industry shut down over the Christmas/New Year period.

41.3 In the absence of agreement on a mutually convenient time for taking leave, the employer may give at least fourteen days notice of the commencement of leave or part of leave which is due to the employee.”

[7] Appendix B identifies the wage rates payable under the Agreement. As a general concept, Appendix B establishes a single hourly rate for all employees which is intended to incorporate payment for all entitlements arising under the relevant modern award (the *Building and Construction General On-site Award 1*) and the Act, including the base award rate of pay, overtime, meal allowances, crib time, annual leave, redundancy, personal leave and fares allowances. Clause 1 of Appendix B explains the general concept as follows:

“1.1 A total rate which does not disadvantage the employee when compared with the benefits of the award and the Fair Pay Standard has been achieved by calculating the gross annual benefits arising from the award and standard. That amount has been divided by the nominal hours for which an employee would be paid in one year. The nominal hours are 38 hours per week for 52 weeks plus the hours of overtime typically worked in one year.”

[8] Clause 7.1 of Appendix B sets out the specific calculation of the “Annual Leave Factor” in the hourly rate of pay:

“7.1 The 28 continuous days pay for annual leave, BCGOA clause 32.1, is already included in the total hours worked, but because employees must fund any time not worked an additional 4 weeks pay is included, plus the annual leave loading, BCGOA clause 32.7:

4 weeks x 38 = 152 hours plus 4 x 38 x 17.5% = 26.6 hours **178.6 hours.”**

[9] Clause 9.1 of Appendix B deals with the “Personal Leave Factor” in a similar way:

“9.1 The BCGOA clause 39 provides for personal leave comprising sick leave, bereavement leave and carer’s leave. Because the employee must fund absences from work the maximum annual benefit of 12 days leave has been included: 12 x 7.6 = **91.2 hours**”

[10] The actual rates payable under the Agreement on the basis of the above methodology are set out in clause 14 of Appendix B:

“**14 Wages Schedule** NB for apprentices see clause 39

Canavan Level	Base Rate \$ per hour	Safety Allowance	Canavan Building Allowance	Total Rate Per Hour
1	\$26.35	\$0.50	\$1.00	\$27.85
2	\$27.40	\$0.50	\$1.00	\$28.90
3	\$29.75	\$0.50	\$1.00	\$31.25
4	\$29.75	\$0.50	\$2.00	\$32.25
5*	\$29.75	\$0.50	\$4.00	\$34.25
6*	\$29.75	\$0.50	\$5.00	\$35.25

* Includes an allowance for leading hand duties”

[11] Clause 16 of Appendix B identifies how wage increases are payable under the Agreement:

“16 Wage Increases

To ensure that wages retain their relativity to the award, the base rate shall be reviewed on each anniversary of the approval of this agreement and the total rate increased by \$0.50 (fifty cents) per hour or the same hourly amount as any increase which has occurred in the award rate for the relevant classifications, whichever is the greater.”

[12] Finally, clause 19.2 of Appendix B confirms the incorporation of a payment in advance for annual leave in the hourly rate as follows:

“19.2 The hourly rate incorporates payment in advance for annual leave, which shall be taken in accordance with clause 40 of this agreement.”

NES annual leave provisions

[13] The scheme of provisions which establishes the statutory entitlement to annual leave is set out in Division 6 of Part 2-2 of the Act. Section 87(1) identifies the basic entitlement in the following terms:

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to:

(a) 4 weeks of paid annual leave; or

(b) 5 weeks of paid annual leave, if:

(i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

[14] Section 87(2) identifies the method of accrual of the annual leave entitlement:

(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

[15] The expression "*paid annual leave*" as used in s.87 (and elsewhere in Division 6 of Part 2-2) is defined, not particularly helpfully, in s.12 as follows:

"*paid annual leave*" means paid annual leave to which a national system employee is entitled under section 87.

[16] Section 88 specifies the circumstances in which annual leave may be taken by an employee:

Taking paid annual leave

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

[17] Section 89, which it is not necessary to set out in full, provides that an employee is taken "*not to be on paid annual leave*" if "*the period during which an employee takes paid annual leave*" includes a public holiday, a period of any other leave, or an absence from employment under Division 8 of the Act. Section 90 then deals with payment for annual leave as follows:

Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

[18] Sections 92-94 set out the circumstances in which paid annual leave may be cashed out. Section 92 prohibits cashing out of annual leave except in prescribed circumstances:

Section 92 Paid annual leave must not be cashed out except in accordance with permitted cashing out terms

Paid annual leave must not be cashed out, except in accordance with:

- (a) cashing out terms included in a modern award or enterprise agreement under section 93, or
- (b) an agreement between an employer and an award/agreement free employee under subsection 94(1).

[19] Section 93, for the purposes of s.92(a), identifies the circumstances in which modern awards and enterprise agreements may include cashing out terms for the purposes of s.92(a). It provides:

Section 93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave

Terms about cashing out paid annual leave

- (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.
- (2) The terms must require that:
 - (a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and
 - (b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and
 - (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Terms about requirements to take paid annual leave

- (3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.

[20] Section 94 specifies the circumstances in which award/agreement free employees may cash out paid annual leave.

[21] Section 323 deals with the method and frequency of payment of certain employment entitlements. Section 323(1), which contains the prescription as to frequency, provides:

(1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:

- (a) in full (except as provided by section 324); and
- (b) in money by one, or a combination, of the methods referred to in subsection (2); and
- (c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

The conflicting decisions

[22] In *Hull-Moody Finishes Pty Ltd* ² Fair Work Australia (O’Callaghan SDP) was required to consider whether the *Hull-Moody Finishes Pty Ltd Enterprise Agreement 2011* was capable of approval under the Act. That agreement was, with respect to the system for the payment of annual leave, the same in all essential respects as the Agreement here, in that it provided for the payment of annual leave “progressively in advance” by way of an amount incorporated into the total hourly rate to be paid to employees for work performed, with the total rate of pay also encompassing a range of other entitlements including overtime. The Senior Deputy President identified two issues as arising with respect to the agreement’s annual leave provisions - the first being what the base rate of pay in the agreement was for the purpose of the entitlement in s.90(1) to payment for annual leave “*at the employee’s base rate of pay*”, and the second being whether the agreement provided for cashing out of annual leave in a manner not permitted by s.93.³ In respect of the first issue, the Senior Deputy

President determined that the base rate of pay for the purpose of the annual leave entitlement was the hourly rate specified in the agreement because, although it was loaded to include overtime, it was payable for the employee's ordinary hours of work.⁴ The implication of this conclusion, although not expressly stated by the Senior Deputy President, was that because the agreement calculated the annual leave amount incorporated into the hourly rate by reference to award rates of pay, it ousted the NES entitlement under s.90(1) to annual leave paid at the hourly rate in the agreement.

[23] As to the second issue, the Senior Deputy President said:

“[24] The provisions of s.90 require that employees be paid for annual leave periods at that base rate for the employee's ordinary hours during that time. The Annual Leave National Employment Standard does not provide the capacity for employees to be paid an amount of money in lieu of the entitlements to paid annual leave unless that leave is cashed out consistent with s.93(2). The provisions of s.93(2) limit the extent to which money could be given to an employee in lieu of that entitlement so as to ensure that employees must retain at least four weeks paid annual leave. I note that there is nothing in the relevant modern awards which details an inherently different approach.

[25] Consequently, even if a lesser amount than the hourly rate specified in the agreement is taken to be the employee's base rate of pay, such as the amount specified in clause 33.2, the agreement excludes employees from receiving payment for their ordinary hours of work whilst they are on annual leave. The agreement provisions are not ancillary or incidental to the National Employment Standard. They simply provide for a payment arrangement which excludes employees from payment at the base rate of pay for ordinary hours over the period of annual leave. To the extent that the agreement is argued to cash out annual leave, those cashing out arrangements contradict the limitations incorporated in the National Employment Standard. Finally, to the extent that s.55 could be argued to permit inclusion of payment for annual leave in the hourly rate, I consider the agreement provisions to be detrimental to employees and hence prohibited by s.55(4).

[26] The agreement provisions are not supplementary to the National Employment Standards; they deny employees payment over periods of annual leave, including the mandatory Christmas closedown.”

[24] The Senior Deputy President also found that, insofar as the agreement also loaded the NES entitlements to paid personal/carer's leave into the hourly rate, the agreement was inconsistent with the NES entitlement to paid personal/carer's leave in s.99 of the Act and permitted cashing out of that entitlement in a manner not permitted by s.100.⁵ The Senior Deputy President rejected an undertaking proffered by the employer on the basis that it did not resolve the problems he had identified, and refused to approve the agreement.

[25] This decision was appealed by the employer and the bargaining representatives of the employer and the employees. In *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti*⁶ a Full Bench of Fair Work Australia decided by majority to uphold the appeal. The majority (Vice President Watson and Hamberger SDP) firstly determined that the total hourly rate of pay specified in the agreement was not the base rate of pay for the purpose of s.90(1) because, having regard to the definition of “*base rate of pay*” in s.16(1), it included

overtime and annual leave payments. In respect of the issue as to whether, by paying for annual leave in advance, the agreement excluded the NES annual leave entitlement, the majority said:

“[38] In our view the concept of cashing out an entitlement to annual leave involves the making of a payment instead of recognising an entitlement to paid leave. The payment is made in substitution of the leave entitlement. When leave is cashed out, the entitlement to take leave is reduced by the amount compensated for by the alternative payment.

[39] In order to determine whether the terms of the agreement contravene s 55 or any term of the NES the nature of the benefits under the agreement must be identified and compared to the entitlements under the NES. Under the Agreement in this matter employees do not lose an entitlement to take leave. Nor are they deprived of payment with respect of leave that they take or that is untaken on termination of their employment. Indeed they receive payment with respect of their leave entitlements at the time the entitlement arises. Because they have already been paid for leave at the time it accrues, they do not receive any payment at the time they take the leave.

[40] Employees under the Agreement can take leave as provided for in the NES. They are obliged to take at least two weeks per year. If they do not take leave it will accrue until they subsequently take it. On termination of employment employees are entitled to receive payment for untaken leave. Under the Agreement they have already received payment of this entitlement in advance.

[41] The real difference between the conventional operation of the NES and the arrangement under this Agreement is the timing of payments. In our view there is no obligation in the NES to make a payment for annual leave at a particular time, although a delay in payment may be in a different category. Even if there was an obligation to pay for leave at the time it is taken, we do not believe that payment in advance amounts to the exclusion of the entitlement to payment. The Senior Deputy President placed some importance on payment being made at the time of taking leave. We cannot see any basis for this in the NES. In our view each of the benefits conferred by the NES are provided for by the Agreement.

[42] We do not agree that the arrangement involves the cashing out of annual leave because the payment incorporated into wages does not extinguish the entitlement to leave. In our view it is not permissible to speculate as to how employees will conduct their leave arrangements under the Agreement or consider whether the arrangement encourages them to adopt one approach or another.

[43] In determining this matter the focus must be on whether the benefits provided by the NES are retained or removed by operation of the payment arrangements. As the amount of leave available to be taken is equivalent to that provided for in the NES, and the Agreement provides for payment with respect to annual leave at the level required by s 90, we do not believe that the arrangement is inconsistent with the NES. It is unnecessary to consider the prohibition of cashing out or the conditions in the Act with regard to cashing out as the arrangement cannot properly be described as cashing out.

[44] We find that the payment arrangement in the Agreement does not exclude the NES because the NES is expressly adopted, each of the annual leave benefits in the NES are reflected in the Agreement and the payment arrangement does not amount to cashing out of annual leave.”

[26] Commissioner Cambridge dissented. The gravamen of his reasoning was contained in the following part of his decision:

“[49] The Appellants and the majority, have contended that the period of the leave is a period of paid leave because the hourly rate has included payment made in recognition for the leave, in effect, payment made incrementally in advance. The majority see no legislative basis for there to be any particular connection between time of payment and time of taking leave. Additionally, the leave is said not to have been cashed out because the leave remains available to be taken.

[50] The issues of contest can be summarised by the following two questions. Does the Act, Division 6 of Part 2-2 in particular, contemplate that a period of paid annual leave might involve payment incrementally in advance and therefore no payment would be made at around the commencement of or during the period of absence on the leave? If payment is made incrementally in advance does this amount to the cashing out of paid annual leave? These questions essentially involve an exercise of statutory interpretation.

[51] The definition of “paid annual leave” in s.12 of the Act refers to s.87. Section 87 does not include any mention of the time when payment of annual leave must be made so as to satisfy the terminology “paid annual leave”. In addition, the absence of any definition of “cashing out” and the use of such terminology does provide for ambiguity, uncertainty and a potential result that was manifestly unreasonable and thus permits the interpretation to involve the use of extrinsic materials via application of section 15AB of the Acts Interpretation Act 1901.

[52] The words in Division 6 need to be approached having cognisance of the context in which they appear. The terms form part of national legislative minimum entitlements which provide basic benefits to employees. The statutory interpretation exercise therefore involves provisions which operate as a safety net. Inherently there are issues involving the preservation and protection of minimum employment conditions. In this particular analysis the protected benefit is of four weeks paid annual leave and the impact on that benefit by arrangements described as cashing out.

[53] In my view the approach adopted by the majority has not, with respect, had sufficient regard for the beneficial, protective context of the provisions under examination. In particular there has not been proper appreciation and weight given to the indisputable fact that “... *the matters in s.93 (2) are in the nature of protections for employees and could be described as safeguards.*”

[54] When properly considered as underlying safeguards, the words of subsection 93(2) (a) of the Act should be construed in the context of the purpose for which the Standards prescribed by Division 6 of Part 2-2 are made. Division 6 establishes various minimum terms for paid annual leave such that subsection 93(2) is a safeguard which intends that no terms in a modern award or enterprise agreement

which deal with payments made in connection with annual leave, however described or configured, are to create an arrangement whereby it “...*would result in the employee’s remaining accrued entitlement to paid annual leave being less than 4 weeks.*” [emphasis added]

[55] The fundamental notion of paid annual leave is defeated if at around the commencement of or during the period of actual leave, there is no payment provided in respect of the period of absence from work. The redirection of the payment into an hourly rate creates such disconnection with the period of absence from work so as to effectively make the period of absence a period of unpaid leave. The obvious practical outcome is to establish financial disincentive for the taking of the period of leave. Thus the rationale for the establishment of paid annual leave involving annual rest and recuperation away from work is impugned and the protected benefits and safeguards intended by Division 6 are violated.”

[27] The Commissioner also noted that the appeal had been conducted without the benefit of a contradictor [7](#), and said:

“[76] In my view the absence of any carefully developed and articulated argument against approval of the Agreement should introduce a level of caution towards upholding an Appeal which has broad ramifications including potentially undermining a legislative safety net provision.”

[28] In *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd* [8](#) the Federal Court (Gray J) considered an application for civil penalties to be imposed under the Act in respect of an employer which, in accordance with the provisions of an Australian Workplace Agreement (AWA) entered into under the *Workplace Relations Act 1996* and remaining in effect by virtue of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, had paid an employee an extra 1.5 hours’ pay each week in lieu of any entitlement to payment when the employee utilised any of his ten days’ sick leave entitlement. The application alleged that this method of payment contravened ss.100 and 101 of the Act, which prohibited the cashing out of personal/carer’s leave except in accordance with terms of a modern award or an enterprise agreement complying with the standards set out in s.101.

[29] The Court determined that the sick leave provisions contained in the AWA provided in effect for the cashing out of sick leave in a manner not permitted by s.101 of the Act, and were therefore unenforceable because otherwise they would displace the NES personal/carer’s leave provisions in s.101. The Court’s reasoning was as follows:

“[18] The online edition of the Macquarie Dictionary defines “*cash out*” as meaning “to take in monetary form”. It gives as an example “*to cash out one’s annual leave.*” It is interesting that there is also a definition of “*cash in*”, which means “to obtain cash for”. The example given is “*to cash in an insurance policy.*” The use of prepositions that are antonyms, in conjunction with the word “cash” as a verb, gives rise to two expressions that are highly similar, if not identical, in meaning. There is nothing to indicate that the phrases “cashed out” and “cashing out”, used in ss 100 and 101 of the Fair Work Act, have anything other than their ordinary meaning, which in this case corresponds with the dictionary meaning. In other words, s 100 provides that paid personal/carer’s leave must not be taken in monetary form (as distinct from in the

form of leave), otherwise than in accordance with terms included in a modern award or enterprise agreement, which comply with the standards in s 101(2) and provide for such leave to be taken in monetary form.

[19] It is clear that it is the entitlement to take paid personal/carer's leave that is capable of being cashed out, rather than the leave itself. If leave is taken, there is an obligation on the employer to pay the employee at the appropriate rate, pursuant to s 99 of the Fair Work Act (or, in this case, pursuant to cl 13.5(b) of the individual agreement). It is only untaken leave entitlements for which a monetary payment could substitute. Once this conclusion is reached, it becomes clear that the leave to which cl 13.5(b) of the individual agreement entitled Mr de Thierry was required to be paid leave on and after 1 January 2010, when the National Employment Standards came into operation. Reference to s 97(a) of the Fair Work Act makes it clear that the sick leave to which Mr de Thierry was entitled is paid personal/carer's leave for the purposes of the National Employment Standards. If cl 13.5(b) does not of itself provide that entitlement, the entitlement arises from s 96(1) in conjunction with s 61(1) of the Fair Work Act, by setting a standard of 10 days of paid personal/carer's leave for each year of service with the employer, which cannot be displaced.

[20] To understand this is to understand that one argument put on behalf of Jeld-Wen cannot be accepted. That argument is that the prohibition on leave being cashed out for which s 100 of the Fair Work Act provides is limited to entitlements that have accrued. The prohibition is equally capable of application to entitlements yet to be accrued as it is to entitlements already accrued. The mere fact that money was paid in advance would not render the payment any less a payment in substitution for the entitlement than if the payment were made after the entitlement had accrued. In any event, cl 13.5(c) of the individual agreement did not provide for payment in advance. Clause 13.5(b) gave rise to an immediate entitlement, at the beginning of each year of service, to be taken at any time during the year in the event of the occasion for leave arising. The effect of cl 13.5(c) was to spread the payment over the entire year, so that it would be made whether or not the leave had actually been taken. (The question whether s 96(2) of the Fair Work Act has the effect of converting the entitlement to one that accrues progressively during a year of service remains to be determined on a future occasion.)

[21] The effect of cl 13.5(c) of the individual agreement is to provide that paid personal/carer's leave is cashed out. There is no suggestion of the existence of any modern award or enterprise agreement, containing terms providing for the cashing out of paid personal/carer's leave, complying with s 101(2) of the Fair Work Act, so as to permit Jeld-Wen to cash out the leave entitlement. Because cl 13.5(c) provides for cashing out, it must be unenforceable, by virtue of s 61(1) of the Fair Work Act. If this were not so, cl 13.5(c) would operate to displace the standard for which s 100 provides. From 1 January 2010, therefore, Jeld-Wen had an obligation to provide Mr de Thierry with 10 days of paid personal/carer's leave each year. Jeld-Wen could not substitute a monetary payment, whether in weekly parts or otherwise, for that entitlement."

[30] Although *Jeld-Wen* is concerned with the NES personal carer's leave entitlements rather than annual leave, it is nonetheless clear that its reasoning is inconsistent with that of the Full Bench majority in *Hull-Moody*. The decision in *Jeld-Wen* was delivered on 6 February 2012,

but the hearing in the matter took place on 30 May 2011, well before the *Hull-Moody* appeal decision was delivered on 29 November 2011, so that it is likely that the Court's attention was not drawn to *Hull-Moody*. It is certainly not mentioned by the Court in its decision. In *Jeld-Wen*, the Court founded its conclusion on two propositions. The first was that the requirement for payment for personal/carer's leave under s.99 of the Act was a requirement which applied at the time the leave is taken. The second was that when the Act, in ss.100 and 101, referred to "*cashing out*", it was referring to the cashing out of *paid* personal carer's leave, not the leave itself. The decision of the Full Bench majority in *Hull-Moody* adopted conclusions which were directly contrary to these propositions in respect of annual leave provisions which are, for relevant purposes, difficult to distinguish from the personal/carer's leave provisions.

[31] The conflict in reasoning between the majority decision in *Hull-Moody* and *Jeld-Wen* has led to inconsistency in single-member decisions in this Commission. In *BM & KA Group as trustee for BM & KA Group Unit Trust* [9](#) the Commission (Cribb C) determined that an agreement which provided for the "pre-payment" of annual leave and personal/carer's leave through a loaded wage rate contravened s.55 of the Act by excluding the NES leave entitlements. That decision was based upon a preference for the treatment in *Jeld-Wen* of the expression "*paid personal carer's leave*" as a composite term over the majority reasoning in *Hull-Moody* in which the treatment of the expression "*paid annual leave*" as a composite expression was not considered.[10](#) However in *Robjohn Enterprises Pty Ltd*[11](#) an agreement which provided for the payment in advance of annual leave and personal leave by way of a loaded wage rate was approved by the Commission (Bull C) on the basis that the majority decision in *Hull-Moody* was binding.[12](#)

Submissions

[32] Mr Warren submitted that the Agreement should be approved consistent with the majority decision in *Hull-Moody*, which was correctly decided. He submitted that the use of the word "*paid*" in the expression "*paid annual leave*" as it appears throughout Division 6 of Part 2-2 of the Act was only for the purpose of distinguishing annual leave from leave without pay; "*paid annual leave*" was otherwise not intended to have a meaning distinct from "annual leave". The Act, by the use of that expression or otherwise, did not require that annual leave be paid for during or immediately before the period it was taken. The time at which payment for annual leave could be made was a matter that could be dealt with in an enterprise agreement as a term ancillary or incidental to the operation of the NES annual leave entitlement pursuant to s.55(4)(a). Awards such as the *Building and Construction General On-site Award 2010* (which was the relevant award for Canavan) which required payment for annual leave to be made in advance did not constrain payment for annual leave being made at any time before the leave was taken, either in a single payment or progressively. [13](#)

[33] Ai Group and the ACCI made submissions which generally accorded with the interpretation of the relevant provisions of the Act advanced by Mr Warren, without necessarily endorsing the precise payment methodology in the Agreement. We will not recite their submissions where they were in substance the same as those of Mr Warren. Ai Group submitted that the annual leave provisions such as those found in the Agreement did not contravene s.55(1) in that they did not contain any express exclusion of the NES or an exclusion of the effect or benefit of the NES. Such agreement terms instead adopted and provided to employees the full annual leave benefits of the NES, with its provision for

payment in advance being a term ancillary or incidental to the operation of the NES entitlement authorised by s.55(4). Ai Group in that connection made reference to the statutory note that accompanies s.55(4) and identifies that such an ancillary or incidental term may, as an example, include a term that specified when payment under s.90 for paid annual leave must be paid. It submitted that a term that allows for payment of annual leave in advance, as in the Agreement, does not result in any detriment to employees but rather a benefit, since employees would have early use of the money. The AIG sought to distinguish the decision in *Jeld-Wen* on the basis that it did not concern the approval of an enterprise agreement, involved a different NES entitlement and different provisions of the Act, and dealt with a payment system for personal/carer's leave that was quite different to the payment system in the Agreement.

[34] The ACCI submitted that neither s.87 nor s.90 contained any affirmative statement about when an employee is to be paid when they take annual leave. There is nothing unusual about payment being made for annual leave in advance, and the ACCI pointed in this respect to modern award provisions requiring this, as well as statutory provisions such as s.3(6)(b) of the *Annual Holidays Act 1944* (NSW). The law relating to the set-off of award entitlements, established in cases such as *Poletti v Ecob* [14](#), *Ray v Radano* [15](#), *Otis Elevator Company Pty Ltd v Logan* [16](#) and *Maslen v Core Drilling Services Pty Ltd* [17](#), demonstrates that employees may be paid an entitlement by way of aggregated remuneration rather than directly provided that the employer makes clear to the employee that a particular payment is being made in lieu of another entitlement. The type of payment in advance system contained in the Agreement did not amount to cashing out, the ACCI submitted, because, consistent with the reasoning of the majority in *Hull-Moody*, the fact that an employee has been paid in advance for a period of leave does not render a period of leave taken at a later date without further payment as “unpaid” leave.

[35] The ACTU submitted that the Agreement was incapable of approval under the Act because it contravened s.55(1). It pointed to s.90(1) as establishing a requirement that payment for annual leave was to occur only if an employee took a period of paid annual leave. The effect of clause 41 of the Agreement was to exclude s.90(1) by providing a different contingency for the payment of annual leave than that provided for by s.90(1). Clause 41 was not saved by s.55(4) because it was not ancillary, incidental or supplementary to the operation of the NES entitlement in s.90(1), but rather provided for a completely different entitlement to payment which was unconditioned by anything apart from turning up to work. Additionally, the expression “*paid annual leave*” connoted leave for which payment was made at the time the leave was taken. This interpretation of the expression is supported by the origins of the paid annual leave entitlement and universally accepted norms. The method of payment provided for in the Agreement constituted the cashing out of annual leave contrary to s.92, because on receipt of the loaded rate the employee forwent an entitlement to paid annual leave, retaining only an entitlement to take unpaid annual leave. *Hull-Moody* was wrongly decided and should not be followed.

Consideration

[36] Section 55(1) of the Act relevantly provides that an enterprise agreement “*must not exclude*” the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), we consider that if the provisions of an agreement would in their operation result in

an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES. That was the approach taken by the Full Bench in *Hull-Moody*. [18](#) The correctness of that approach is also confirmed by the Explanatory Memorandum for the *Fair Work Bill 2009* as follows:

“209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56).”

[37] We will consider whether the Agreement excludes the NES provisions concerning annual leave on this basis.

[38] There is an immediate reason why the Agreement cannot be approved in its current form, irrespective of whether the Act allows for the payment of annual leave in advance or whether the Agreement provides for the cashing out of annual leave in a manner not permitted by the Act. The obligation for payment for annual leave in s.90(1) requires that the payment be made at the employee's base rate as it is at the time the leave is taken. This is made clear by the words “*must pay the employees at the employee's base rate of pay for the employee's ordinary hours of work in the period*” (underlining added), the “*period*” being the “*period of paid annual leave*” taken by the employee. The ACCI and Ai Group accepted this was the case, and no party submitted otherwise. Because the Agreement provides for payment for annual leave on a progressive basis in advance rather than when annual leave is taken, and also provides for increases in the rates of pay during the life of the Agreement, it permits annual leave to be paid for, at least in part, at an earlier and lower rate of pay rather than the rate of pay applicable at the time that leave is taken. Therefore compliance with the terms of the Agreement does not require compliance with the payment obligation in s.90(1), and may result in that obligation not being complied with. To that extent, the NES provision in s.90(1) is excluded, contrary to s.55(1) of the Act.

[39] The same conclusion would apply to the agreement considered and approved by the Full Bench majority in *Hull-Moody*, which as earlier observed was the same in all relevant respects as the Agreement here. Due to the lack of a contradictor in the *Hull-Moody* appeal, this issue does not appear to have been raised or considered. It nonetheless follows that the Full Bench majority in *Hull-Moody* was in error in approving the agreement under consideration in that matter.

[40] However, because it is possible that this impediment to approval could be overcome by an undertaking in appropriate terms, it remains necessary for us to consider whether the “pre-payment” or “self-funded” system for annual leave contained in the Agreement contravenes s.55(1) even if a mechanism could be developed to ensure that payment is made at the base rate applicable when the employee takes leave.

[41] The starting point for our consideration is to identify the meaning of the expression “*paid annual leave*” as used in Division 6 of Part 2-2 of the Act. The Division consistently uses the expression “*paid annual leave*”, not merely annual leave, in its prescription of the annual leave entitlement. The quantum of the entitlement as prescribed in s.87(1) is for the specified number of weeks of “*paid annual leave*”. Section 88 prescribes when “*paid annual leave*” may be taken. Section 89 specifies certain times at which an employee may be taken

not to be on “*paid annual leave*”. Section 90(1) identifies the requirement for payment of annual leave when an employee takes a period of “*paid annual leave*”. And, critically, ss.92-94, in dealing with cashing out, refer to the cashing out of “*paid annual leave*”. The consistent use of the expression strongly suggests its fundamental significance to the nature of the entitlement established by the Division.

[42] The definition of the expression in s.12 is of little utility except insofar as it repeats within the definition the whole of the expression itself, again emphasising that “*paid annual leave*” is to be treated as the basal concept in the scheme. We consider that it should be treated as a composite expression, in which payment for the leave is inextricably linked to the leave itself. As a matter of the ordinary understanding of that composite expression, and consistent with the approach taken by Gray J in *Jeld-Wen*, we consider that “*paid annual leave*” means annual leave with pay, in the sense that the pay is provided together with the leave.

[43] Both the internal and the historical contexts of the Act support this approach. Internally, s.90, which deals with payment for annual leave, is the critical provision. Interpreted in accordance with its ordinary meaning, s.90(1) by the use at its commencement of the word “*If*” identifies a condition or contingency upon the satisfaction or occurrence of which a specified requirement applies. The condition or contingency is that “*an employee takes a period of paid annual leave*”. The requirement is that “*the employer must pay the employee’s base rate of pay for the employee’s ordinary hours of work in the period*”. It is therefore clear that the requirement to make payment in respect of paid annual leave arises when the employee actually takes the annual leave. It may also be noted, although not directly relevant here, that s.90(2) is constructed in a similar way: with respect to untaken paid annual leave; the condition or contingency is “*when the employment of an employee ends*”, and the requirement is that “*the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave*”. Thus, upon termination of employment, untaken annual leave must be paid out.

[44] Section 90(1) therefore confirms that the statutory scheme is founded on there being a temporal connection between the taking of annual leave and the payment for such leave. Section 323(1)(c), which deals with the frequency of payment for amounts payable to employees in relation to the performance of work - including, as the accompanying statutory note indicates, leave payments - further confirms this, in that such payments must be made “*at least monthly*”. In relation to annual leave, this provision only makes sense if read as a requirement for employers to pay for annual leave within the pay cycle that the leave is taken, such pay cycle being at least monthly in frequency. Paragraph 1283 of the Explanatory Memorandum for the *Fair Work Bill* supports s.323(1)(c) together with the statutory note being read in this way (underlining added):

“The legislative note after this subclause makes clear that the payment rule covers a wide range of payments, where they fall due during the relevant payment period - including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments.”

[45] On the contrary approach taken by the majority in *Hull-Moody* and advanced in this appeal, namely that Division 6 of Part 2-2 establishes no connection between the taking of and payment for annual leave, no practical work can be assigned to s.323(1)(c) in respect of annual leave, because there is never any time at which payment for annual leave falls due,

and therefore any part of the amount may be paid at any time. We note in this connection that the majority in *Hull-Moody* recognised a difficulty in this approach in that while they said that “there is no obligation in the NES to make a payment for annual leave at a particular time”, they went on to say that “a delay in payment may be in a different category” without identifying why that would be the case. In fact, on the *Hull-Moody* majority’s approach, there would be no statutory impediment to payment for annual leave being made at any time before or after the taking of annual leave. The detrimental consequences of that result are obvious and are strongly suggestive of fallacy in that approach. The interpretation of the expression “paid annual leave” in Division 6 of Part 2-2 and of ss.90(1) and 323(1)(c), which we favour, avoids that result.

[46] The historical context is of significant assistance in understanding the provisions of Division 6 of Part 2-2. [19](#) The enactment by the legislature of a NES entitlement to paid annual leave in the Act did not occur in a vacuum, but rather against the lengthy historical background of the development and establishment of paid annual leave as a standard industrial entitlement through decisions and awards of industrial tribunals and earlier State and federal statutory provisions. We consider that we are entitled, under s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth), to have regard to that historical context in order to confirm that the meaning of “paid annual leave” and s.90 “is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act”.

[47] Foundational arbitral decisions concerning annual leave referred to an entitlement to “annual leave on full pay” [20](#), “an adequate period of respite, without loss of income” and “a minimum annual holiday of two continuous weeks, with pay”[21](#). The earliest statutory provisions for annual leave expressed the entitlement in a similar way: for example, s.3(1) of the *Annual Holidays Act 1944* (NSW) provided for an entitlement to “an annual holiday of two weeks on ordinary pay”, and s.10A(2) of the *Industrial Conciliation and Arbitration Act 1932-1945* (Qld) as amended by s.4 of the *Industrial Conciliation and Arbitration Acts Amendment Act 1946* (Qld) provided for “an annual holiday on full pay”. The NSW statute (s.3(6)(b)) required the employer to “pay each worker in advance before the commencement of the worker’s annual holiday, his ordinary pay for the holiday period”, and the Queensland statute (s.10A(3)) similarly required that the annual holiday “be paid for in advance at the ordinary rate payable to the employee immediately prior to such annual holiday”. The standard award provision for annual leave established by the *Metal Trades Annual Leave Case*[22](#) in 1946 and the NSW statute (s.3(5)) both contained prohibitions against the making and acceptance of payment in lieu of the annual leave entitlement. It is clear, we consider, that the development of the entitlement of annual leave by industrial tribunals and legislatures did not contemplate anything other than that annual leave would be taken by employees and paid for at the time it was to be taken (except in respect of the payment of untaken accrued annual leave upon termination of employment). References to payment for annual leave in advance in that context are to be read, we consider, as payment before the period of leave commenced but once the decision to provide, and take, the leave had been made - not at some indeterminate earlier period.

[48] That position remained unchanged for many decades. In 1987, a Full Bench of the NSW Industrial Relations Commission in *Bakers (Cumberland) Conciliation Committee* [23](#) rejected a consent application to vary an award which permitted the cashing out of an additional leave entitlement as contrary to established industrial principles[24](#), and indeed Cahill VP went so far as to refer to “industrial morality” in his rejection of the claim.[25](#)

Similarly in 1994, the Australian Industrial Relations Commission (Watson DP) declined to approve an enterprise flexibility agreement under the provisions of the *Industrial Relations Act 1988* (Cth) because it contained provisions permitting the cashing out of annual leave which were considered to be contrary to the public interest in that they involved the diminution of an entitlement in the nature of a community standard.²⁶

[49] The well-established position concerning the industrial standard for annual leave began to be altered when specific legislative provision began to be made for the cashing out of annual leave. The first example of this appears to have been s.8 of the *Minimum Conditions of Employment Act 1993* (WA), which permitted an employer and employee to agree in writing that the employee forgo his or her annual leave entitlement if the employee was given “*an equivalent benefit in lieu of the entitlement*”. Section 8 operated as an exception to the general entitlement conferred by s.23 to “*paid annual leave*”, payment for a period of which was, under s.24(1), to be made “*in the normal course of employment*” unless the employee requested in writing to be paid before the period of leave commenced.

[50] In the federal sphere, cashing out of annual leave was first permitted under the *Workplace Relations Act 1996* (Cth) as amended by the *Workplace Relations (Work Choices) Amendment Act 2005* (Cth). The *Workplace Relations Act* as amended by the Work Choices legislation established for the first time a federal legislative annual leave prescription of general application, as part of the “*Australian Fair Pay and Conditions Standard*”. The entitlement “*guarantee*” in s.232 of the amended *Workplace Relations Act* was expressed in terms of “*paid annual leave*” (not defined). Section 235(1) set out the “*payment rules*” applicable upon the taking of annual leave as follows:

(1) If an employee takes annual leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).

[51] Section 233 entitled an employee to elect to forgo an annual leave entitlement credited to the employee (subject to a limit of half the entitlement accrued each year) with the authorisation of the employer, provided that an applicable workplace agreement provided for such an entitlement on the basis that the employee would receive payment at the employee's base rate for any leave so forgone. The section did not actually use the expression “cashing out”, but instead referred to an entitlement to “*forgo*” annual leave. However, the explanatory memorandum for the Work Choices legislation ²⁷ repeatedly referred to the provision as being concerned with an entitlement to cash out annual leave.

[52] The position that emerges from the historical context at the time the Act was enacted is therefore that annual leave was an entitlement which involved payment at the employee's ordinary rate of pay, with such payment being made during the taking of the leave in accordance with normal pay arrangements or immediately before the leave was taken. However, a specific exception to this entitlement was created by statutory provisions permitting the cashing out of annual leave in prescribed and limited circumstances. That historical context confirms that “*paid annual leave*” in Division 6 of Part 2-2, and s.90, are to be interpreted in the way earlier identified.

[53] It follows that we cannot accept the submission that the provisions in the Agreement concerning “pre-payment” for annual leave can be characterised as provisions merely

ancillary or incidental to the operation of the NES annual leave entitlement and are thus authorised by s.55(4) of the Act. For the reasons we have set out, the scheme of self-funded or pre-paid annual leave provided for by the Agreement does not constitute “*paid annual leave*” as contemplated by the Act at all. To the extent, as indicated by the accompanying statutory note, that an enterprise agreement may under s.55(4) contain ancillary or incidental provisions concerning when payment for annual leave is to be made, such provisions would necessarily have to be consistent with the concept of “*paid annual leave*” as we have earlier described it. Provisions which require payment immediately before the leave is taken, or at identified intervals during the period of leave, or in accordance with the normal pay cycle at the time leave is taken, are the type of provisions in this respect which would be authorised by s.55(4). Modern award provisions concerning payment for annual leave, such as that in the *Building and Construction General On-site Award 2010* referred to by Mr Warren, are to be understood in this way: they provide for payment in advance for an actual period of annual leave which has been arranged to be taken, not a payment made in respect of any future annual leave entitlement whenever it is taken or whether taken at all.

[54] The interpretation of relevant provisions of the Act advanced by Mr Warren and the various employer groups (and as stated in *Hull-Moody*) would in application have consequences which are entirely improbable. For example (and as was conceded by the ACCI), if pre-payment of annual leave was permissible under the Act, that would include the capacity to pre-pay for annual leave for any number of years in the future at the commencement of employment or at some other time, regardless of whether such leave was ever taken or not. It would further follow that, in connection with bargaining for an enterprise agreement, it would be available for employees to take protected industrial action in support of a claim that annual leave entitlements over the life of the proposed agreement be paid to employees “in advance” by way of a single payment regardless of whether such annual leave is ever actually taken or not. Such a consequence is so far removed from the ordinarily-understood concept of “*paid annual leave*” that it cannot have been intended by the legislature, and constitutes a further reason why that interpretation cannot be accepted. [28](#) The requirement for payment in s.90(1), as we have earlier interpreted it, avoids such consequences in a way which provides mutual protection for employers and employees.

[55] We therefore conclude that the Agreement, in providing in clause 7.1 of Annexure B that employees are required to fund any time taken off work by way of annual leave, excludes the NES provisions for annual leave contrary to s.55(1) of the Act in two inter-related respects:

- (1) it excludes the entitlement to “*paid annual leave*” in s.87(1); and
- (2) it excludes the requirement for payment in respect of annual leave in s.90(1).

[56] Additionally we consider that the scheme of “pre-payment” of annual leave in the Agreement constitutes cashing out of annual leave in a manner inconsistent with s.93, with the result that the prohibition in s.92 is excluded. Once it is understood that “*paid annual leave*” means annual leave accompanied by pay when it is taken, then the prohibition in s.92 must be understood as prohibiting the making of a payment which would lead to the employee forgoing his or her entitlement to later take annual leave *with pay* (unless such cashing out is authorised by s.93 or s.94). This is what the Agreement if approved would do. Mr Warren did not contend that the annual leave payment provisions in the Act constituted a cashing out provision in an enterprise agreement which complied with s.93, and it is clear that it does not because the Agreement does not contain any provision which would ensure a

minimum accrual of four weeks' paid leave would remain in place, and does not require a written separate agreement between the employer and the employee in order for the cashing out to occur.

[57] It would probably follow from our reasoning and the decision of Gray J in *Jeld-Wen* that the provisions in the Agreement concerning "pre-payment" for personal/carers leave also offend s.55(1) of the Act. However because this issue was not properly argued before us, and because it is unnecessary for us to do so, we will not express a final view about this issue at this point.

[58] The Agreement as it currently stands cannot be approved, because we cannot be satisfied for the purpose of s.186(2)(c) that the terms of the Agreement do not contravene s.55. However we will give Canavan an opportunity to proffer undertakings which might allow the Agreement to be approved under s.190. In deciding whether and how it might avail itself of this opportunity, Canavan should give consideration to the issue of personal/carer's leave as well as annual leave.

PRESIDENT

Appearances:

I. Warren for Canavan Building Pty Ltd

N. Ward for the ACCI

B. Ferguson for Ai Group

R. Reitano of counsel for the ACTU

Hearing details:

2014.

Melbourne:

1 April.

[1 MA000020](#)

[2 \[2011\] FWA 5618](#)

[3 Ibid at \[21\]](#)

[4 Ibid at \[23\]](#)

[5 Ibid at \[28\]-\[31\]](#)

[6 \[2011\] FWAFB 6709](#)

[7 Ibid at \[75\]](#)

[8](#) [2012] FCA 45; (2012) 213 FCR 549

[9](#) [\[2013\] FWC 3654](#)

[10](#) Ibid at [25]-[29]

[11](#) [\[2013\] FWCA 6685](#)

[12](#) Ibid at [24]-[29]

[13](#) Clause 38.2(a) of the *Building and Construction General On-site Award 2010* provides: “*Instead of the base rate of pay as referred to in s.90(1) of the Act, an employee under this award, before going on annual leave, must be paid, in advance, the amount which they would have received for working ordinary time hours if they had not been on leave.*”

[14](#) [1989] FCA 492, (1989) 30 IR 343

[15](#) [1967] AR (NSW) 471

[16](#) S119/1999 [2000] HCATrans 84 (10 March 2000)

[17](#) [2013] FCCA 460

[18](#) At [26]; see also *Re Armacell Australia Pty Ltd* (2010) 202 IR 38 at [18]-[19]

[19](#) See *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36 at [45], [52]-[59] for an example of the way in which historical context may be used as an aid to statutory interpretation.

[20](#) *Printing and Allied Trades Employers Federation of Australia v Printing Industry Employees Union of Australia* (1936) 36 CAR 738 at 746

[21](#) *Metal Trades Annual Leave Case* (1945) 55 CAR 595 at 597

[22](#) Ibid at p.601, cl.7.

[23](#) (1987) 20 IR 152

[24](#) Ibid at 166 and 181.

[25](#) Ibid at 181.

[26](#) *Arrowcrest Group Pty Ltd* [1994] AIRC 1054, Print L4310

[27](#) At paragraphs 511-516

[28](#) See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Leslie Holland

v

UGL Resources Pty Ltd T/A UGL Resources
(U2011/11538)

DEPUTY PRESIDENT MCCARTHY

PERTH, 23 APRIL 2012

Termination of employment - casual employee - minimum period of employment - continuous period of service - regular and systematic employment.

Background

[1] Mr Leslie Holland (the Applicant) was employed on a casual basis by UGL Resources Pty Ltd T/A UGL Resources (UGL) for various periods during 2003-2011.

[2] Between 2003 and 2011, UGL was contracted by Verve Energy to provide onsite mechanical and electrical maintenance work at their Kwinana and Muja Power Stations. UGL performed outage work on boiler turbine and associated equipment for Verve Energy (Verve). “Outage work” is major shut down work to complete statutory compliance work and to carry out essential maintenance work to ensure the reliability of the unit until its next planned major outage. Verve Energy is owned by the Western Australian Government and generates about 60% of all the electricity in the Western Australian market.

[3] The number of major outages that UGL performs each year varies but is usually one or two per year. Outage work usually lasts about six to eight weeks. The number of employees required for each major outage varies. On average, UGL requires 180-220 employees on each major outage.

[4] It is not in dispute that the nature of the Applicant’s engagements involved employment on a casual basis and that he had been employed by UGL for outages at Muja and for periods of work at other sites since 2003 for varying periods. It is also not disputed that the Applicant has been employed by a number of other employers throughout the period of 2003 to 2011.

[5] The complete work history of the Applicant with UGL was summarised by UGL in the following table:

Year	Date	Site
2003	17 October - 13 November	Muja
2004	20 - 27 February	Cape Lambert
	29 March - 28 April	Kwinana
	4 June - 23 July	Hismelt
	6 September - 20 November	Kwinana
2005	11 April - 14 May	Kwinana
	10 October - 9 November	Muja
2006	8 September - 5 December	Muja
2007	2 April - 1 June	Muja
	10 September - 11 October	Muja
2008	27 March - 3 May	Muja
2009	9 July - 11 September	Muja
2010	16 February - 22 March	Worsley
	19 April - 4 May	Muja
2011	17 January - 18 February	Worsley
	18 May - 22 July 2011; 22 - 27 August	Muja

[6] Some of the periods of employment are disputed but none of those since 2009.

[7] UGL asserts that the Applicant does not satisfy the requirements of the *Fair Work Act 2009* (the FW Act) asserting that he was not employed for a minimum period of six months. They argue that:

- (i) the Applicant was not employed on a regular and systematic basis;
- (ii) the Applicant should not have had a reasonable expectation of continuing employment by the employer on a regular and systematic basis;
- (iii) periods of service prior to 2011 should not count because the Applicant resigned in May 2010;
- (iv) the relevant period of service commenced on 17 January 2011; and
- (v) periods in 2011, when work was not performed, do not count as service and therefore, the aggregate of service that does count is less than six months.

[8] The Applicant asserts that he had continuous service with UGL for the period from 9 July 2009 until his dismissal on 27 August 2011. He also asserts that he was a casual employee engaged on a regular and systematic basis throughout that period and that he had a reasonable expectation of further employment.

[9] The total time worked, if all of the work undertaken since 9 July 2009 is included, is about 28 weeks. The total time worked, if only the periods since 17 January 2011 are included, is 14 weeks. If only the periods of work at Muja are included, the total time for all periods since 9 July 2009 is 21 weeks. Therefore, for the Applicant to achieve the six month minimum he must have been in continuous service since 9 July 2009 and periods of work must include work at Muja and at Worsley.

The Legislation

[10] The FW Act provides that a person who is protected from unfair dismissal includes a person who is an employee who has completed a period of employment with his or her employer of at least the minimum employment period.ⁱ The relevant minimum period of employment for this matter is six months.ⁱⁱ

[11] The FW Act defines period of employment in s.384(1) as follows:

“An employee’s *period of employment* with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.”

[12] The FW Act then goes on to provide in s.384(2) that:

“(2) However:

(a) a period of service as a casual employee does not count towards the employee’s period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and”

....

[13] The determination of whether an employee’s period of employment “at a particular time” meets the six month minimum requirement of s.383 is prescribed by s.384(1). If “the” period of “continuous” service “at that time” is six months, then the requirement of s.383 is met.

[14] Section 384(2) provides which periods of casual service should count in ascertaining the employee’s period of employment. A period of casual service may only count in that calculation if the circumstances of (a)(i) and (ii) exist.

[15] The FW Act, thus in this matter, requires a determination as to:

- (i) what was the period of employment at a particular time?
- (ii) what was the period of continuous service for that period of employment?
- (iii) was that period of service on a regular and systematic basis?
- (iv) during that period, did the Applicant have a reasonable expectation of continuing employment on a regular and systematic basis?

[16] The wording in s.384 with respect to various times and periods is specific. Firstly, s.384 refers to “a” period of employment “at a particular time”. It also states that “the” period of employment is “the” period of service completed “at that time”. The period of employment clearly must be “a” singular period of service and not multiple or a plurality of periods of service. That singular period also must be a singular “continuous” period of service “at that

time”. The meaning of a period of service then envisages different periods of service but only the last of those periods of service count for the purpose of ascertaining the length of the period. Other periods, which may be previous periods of service, do not count.

[17] What s.384(2) then specifies is that “a” period of service as a casual does not count towards the employee’s period of employment unless it has the characteristics of being regular and systematic and expected to continue on that basis. The period of service referred to in s.384(2)(a) is “a” singular period. What s.384(2)(a) and (b) do is to regard regular and systematic engagements as “a” period of service.

[18] Importantly, s.384(2) does not refer to a plurality of periods of service to determine the nature of the relationship but rather, the nature of the relationship is determined by the nature of the one singular period. There is no notion of counting discrete periods of prior service. Thus, s.384(2) does not alter the condition attached to s.384(1) viz; that the period of service at a particular time needs to be a continuous period.

[19] Section 12 of the FW Act prescribes that “continuous service” has a meaning affected by s.22. “Service” and “continuous service” are dealt with in s.22 as follows:

“(1) A period of *service* by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an *excluded period*) that does not count as service because of subsection (2).

(2) The following periods do not count as service:

(a) any period of unauthorised absence;

(b) any period of unpaid leave or unpaid authorised absence, other than:

(i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or

(ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee’s contract of employment; or

(iii) a period of leave or absence of a kind prescribed by the regulations;

(c) any other period of a kind prescribed by the regulations.

(3) An excluded period does not break a national system employee’s *continuous service* with his or her national system employer, but does not count towards the length of the employee’s continuous service.”

[20] Continuous service is not expressly defined by either s.12 or s.22. Rather, s.22(3) deems what would otherwise be service that is not continuous, to be continuous for periods of particular types of “absences”. Therefore, other than for the deeming effect of s.22(3), “continuous service” should be given its ordinary meaning. The Macquarie Dictionary gives two meanings to “continuous” relevant here:

1. having the parts in immediate connection, unbroken; and
2. uninterrupted in time; without cessation.”

[21] In addressing the meaning of continuous the service at the time of the termination I should consider answers to questions such as whether it had parts in immediate connection? Was it unbroken? Was it uninterrupted in time? Was it without cessation? The services cannot be continuous if there were periods of absence. But if the absences were of a type within the meaning of s.22(2), then the service is deemed to be continuous.

[22] Whether “a” period of service which is casual counts for that calculation and purpose, depends on whether it meets the requirements of s.384(2).

[23] I have gone to some lengths to explain my reasoning of the construction of the FW Act because on the face of it, it might be regarded as being at odds with the findings of the Full Bench in *Shortland v The Smiths Snackfood Co Ltd.*ⁱⁱⁱ However, the circumstances there and the issue under consideration were markedly different to here. There, the Applicant had been employed almost every week for over three years. His only time off was for four isolated weeks, presumably as a period of authorised absence. Shortland sustained an injury in 2009 and had been on worker’s compensation or other absences since that time until his employment was terminated. Here, the periods of work and the periods of absences are significantly different.

Consideration

[24] Here, the “particular time” was 27 August 2011. The period of employment at that time was one week.

[25] The nature of the period between 22 July and 22 August is unclear. For the purposes of this determination I will treat it as a period deemed to be continuous with the period employment immediately prior to that period (i.e. 18 May 2011 to 22 July 2011) by operation of s.22. Indeed, as UGL has contended that the service is continuous from January 2011, I will also treat the period of absence from 18 February to 18 May as a period of a type deemed to not break continuity of service for the same reason. I doubt that either of those periods of absence in 2011 do actually satisfy the requirements of s.22 but as UGL regard it in that way, then I will accept their concession of that.

[26] Given that the Applicant conceded that the period of continuous service commenced on 9 July 2009, it is not necessary to examine the nature of those periods before that time. The periods that require consideration for the purposes of s.384 then are these:

2009	9 July - 11 September	Muja
2010	16 February - 22 March	Worsley
	19 April - 4 May	Muja
2011	17 January - 18 February	Worsley
	18 May - 22 July 2011; 22 - 27 August	Muja

[27] The particular time that the Applicant was dismissed from his employment was 27 August 2011. So the question that must be answered is whether, on 27 August 2011, the Applicant had been in the continuous service of UGL for six months? The period of service

the Applicant says is that period since 9 July 2009. UGL says the period of service is from 17 January 2010.

[28] It is not in dispute that by operation of s.22, the aggregate of the service, if UGL is correct, is less than six months and whereas the aggregate of service, if the Applicant's contentions are correct, is more than six months. For the periods to meet those requirements the periods must not only be continuous but they must be of the nature described in s.384(2). Firstly, the employment must be on a regular and systematic basis. "Regular"^{iv} is not defined and nor is "systematic".^v

[29] In the circumstances here, the five or six separate engagements over three years, to some minds, would be regarded as regular and systematic. To others it would not. It depends on ones perception of timeframes. A person that has greater reliance on the income derived from the work might also have a different view of it than a person who had less reliance. Similarly, one person may have a reasonable expectation of receiving income from engagements and others may not.

[30] It thus becomes a judgement based on the circumstances and ordinary meaning of the relevant words in the FW Act.

[31] Here, the periods were discrete; the engagements were of different durations; there was not an established pattern of when the work was to be performed, and the engagements were clearly expressed on each occasion as being discrete. Importantly, there were also extensive absences between periods of employment. Certainly, the shutdowns were planned as it would be impossible for them not to be. But the character of the planning for the shutdowns does not turn the discrete periods into regular and systematic employment.

[32] Even if the periods of employment were regular and systematic, I do not consider the Applicant should have had a reasonable expectation of continuing employment on that basis. UGL made it clear on each occasion that there should be no expectation.

[33] In the circumstances and facts here, I do not regard the periods of employment involved as regular and systematic. The requirement of s.384(2)(a) is thus not met. I regard each of these periods to be discrete separate periods with no regular and systematic nature of the type s.384(2) refers.

[34] However, even if the various engagements did meet the requirements of s.384(2), only those engagements in 2011 should count. In May 2010, UGL asserts that the Applicant resigned. The Applicant asserts that he did not, but rather, left the employment because no work was being performed because of a safety dispute. To me the Applicant either resigned, terminated his employment or abandoned his employment but it matters not whichever of those circumstances occurred. The fact is that the Applicant's employment came to an end when there was still work to be performed. The employment and the service at that juncture came to an end. It recommenced in 2011 but in my view recommenced as a new period, not as a period that could be regarded as continuous service. That being the case, the aggregated periods of service that can count for the purposes of s.383 do not amount to six months.

Conclusion

[35] The application is dismissed as the Applicant is not a person who is protected from unfair dismissal by the FW Act in respect of his employment with UGL. The period of service at the particular time was not six months; his employment from January 2011 was not continuous with previous periods of employment; his service did not involve a regular and systematic basis of employment and the Applicant should not have had a reasonable expectation of continuing employment on that basis, even if it had been on a regular and systematic basis.

DEPUTY PRESIDENT

Appearances:

Mr T Kucera on behalf of the Applicant.

Mr N Ellery and Ms C Tsang on behalf of UGL.

Hearing details:

2011.

Perth:

January, 17; March, 7.

ⁱ s.382

ⁱⁱ s.383

ⁱⁱⁱ [2010] FWAFB 5709

^{iv} The Macquarie Dictionary gives the following meanings to regular:

1. usual; normal; customary: *to put something in its regular place.*
2. conforming in form or arrangement; symmetrical: *regular teeth.*
3. characterised by fixed principle, uniform procedure, etc.: *regular breathing.*
4. recurring at fixed times; periodic: *regular meals.*
5. adhering to rule or procedure: *to be regular in one's diet.*
6. observing fixed times or habits: *regular customer.*
7. orderly; well-ordered: *a regular life.*
8. conforming to some accepted rule, discipline, etc.
9. carried out in accordance with an accepted principle; formally correct.
10. properly qualified for or engaged in an occupation.

^v The Macquarie Dictionary gives the following meanings to systematic:

1. having, showing, or involving a system, method, or plan: *a systematic course of reading; systematic efforts.*
2. characterised by system or method; methodical: *a systematic person; systematic habits.*
3. arranged in or comprising an ordered system: *systematic theology.*