[2015] FWCFB 210

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Esso Australia Pty Ltd
v
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); The Australian Workers' Union (AWU)
(C2014/8435)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER SIMPSON

MELBOURNE, 10 FEBRUARY 2015

Appeal against decision [2014] FWC 8391 and orders PR558830, PR558828 & PR558827 of Commissioner Cribb at Melbourne on 5 December 2014 in matter numbers B2014/1104 & B2014/1571 & B2014/1570 - permission to appeal granted, public interest enlivened - appeal dismissed.

Background

[1] Esso Australia Pty Ltd (Esso) and its upstream oil and gas workforce (the Employees) are covered by four enterprise agreements (collectively the Agreements). The AMWU, AWU and CEPU (the Unions) are covered by one or more of the Agreements. Each of the Agreements has a nominal expiry date of 1 October 2014. In June 2014 Esso gave notice to the Employees pursuant to s.173 of the *Fair Work Act* 2009 (Cth) (the FW Act) and the Unions were appointed as bargaining representatives in relation to one or more of the Agreements. On 10 November 2014 each of the Unions made applications for protection action ballot orders. The applications were heard, together, on 19 and 20 November 2014 and on 5 December 2014 Commissioner Cribb issued a decision[1] granting the applications (the Decision) having regard to, among other things, an undertaking provided by the Unions regarding a claim said to contain non-permitted content. The Commissioner subsequently made orders, for the holding of protected action ballots.[2] Esso has appealed the Commissioner's decision and orders. The appeal raises for consideration the proper construction of s.443(1)(b) and, in particular, whether an applicant for a protected action

ballot order can be said to be genuinely trying to reach an agreement in circumstances where they are, or have been, pursuing claims which include a claim for a non-permitted matter.

[2] In the course of the Decision granting the Unions' applications the Commissioner made the following findings:

- the applications had been made under s.437 and are valid applications (at [48] - [49]); and
- each of the applicants had been, and is, genuinely trying to reach an agreement with Esso, the employer of the employees who are to be balloted (at [50]).

[3] The Commissioner's reasons in support of the first finding are set out at paragraphs [24] - [36] of the Decision. As the grounds of appeal in respect of this aspect of the Decision are not pressed it is unnecessary to set out the Commissioner's reasons.

[4] As to the second finding the Commissioner rejected Esso's contention that the Unions were not genuinely trying to reach an agreement. The Commissioner's reasons are set out at paragraph [37] - [46] of the Decision:

> "[37]The company contended that the unions have not been, and are not, genuinely trying to reach an agreement. This was on the basis that the unions were not bargaining in good faith and that they had pursued, but not withdrawn, a non-permitted matter, namely, the proposed contractors clause and the claim in the revised log of claims.
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> [38] In relation to the contention that the unions have not been, and are not, genuinely trying to reach agreement, the company referred to a number of issues in support of this proposition. These included that there was not proper attendance and participation in the meetings under the order and directions of the FWC (the delegates did not attend the meetings endorsed by DP Hamilton), the only meetings between the parties were those under the auspices of DP Hamilton and Johns C and that the unions have failed to agree to other meetings. In particular, it was submitted that the ASU, by not attending any of the meetings, has not been, and are not, genuinely trying to reach an agreement. Further, the company argued that, whilst the AWU's organiser had attended the meetings, as he was not called to give oral evidence, the FWC could not be satisfied of the AWU's bona fides in this regard.
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> [39] In relation to the issue of non-permitted matters, the draft clause[3] that was given to the company by the unions, may appear to be terms restricting or qualifying the company's rights to use independent contractors. However, when the unions revised their logs of claims, at the direction of Johns C, they proposed a security of employment claim. Such a claim, if it sufficiently relates employees' job security to the terms and conditions of contractors, would not necessarily be a non-permitted matter.
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> [40] The Full Bench in *Airport Fuel Services* summarised the legislation, jurisprudence and the Explanatory Memorandum regarding this use. Amongst other things, the Full Bench found that it is conceivable that a bargaining representative may be genuinely trying to reach agreement even if the claims advanced contain non-permitted matters. The Full Bench stated further, that it is open to a bargaining representative to make it clear that it is not pursuing claims for non-permitted matters.[4]
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> [41] On the second day of the hearing, the unions withdrew the draft contractors clause and reserved their right to continue to negotiate the claim in the revised log, which deals with the security of employment of employees of the company.

[42] As the unions have withdrawn the contractors clause and have indicated that they reserve the right to negotiate a security of employment clause, it is not possible to say that, on this basis, the unions are not genuinely trying to reach an agreement. In terms of whether the unions, prior to the revised log of claims on 1 October 2014, were genuinely trying to reach agreement, the Full Bench in *Australian Postal Corporation v CEPU*[5] found that:

> "*To suggest that the time at which a union can commence to genuinely try to reach an agreement with an employer is the time at which it makes a claim that in Fair Work Australia's view does not contain prohibited content is to inject an unwarranted degree of artificiality and technicality into what is intended to be "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".*"[6]

[43] I am also guided by the words of the Full Bench in *Alcoa of Australia Ltd v Australian Workers' Union - Western Australian Branch*.[7] The Full Bench found that:

> "*....the issue of permitted matters is but one of the factors to be taken into account in determining whether an applicant has been genuinely trying to reach an agreement.*"[8]

[44] Therefore, when assessing whether an applicant has been, and is, genuinely trying to reach an agreement with the employer, the authorities generally require the Commission to take account of all the circumstances and the factual scenario in each particular case. In these matters, these include whether the applicants have been bargaining in good faith and whether the unions are pursuing claims about non-permitted matters.

[45] Taking into account all of the circumstances in these matters, I am satisfied that the applicants have been, and are, genuinely trying to reach agreement with the employer. This is on the basis that the applicants attended and participated in the meetings ordered by DP Hamilton in September 2014. The applicants also attended and participated in the meetings directed by Johns C. The applicants have engaged in the process of arranging further meetings with the company. The applicants also made the decision to suspend their claim for one agreement to be negotiated through the all sites committee. From the evidence of Mr Vickers, in particular, it seems that, at the meetings in September and October 2014, the usual bargaining process was engaged in by the applicants. From the written material before me, I am satisfied that the AWU attended and participated in all of the meetings. In relation to the ASU, it is accepted that, but for Mr Leydon's illness, the ASU would have been in attendance at the meetings. As indicated earlier, the ASU is part of the all sites committee. Any correspondence from the committee was from each of the four unions which included the ASU. It is also more than likely that, in the absence of Mr Leydon, the other unions "represented" the ASU when necessary.

[46] Therefore, taking everything into account, I am satisfied that the four applicants have been, and are, genuinely trying to reach an agreement with Esso, the employer of the employees who are to be balloted."

[5] We now turn to the Appeal.

The Appeal

[6] An appeal of a decision is not as of right and permission to appeal must first be obtained.[9] 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.[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 issues 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]

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

[8] The appellant submits that permission to appeal should be granted on the basis that the Decision is attended with sufficient doubt such as to warrant its reconsideration, an arguable case of appealable error has been shown and/or substantial injustice would result if permission were refused. It is also submitted that given the matters agitated on the appeal it is in the public interest to grant permission to appeal.

[9] As to the disposition of the appeal the appellant submits that, should one or more of the alleged errors be established, the appropriate course is for the Commission to allow the appeal, quash the Decision and Orders and dismiss each of the applications by the respondents.

[10] We are satisfied that it is in the public interest to grant permission to appeal. As we demonstrate later, there is a degree of disconformity between the various Full Bench decisions dealing with the interpretation of s.443(1)(b). It is appropriate that these issues be ventilated on appeal and that further guidance be given on this issue.

[11] Grounds 1(i) and (j) and 2(a) - (e) in the Notice of Appeal were not pressed by the appellant and we need say no more about them. The remaining grounds of appeal can be distilled into two contentions:

> (i) the Commissioner erred in finding that each of the applicants had been, and is, genuinely trying to reach an agreement with Esso, the employer of the employees who are to be balloted ('Genuinely trying to reach agreement'); and
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> (ii) the Commissioner did not afford the appellant natural justice in accepting the applicants' undertaking and relying on it without giving the appellant any opportunity to deal with it or to make submissions about it ('Denial of Natural Justice').

(i) Genuinely trying to reach agreement

[12] There are two limbs to the appellant's contention that the Commissioner erred in finding that each of the respondents had been, and were, genuinely trying to reach an agreement,:

(a) at all relevant times the respondents were pursuing a proposed substantive term in each agreement which was a non-permitted matter; and

(b) the Commissioner erred by failing to find and take into account the respondents' alleged non-compliance with the FW Act's good faith bargaining requirements.

[13] It is convenient to deal with the second matter first.

Non compliance with good faith bargaining requirements

[14] The essence of this limb of the appellant's argument is that the Commissioner erred in failing to take into account the respondents' alleged non-compliance with the good faith bargaining requirements, in the FW Act.

[15] The good faith bargaining requirements are set out in s.228 of the FW Act, as follows:

228 Bargaining representatives must meet the good faith bargaining requirements

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

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

[16] The appellant contends that while the Unions responded to the proposals it advanced during bargaining they did not provide any reasons for some of those responses, despite being requested to do so. On this basis it is contended that the Unions have not complied with the good faith bargaining requirements, and in particular the requirement that they give reasons for their responses to the proposals of another bargaining representative (see s.228(1)(d)). The

appellant submits that the Commissioner gave no real consideration to this matter and that the failure to do so was an error.

[17] We are not persuaded that the Commissioner erred in the manner contended. The argument advanced by the appellant on appeal was not put at first instance. While the matter was the subject of some evidence before the Commissioner at no stage did the appellant contend that the Unions had not met their good faith bargaining requirements because they had failed to provide reasons for some of their responses to Esso's proposals. The appeal process is not intended to provide an avenue for an unsuccessful party to seek to redress deficiencies in the manner in which their case was run at first instance.[13] The failure to consider an argument which was not put is not an error in circumstances where the relevant evidence is far from unequivocal. Such was the case here, indeed there was a significant conflict in the evidence about this issue. While the appellant pointed to some evidence in support of its contention that the Unions had failed to provide reasons for some of their responses, two of the Unions' witnesses gave evidence that reasons for their responses had in fact been provided - orally during the course of discussions facilitated by Commissioner Johns.[14]

[18] In any event, while there is a relationship between the good faith bargaining requirements and the concept of genuinely trying to reach an agreement, it would be wrong to conflate these terms. A party may not meet a particular good faith bargaining requirement but may nevertheless be genuinely trying to reach an agreement.[15]

Pursuing non-permitted matters

[19] The other limb of the appellant's contention is that there was uncontested evidence before the Commissioner that at all relevant times the respondents were pursuing a proposed substantive term in each agreement which on its face was clearly about non-permitted matters. The proposed term to which the appellant refers is set out in Exhibit R3 (AB 296), as follows:

> **USE OF CONTRACTORS**
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> The Employer agrees to utilise only Esso employees in designated roles including supervisory, DPIC and team leader roles so as to drive ownership. Contractors will not be used to replace positions of the permanent workforce.
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> Where work exists that may require external resources (contractors) this work shall be conducted by supplementary contract labour. If the correct knowledge and resources are available within Esso employee numbers then the work will be allocated to Esso employees.
>
> Or, if Esso employees are unable to fulfil the work requirements based on correct knowledge and resource capacity, relating to the scope of work to be performed, then the work may be let to contractors.
>
> Where the Company does engage a Contractor to perform work covered by this Agreement, they must ensure the wages and conditions of the employees engaged to do this work, are no less favourable than the wages and conditions provided for in this Agreement for equivalent or similar work.
>
> Any disputes arising out of this clause will be dealt with through the disputes procedure of this Agreement.

[20] The appellant submits that the proposed term was a provision restricting or qualifying Esso's right to use independent contractors and as such was clearly about non-permitted

matters. On this basis the appellant contends that the Commissioner should have found that at all relevant times the respondents were pursuing a proposed substantive term in each agreement which was clearly about non-permitted matters and that such a finding ought to have led to a subsequent finding that each respondent had not been, and was not, genuinely trying to reach an agreement. However, the Commissioner instead made findings that:

> (a) the clause set out above had been revised such that it could not necessarily be said that the respondents were continuing to pursue non-permitted matters; and
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> (b) an undertaking provided to the Commission by the respondents could be relied upon to support a finding that the clause had been withdrawn, such that the respondents were at all times genuinely trying to reach an agreement.

[21] The appellant contends that each of these findings is affected by error.

[22] The first finding is set out at paragraph [39] of the Decision:

> "In relation to the issue of non-permitted matters, the draft clause (Exhibit R3) that was given to the company by the unions, may appear to be terms restricting or qualifying the company's rights to use independent contractors. However, when the unions revised their log of claims, at the direction of Johns C, they proposed a security of employment claim. Such a claim, if it sufficiently relates employees' job security to the terms and conditions of contractors, would not necessarily be a non-permitted matter."

[23] The appellant submits, that there was no evidentiary basis for the finding that the clause had been revised (Grounds 1(g)-1(h)) and, to the contrary, the evidence was that:

> (a) the "security of employment" claim, that is the clause in Exhibit R3, and the claim in the revised log were one and the same. Exhibit R3 was the wording that the respondents sought for the "security of employment" claim in the log (and the revised log); and
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> (b) the revised log was simply a re-ordering of the claims according to priority, and remained the same in substance.

[24] For present purposes it may be accepted that the revised log was simply a re-ordering of the Unions' claims according to priority. Both the original log and the revised log contained a claim for 'security of employment'. The draft clause in Exhibit R3 was intended to particularise the Unions' security of employment claim. However the flaw in the appellant's argument is that it conflates the 'security of employment' claim in the revised log and the draft clause in Exhibit R3. Such a proposition ignores the evidence regarding Exhibit R3. We deal with that evidence later (at paragraphs [72]-[76]) but note now that it clearly establishes that the Unions were not saying that the only way that their claim for security of employment could be satisfied was for Esso to agree to a clause in the terms of Exhibit R3.

[25] We acknowledge that paragraph [39] of the Commissioner's decision suggests that the security of employment claim in the revised log was different from the claim advanced in the earlier log. But in our view the appellant is attaching much more significance to the Commissioner's reference to the revised log than is warranted. As Kirby J observed in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,:[16]

> "The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law."

[26] It seems to us that in paragraph [39] of the Decision the Commissioner is plainly referring to the evidence which established that the Unions had a flexible position in relation to the satisfaction of their security of employment claim. We are not persuaded that the Commissioner has erred in the manner contended by the appellant.

[27] The second finding is set out at paragraphs [42]-[43] of the Decision:

> "As the unions have withdrawn the contractors clause and have indicated that they reserve the right to negotiate a security of employment clause, it is not possible to say that, on this basis, the unions are not genuinely trying to reach an agreement. In terms of whether the unions, prior to the revised log of claims on 1 October 2014, were genuinely trying to reach agreement, the Full Bench in *Australia Postal Corporation v CEPU* found that:
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> > '*To suggest that the time at which a union can commence to genuinely try to reach an agreement with an employer is the time at which it makes a claim that in Fair Work Australia's view does not contain prohibited content is to inject an unwarranted degree of artificiality and technicality into what is intended to be "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".'*
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> I am also guided by the words of the Full Bench in *Alcoa of Australia Ltd v Australian Workers' Union - Western Australia Branch*. The Full Bench found that:
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> > '*... the issue of permitted matters is but one of the factors to be taken into account in determining whether an applicant has been genuinely trying to reach an agreement*.'

[28] The appellant makes two points in relation to the second finding. The first is that the undertaking was insufficiently clear to enable the Commissioner to conclude that the non-permitted contractors claim (Exhibit R3) had been withdrawn and that this would enable a finding that the respondents were genuinely trying to reach an agreement. The undertaking is set out at paragraphs 2367 to 2369 of the transcript of the proceedings at first instance:

> "Mr Vroland: I'm instructed, on behalf of the AMWU, and I understand, on behalf of the other unions as well, but my friends will jump up and tell me if I'm wrong, that we will give an undertaking to withdraw the clause that has been put to the company; however, reserving our right to continue to negotiate around the claim that has been put to the company.
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> The Commissioner: Could you be specific about that claim? Is it the claim in the revised log?
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> Mr Vroland: That's right. In relation to security of employment. We say that's a perfectly legitimate thing to negotiate about and contractors clauses are also a legitimate thing to be negotiated about. We will, however, to set your mind at ease, undertake to withdraw that specific clause, reserving our right to negotiate on the issue. Now, my friend drew your attention to a number of decisions in this respect: *JJ Richards*, at 63; the *Wesfarmers decision*; *Airport Field Services Pty Ltd v the TWU*. What he didn't draw your attention to was the well-known case of *ADJ Holdings*, which makes it clear that clauses in relation to dealing with contractors is in fact a permitted matter..." (emphasis added)

[29] The appellant submits that what was purportedly withdrawn was the draft clause contained in Exhibit R3 but the respondents reserved to themselves the right to continue to negotiate around the claim, whether it be called "security of employment", "use of contractors", or something else. In light of the evidence of the respondents that their previous negotiations for the "security of employment" claim had led to Exhibit R3,[17] the appellant submits that this reservation could not have satisfied the Commission that the respondents would no longer from that point onwards, seek and intend to negotiate an equally non-permitted term.

[30] We are not persuaded that there is any substance in the appellant's first point in relation to the Commissioner's finding in respect of the undertaking proffered by the Unions. The reservation about negotiating around 'the claim' refers to the Unions' security of employment claim. It is clear to us that the Unions were withdrawing the draft clause (Exhibit R3) which contained non-permitted content but reserving their right to pursue their security of employment claim. The security of employment claim is capable of being addressed by a provision which only contains permitted content. The appellant's submission erroneously conflates the security of employment claim with a provision which limits or restricts the employer's use of contractors.

[31] The second point advanced by the appellant is that, even if the Commissioner was correct to conclude that as at the time of the giving of the undertaking, the non-permitted matter claim had been withdrawn and the Unions were then genuinely trying to reach an agreement, the Commissioner erred in finding that at all times previously, the Unions had been genuinely trying to reach an agreement. In this regard the appellant contends that the Commissioner's reliance on *Australia Post* and *Alcoa* (Decision at [42]-[43]) was misplaced. Each of those cases is said to be clearly distinguishable on the basis that they each involved repeated attempts by the union in each case to sufficiently revise existing non-permitted contractors claims, to ensure that they were then permitted (or at least to enable a finding that the unions reasonably believed those claims to then be permitted).

[32] The appellant submits that this case is distinguishable on the basis that Exhibit R3 was "clearly" non-permitted[18] and all of the Full Bench authorities in such a circumstance would have required a finding that the respondents to that point in time (ie until the giving of the undertaking) had not been genuinely trying to reach an agreement.[19] The appellant submits that the Commissioner erred in concluding otherwise, and that the applications should have been (and should now) be dismissed on that basis.

[33] A number of Full Bench decisions have considered the meaning of 'genuinely trying to reach an agreement' in s.443(1)(b), particularly in the context of an applicant pursuing a claim in respect of a non-permitted matter. We propose to refer, in chronological order, to the relevant parts of some of the decisions which have considered this issue.

[34] In *Total Marine Services Pty Ltd v Maritime Union of Australia*[20] (*Total Marine)* the Full Bench upheld an appeal from a decision to grant an application for a protected action ballot. The Full Bench held that the member at first instance had erred in concluding that the applicant had genuinely tried to reach an agreement within the meaning of s.443(1)(b) in circumstances where certain claims were 'put to one side'; the negotiations involved limited face to face meetings and limited articulation of many of the claims; many items were only set out in a list of headings, being neither explained nor discussed; and no wage claim was

specified.[21] In the course of its decision the Full Bench expressed the following views about s.443(1)(b),:

> "[31] In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. It is not useful to formulate any alternative test or criteria for applying the statutory test because it is the words of s 443 which must be applied. In the course of examining all of the circumstances it may be relevant to consider related matters but ultimately the test in s 443 must be applied.
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> [32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted."

[35] For our part, for reasons we articulate later, we agree with the observations in paragraph [31] and the first three sentences of paragraph [32] of *Total Marine,* set out above. We note that the observations which follow the first three sentences in paragraph [32] are *obiter* and although we do not consider that they should be understood as attempting to establish any binding decision rule, nonetheless they are, with respect, somewhat inconsistent with the earlier expressed proposition (with which we agree) that it is not useful to articulate any alternative test or criteria to the words of s.443(1)(b). We note that similar reservations were expressed by the majority of the Full Bench in *JJ Richards and Sons Pty Ltd v TWU* (*JJ Richards No.1*)[22] and by the Full Bench in *Farstad Shipping (Indian Pacific) Pty Ltd v MUA (Farstad)*[23].

[36] In *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[24] (*Australia Post No.1*) the Full Bench upheld an appeal from a decision to grant a protected action ballot order. The basis for the Full Bench's decision is set out at paragraphs [60]-[61] in the following terms:

> "[60] Since the CEPU has been and is pursuing as a substantive term of the proposed enterprise agreement a claim in respect of contractors which is not about a permitted matter, we were not satisfied the CEPU has been, and is, genuinely trying to reach an agreement with Australia Post, being the employer of the employees to be balloted.
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> [61] As a result a jurisdictional pre-requisite for making the protected action ballot order sought by the CEPU ... was not satisfied. Her Honour erred in concluding otherwise. We therefore decided to uphold the appeal and quash her Honour's decision ...."

[37] In the course of its decision the Full Bench also made the following observation:

> "[43] It is apparent that the scheme of the FW Act is that the substantive terms of an enterprise agreement are to be about permitted matters. Since an enterprise agreement is made by employees approving a proposed enterprise agreement, it follows that the substantive terms of a proposed enterprise agreement are also to be about permitted matters.

> [44] As a result, an applicant for a protected action ballot order pursuing a claim as a substantive term of a proposed enterprise agreement which is not about a permitted matter is not genuinely trying to reach an agreement with the employer of the employees to be balloted.
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> [45] This accords with the inference in the statement in the Explanatory Memorandum that 'the pursuit of claims about non-permitted matters for a proposed enterprise agreement does not necessarily prevent a finding that a bargaining representative is genuinely trying to reach an agreement … where those claims have subsequently been abandoned.' "

[38] *Australia Post No.1* would appear to be authority for the proposition that there is a decision rule whereby if an applicant is pursuing a substantive claim which is not about a permitted matter then it is necessarily not genuinely trying to reach an agreement within the meaning of s.443(1)(b). There is an obvious tension between this proposition and the views expressed in *Total Marine*.

[39] After *Australia Post No.1* negotiations between Australia Post and the CEPU continued. The negotiations were for an agreement to replace the Australia Post Enterprise Agreement 2004, the nominal expiry date of which was 31 December 2006. During the course of the negotiation the CEPU revised its contractors claim, on a number of occasions. The parties were unable to reach agreement and the CEPU successfully applied for a protected action ballot. In *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia-Communications Division*[25] *(Australia Post No.2),* a differently constituted Full Bench dismissed the subsequent appeal, on the following basis:

> "[56] It seems to us ... that if a bargaining agent that reasonably believed that the claims it was advancing at the time it sought a protected action ballot order were only about permitted matters, it could not, for that reason alone, be said that the bargaining agent was not genuinely trying to reach an agreement. ...
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> [58] The history of the negotiations demonstrates that the CEPU, especially after the decision of the first Full Bench, was seeking to formulate a contractors' clause that did not restrict or qualify the right of Australia Post to use contractors or agency staff and pertained to the employer/employee relationship. It is clear that by the time of the last hearing before Commissioner Roberts, and indeed well before, the CEPU reasonably believed that the clauses it was promulgating did not contain non-permitted matters.
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> [59] Ultimately, because of the operation of s 409(1), it is not necessary to decide whether the claim at the time of the hearing under appeal contained non-permitted matters as identified by Australia Post. Because the CEPU reasonably believed that they did not, it was genuinely trying to reach an agreement. In any event, for the reasons given by him, we consider that the Commissioner did not err in characterizing those matters as permitted. Further, in our view, even were they non-pertaining, the few remaining clauses to which Australia Post still objected were ancillary or incidental or machinery provisions relating to matters pertaining to the employment relationship."[26]

[40] *Australia Post (No.2)* is authority for the proposition that if a bargaining agent *reasonably believed* that the claims it was advancing at the time it sought a protected action ballot order were only about permitted matters, it could not for that reason alone, be said that the bargaining agent was not genuinely trying to reach an agreement. Consistent with this proposition, and with a non-prescriptive construction of s.443(1)(b) in which it is always necessary to take into account all the circumstances of the particular case, the Full Bench went on to say at paragraph [48]:

> "[48] In our view the Commissioner was correct in finding that the CEPU had been and was genuinely trying to reach an agreement with Australia Post. However, in our view, the removal of the non-permitted matters from the claim on 30 October 2009 was not necessarily the time from which the CEPU commenced to genuinely reach an agreement with Australia Post. To suggest that the time at which a union can commence to genuinely try to reach an agreement with an employer is the time at which it makes a claim that in Fair Work Australia's view does not contain prohibited content is to inject an unwarranted degree of artificiality and technicality into what is intended to be "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"."[27] (emphasis added)

[41] However, having effectively determined the matter on the basis of the above reasoning, the Full Bench later in the decision made the following *obiter* observation which would appear to contradict its reasoning in the decision:

> "[60] It is self-evident that if a union is proposing an agreement containing clearly non-pertaining clauses it cannot be genuinely trying to reach an agreement that may be approved by Fair Work Australia under s 186 of the FW Act. Section 409(1) could not be called in aid because it could not be said that a union advancing such claims reasonably believed that they were only about permitted matters." (emphasis added)

[42] In *Airport Fuel Services Pty Ltd v TWU*[28] (*Airport Fuel Services*) a Full Bench endeavoured to summarise the jurisprudence in respect of this issue in a series of dot points (at [22] of that decision) which, relevantly for present purposes, were in the following terms:

- A bargaining representative or party proposing that an agreement contain a non-permitted matter as a substantive term cannot be genuinely trying to reach an agreement under the FW Act.

- Leaving aside cases in which it is clear on any reasonable view that claims being advanced involve non-permitted matters, it is conceivable that a bargaining representative or a party may be "genuinely trying" to reach an agreement even though, as a matter of ultimate conclusion, the claims it is advancing do contain non-permitted matters. In cases where doubt exists, it is open to a bargaining representative or a party to make it clear that it is not pursuing claims containing non-permitted matters.

- The requirement that an applicant for a protected action ballot order "is", as opposed to "has been", genuinely trying to reach an agreement is expressed by reference to the time of the making and determining of the application for the order.

[43] There is a degree of tension between the propositions in the first two dot points which appears to arise from a perceived need to reconcile the various propositions and *obiter* observations in the earlier decisions to which we have referred.

[44] The last Full Bench decision to which we wish to refer is *Alcoa of Australia Ltd v Australian Workers' Union - Western Australian Branch*[29] *(Alcoa)*. In *Alcoa* the Full Bench held that a finding that the union applicant had been and was genuinely trying to reach an agreement was appropriate in the following circumstances:

"On the face of the clause in question, it cannot be said that the union is clearly making claims for non-permitted matters and it is strongly arguable that it is not. Further, the union has sought to clarify that it has no such intention."[30]

[45] The Full Bench also made the following general observations:

"[18] Further, as was also noted in *Australia Post* ([No.2]), s.253 recognises that an enterprise agreement may contain terms that are about non-permitted matters. This seems to us to reinforce the conclusion that the mere fact that a proposed agreement contains non-permitted matters is not fatal to a conclusion that the bargaining representative who propounded it is genuinely trying to reach agreement...

[23] It is readily apparent that s.443(1), on its face, does not contain any requirement relating to permitted matters. As may be discerned from our analysis of the *Australia Post* case ([No.2)], the issue of permitted matters is but one of the factors to be taken into account in determining whether an applicant has been genuinely trying to reach an agreement.

[24] It is not only satisfaction that a proposed agreement does not contain claims about, or reasonably be believed to be about, permitted matters that informs a judgment as to whether an applicant has been genuinely trying to reach an agreement.

[25] Alcoa submitted that the Commissioner applied the wrong tests in determining that the question he was required to answer was:

> "...not simply whether those words [being the words in clause 20.3] amount to permitted matters, but, rather, whether in fact the union … is now pursuing claims that are non-permitted matters or not." And further: "The question is whether or not there has been a changed view on the issue of non-permitted matters regarding the use of contractors. Is there an unequivocal acceptance by the union that claims that constrain or qualify the use of contractors by Alcoa cannot be pursued in these negotiations?"

[26] We do not accept this proposition. In our view, the issue that had to be decided was whether the union had been, and was, genuinely trying to reach an agreement. In the circumstances of this case, the questions that the Commissioner posed, in order that he could determine that issue, were appropriate.

[27] The evidence was to the effect that the union was seeking to protect its members at Alcoa from having their work reduced by the use of contractors, but that it was conscious that any clause that was finally agreed upon should be within the acceptable parameters of not constraining or qualifying the use of contractors by the company. To this end it was fine tuning the relevant clause. The evidence upon which the Commissioner relied made it clear that the union's intention was not to insist upon an impermissible clause ....

[28] It must be borne in mind that a negotiating process is fluid. The draft agreement in question was the union's latest attempt to formulate a contractors' clause which Alcoa would not contend contained non-permitted matters. Whether the last draft does, or does not, contain permitted matters is not determinative of the issue...." (emphasis added)

[46] It is apparent that there is some tension between the views expressed in *Total Marine*, *Australia Post No.2* and *Alcoa* on the one hand and *Australia Post No. 1* and *Airport Fuel Services* on the other. The latter two decisions on one view postulate a decision rule whereby the pursuit of a non-permitted claim by an applicant must inevitably result in a finding that the applicant has not been genuinely trying to reach an agreement, although in *Airport Fuel Services*, as already noted, the arguably postulated rule (in the first dot point earlier quoted)

was subject to a paradoxical qualification (in the second dot point). The other three decisions adopt a more flexible approach to the determination of the s.443(1)(b) issue.

[47] The Full Bench decisions to which we have referred were all decided prior to the decision of the Full Court of the Federal Court in *J.J Richards Sons Pty Ltd and Another v Fair Work Australia and Another*[31]. The applicants in that matter had contended that s.443 should be construed in a way which conditioned its operation upon bargaining having commenced. The Full Court rejected this proposition and held that a protected action ballot order under s. 443(1) of the Act may be made even though bargaining between an employer and employees has not commenced. Jessup J held, at [30]-[31]:

> "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.
>
> 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."

[48] As to the question of whether a bargaining representative has been and is genuinely trying to reach an agreement, Flick J said:

> "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 Pt 2-4 of the Fair Work Act.

> 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."[32]

[49] Tracey J agreed with Jessup and Flick JJ that on its proper construction s.443(1) could not be construed in the manner contended by the applicants:

> "There is simply no warrant to read into the subsection 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."[33]

[50] We now turn to consider, for ourselves, the proper construction of s.443(1)(b).

[51] Ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose.[34]

[52] Division 8 of Part 3-3 of the FW Act deals with protected action ballots. The object of the 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.' (s.436). Industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot (see ss.408 and 409). However the making of a protected action ballot order does not mean that any industrial action authorised by the relevant employees, or any resulting industrial action, will be protected. The ballot order (and the result of the ballot) does not of itself confer protected status - the industrial action must also meet the other requirements of s.409 in order to be protected and to attract the immunity in s.415.

[53] Section 443 deals with the circumstances in which the Commission must make a protected action ballot order. Subsections 443(1) and (2) are relevant for present purposes and they are in the following terms:

> **443 When the FWC must make a protected action ballot order**
>
> (1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
>
> (a) an application has been made under section 437; and

> (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
>
> (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

[54] The reference to the Commission being 'satisfied' means that whether or not the requisite circumstance exists is a discretionary decision. Section 443(1)(b) directs attention to the conduct of the applicant. The expression 'has been, and is', imports temporal considerations. The Commission's attention is thereby directed to the applicant's prior conduct at the time the application for a protected action ballot order is determined.[35] Given the context the reference to 'an agreement' is plainly a reference to an enterprise agreement within the meaning of Part 2-4 of the FW Act. The clear inference from s.172(1) is that the substantive terms of enterprise agreements should be confined to permitted matters, though the Commission is not required to scrutinise each agreement to ensure that all its terms are about permitted matters[36] and the statutory requirements for the approval of an agreement (ss 186-187) make no express reference to the concept of permitted matters (also see s.253).

[55] Section 443(1)(b) does not contain any words which limit the circumstances in which the Commission may be satisfied that an applicant 'has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted'. Further, the Explanatory Memorandum to what became s.443 supports the proposition that the legislature did not intend that any one factor would necessarily be determinative of the question of whether the applicant is genuinely trying to reach an agreement with the employer. The relevant parts of the Explanatory Memorandum to what became s.443 states:

> 1771. For joint applications, each applicant must be and must have been, genuinely trying to reach an agreement with the relevant employer. A finding by FWA that there is no majority support for collective bargaining is not of itself intended to be determinative of the question of whether the applicant is genuinely trying to reach an agreement with the employer.
>
> 1772. It could be the case that an applicant engaged in pattern bargaining (as defined in clause 412) in relation to the relevant employer would not be genuinely trying to reach an agreement, based on the indicia listed in subclause 412(3) (e.g., the applicant may not have been prepared to take into account the individual circumstances of the employer in bargaining for the agreement). (emphasis added)

[56] Neither of the paragraphs set out above support the proposition that it was intended that any one factor would be determinative of the issue in s.443(1)(b).

[57] Whether an applicant 'has been, and is, genuinely trying to reach an agreement' is a question of fact to be decided having regard to all of the facts and circumstances of the particular case. Such a construction of s.443(1)(b) is consistent with the judgment of the Full Court in *JJ Richards* and with a number of Full Bench decisions of the Commission (see *Total Marine; Pelican Point Power Limited v ASU*[37]; *JJ Richards No.1*[38]*; Alcoa*[39]; *JJ Richards No.2*[40]; and *Farstad* [41]) .

[58] In our view the adoption of a decision rule or principle of the type proposed in *Australia Post No.1* and *Airport Fuel Services* would be an inappropriate fetter on the exercise

of what the legislature clearly intended would be a discretionary decision. As Bowen LJ observed in *Gardner v Jay*,:[42]

> "When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Act or the Rules do not fetter the discretion of the Judge why should the court so do."[43]

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

[60] We note that in *Australia Post No.1* the Full Bench reached an apparently contrary view on the basis, in part, of an observation in the Explanatory Memorandum to what became s.409 of the FW Act, as follows:

> "1644 In addition, the pursuit of claims about non-permitted matters during bargaining for a proposed enterprise agreement does not necessarily prevent a finding that a bargaining representative is genuinely trying to reach an agreement (which is also a pre-condition to the taking of protected industrial action under subclause 413(3)) eg, where those claims have subsequently been abandoned." (emphasis added)

[61] At paragraph [44] of *Australia Post No.1* the Full Bench says that 'an applicant for a protected action ballot order pursuing a claim ... which is not about a permitted matter is not genuinely trying to reach an agreement with the employer of the employees to be balloted'. The Full Bench goes on to say:

> [45] This accords with the inference in the statement in the Explanatory Memorandum that 'the pursuit of claims about non-permitted matters for a proposed enterprise agreement does not necessarily prevent a finding that a bargaining representative is genuinely trying to reach an agreement … where those claims have subsequently been abandoned.' "

[62] The ellipsis in paragraph [45] of *Australia Post No.1* obscures the fact that the Explanatory Memorandum is referring to the subsequent withdrawal of a claim about non-permitted matters merely as an example of a circumstance where the pursuit of such claims will not necessarily prevent a finding that a bargaining representative is genuinely trying to reach an agreement. Contrary to the reasoning in *Australia Post No.1* the Explanatory Memorandum to what became s.409 does not support the adoption of a decision rule of the type proposed.

[63] It is also relevant to observe that the object of Division 8 of Part 3-3 and scheme of the FW Act reflects the legislative intention that applications for protected action ballot orders be heard and determined quickly. Such an intention is manifested in the following provisions:

> (i) the Commission must, as far as practicable, determine such applications within 2 working days after the application is made (s.441(1));
>
> (ii) the Commission may deal with 2 or more applications at the same time if it is satisfied that doing so will not 'unreasonably delay the determination of any of the applications' (s.442(b));
>
> (iii) a protected action ballot order must specify a date by which voting in the ballot closes that will enable the ballot 'to be conducted as expeditiously as practicable' (s.443(3A)); and
>
> (iv) there is no power to stay a decision to make a protected action ballot order pending the hearing of an appeal (s.606(3)).

[64] The adoption of a construction of s.443(1)(b) which would require the Commission to scrutinise each of the claims advanced by the applicant to determine whether they are about permitted matters is inconsistent with the object of Division 8 of Part 3-3 and the scheme of the FW Act.

[65] Section 409 is also a relevant contextual consideration. It provides, among other things, that industrial action is 'protected' if, at the time of the action, the person 'reasonably believes' they are pursuing claims about permitted matters (s.409(1)(a)). A decision rule of the type arguably proposed in *Australia Post No.1* and *Airport Fuel Services* would give rise to the incongruous result that the test posited for the grant of a protected action ballot order (a precondition to the taking of protected industrial action) would be more stringent than the conditions attached to the taking of protected industrial action. It is unlikely that such a result would have been intended by the legislature.

[66] The relevant legislative history is also instructive. Section 461 of the *Workplace Relations Act* 1996 (Cth) (the WR Act) dealt with the circumstances in which an application for a ballot was to be granted,:

> "(1) The Commission must grant an application for a ballot order if, and must not grant the application unless, it is satisfied that:
>
> (a) during the bargaining period, the applicant genuinely tried to reach agreement with the employer of the relevant employees; and
>
> (b) the applicant is genuinely trying to reach agreement with the employer; and
>
> (c) *the applicant is not engaged in pattern bargaining* ..."

[67] The requirement in s.461(1)(c) is not reflected in the current provision. Further, s.453 of the WR Act provided, relevantly for present purposes, that an application for a ballot order had to be accompanied by a declaration by the applicant that 'the industrial action to which the application relates is not for the purpose of supporting or advancing claims to include in

the proposed collective agreement any *prohibited content*'. It was an offence to make a declaration which contained a statement that was false or misleading in a material particular (s.453(6)). 'Prohibited Content' within the meaning of s.453(4) included non-permitted content such as restrictions on the engagement of independent contractors (see s.356 of the WR Act and regns 8.5 and 8.7 of the WR Regulations). There are no comparable provisions in the FW Act.

[68] It is apparent from the legislative history that when the legislature has sought to constrain the Commission's power to grant a ballot order by reference to a particular aspect of the applicant's conduct, it has done so expressly.

[69] For the reasons given the question of whether the applicant for a protected action ballot 'has been, and is, genuinely trying to reach an agreement' with the relevant employer is to be determined having regard to all of the relevant facts and circumstances of the particular case. We now turn to consider the facts and circumstances in the matter before us.

[70] The bargaining in this matter commenced in June 2014 and a chronology of the events that have occurred during the bargaining process is attached to Ms Rowe's statement (Exhibit R4 in the proceedings below). The parties have exchanged claims and those matters have been the subject of a number of discussions between them, including discussions facilitated by the Commission.

[71] As to the proposed clause headed 'Use of Contractors' (see paragraph [19] above) we accept the appellant's submission that paragraphs 1, 2 and 3 (and probably 5) of the proposed clause are about non-permitted matters. In *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No. 2)*[44] French J, as he then was, found that "provisions restricting or qualifying the employer's right to use independent contractors" are not matters pertaining to the employment relationship.[45]

[72] However there are a number of contextual matters that are important in considering the significance to be attributed to the Unions' pursuit of a claim in relation to non-permitted matters.

[73] The proposed clause was not part of the Unions' initial claim, which was only for a "Security of Employment clause (contractors)". It was only advanced some months after the negotiations commenced in response to the appellant's request for greater detail in respect of some of the Unions' claims. It is clear on its face that the proposed clause is merely a draft proposal and it is apparent from the evidence before the Commissioner that the Unions had not adopted a rigid position in relation to the draft clause. Nor did the proposed clause appear to feature prominently in the discussions between the parties[46]. In the course of his evidence Mr Mooney said (about the draft clause),:

> "It was a starting point as in a draft... And we were more than happy for the company to modify it, change it, and come back with an alternative draft."[47]

[74] Mr Dodd gave evidence to a similar effect[48] and in the course of his evidence Mr Vickers accepted that the Unions had never said that the proposed clause must be accepted and that they would not negotiate the terms of the clause.[49]

[75] Further, at no stage during the negotiations did Esso's representatives express the view to the Unions that the proposed clause contained non-permitted content.[50] Having first been identified by the appellant as a claim about a non-permitted matter during the hearing before the Commissioner, it was withdrawn by the Unions before the end of that hearing.

[76] It is apparent from a review of the evidence before the Commissioner that there was ample evidence to support her s.443(1)(b) finding. Further, on a review of all the evidence we agree with the Commissioner's finding and would have reached the same conclusion in relation to the applications which have been the subject of these proceedings.

(ii) Denial of Natural Justice

[77] The appellant contends that the undertaking given by the respondents was pivotal in the Commissioner's conclusion that the respondents had been and were, genuinely trying to reach an agreement and that the Commissioner would not have reached the same conclusion absent the undertaking.

[78] The appellant points to the fact that the undertaking was first given by the respondents in reply submissions, after the evidence in the applications had closed, after each of the respondent unions had made their closing submissions and after the appellant had made its closing submissions.

[79] The appellant submits that in accepting the undertaking and relying on it without giving the appellant any opportunity to deal with it or make submissions about it, the Commission did not afford the appellant natural justice. The appellant submits that in the circumstances, natural justice required the Commissioner to:

> (i) identify to the appellant that the undertaking was potentially an important (or at least relevant) factor in coming to her findings on whether the respondents were genuinely trying to reach an agreement; and
>
> (ii) invite the appellant to make submissions about the efficacy of the undertaking, its bearing on the statutory requirement in section 443(1)(b) of the FW Act, and/or the weight the Commission ought give to the undertaking.

[80] There is no doubt that the Commission is bound to 'act judicially', which includes an obligation to afford parties procedural fairness.[51] But the application and content of the doctrine of procedural fairness is determined by the context. As Mason J observed in *Kioa v West*,:

> "What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision - maker is acting."[52]

[81] In terms of the context of the proceedings at first instance the following general observation of Buchanan J (with whom Marshall and Cowdrey JJ agreed) in *Coal Allied Mining Services Pty Ltd v Lawler*, is apposite:

> "...it is an important aspect of the work of [the Commission]...that it is to proceed without unnecessary technicality and as informally as the circumstances of the case permit...It is not

> inappropriate to say that the members of [the Commission] have a statutory mandate to get to the heart of matters as directly and effectively as possible."[53]

[82] His Honour's observation is particularly relevant in this matter as the Commissioner had a statutory obligation to, as far as practicable, determine the applications before her within 2 working days after the applications were made (s.441(1)).

[83] The transcript of the proceedings at first instance makes it clear that the Commissioner did not decline or otherwise refuse to hear the submissions by the appellant on the relevance of the undertaking proffered by the Unions. The appellant's representative in the proceedings at first instance did not seek the opportunity to make submissions on this matter and nor did he voice any objection to the proffering of the undertaking in the context of the Unions' reply submissions. The transcript also makes it clear that the appellant's representative made further submissions on various matters *after* the undertaking was given. In this regard it is relevant to observe that in the proceedings at first instance the appellant was represented by an experienced legal practitioner.

[84] In all the circumstances there was no denial of procedural fairness. The Commissioner provided the appellant with a fair opportunity to present its case; she was not required to ensure that the appellant took the best advantage of the opportunity presented. As Dean J observed in *Sullivan v Department of Transport*:

> "...it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable opportunity to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled."[54]

Conclusion

[85] For the reasons given we are not persuaded that the Commissioner erred in the exercise of her discretion. We grant permission to appeal but dismiss the appeal.

PRESIDENT

Appearances:
The Appellant: *Mr. F Parry QC and Mr. M Follett of Counsel*
The Respondents: *Ms R. Nelson of Counsel*

Hearing details:
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[1] [2014] FWC 8391

[2] PR55830; PR55827 and PR55828.

[3] Exhibit R3

[4] [2010] FWAFB 4457 at [22]

[5] [2010] FWAFB 344

[6] Ibid at [48]

[7] 197 IR 355

[8] Ibid at [23]

[9] Section 604(1)

[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; *Ferrymen 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 paragraph 2328.

[13] *KA Murphy v SF Finance Pty*, Print P1395, 29 May 1997; *B.Curtis v Darwin City Council* [2012] FWAFB 8021 at [80]

[14] Transcript of the proceedings at first instance. Mr Mooney at paragraph 321-336 and Mr Dodd at paragraphs 616-634 and 697-698

[15] See the decisions of Gostencnik DP *in NUW v Riverland Oilseeds Pty Ltd* [2013] FWC 5914 at [17] - [19]; Hamberger SDP in *TWU v CRT Group Pty Ltd* [2009] FWA 425 at [26], and Lewin C in *NUW v SKF Australia Pty Ltd* [2010] FWA 6557 at [19] - [21].

[16] (1996) 185 CLR 259 at 291

[17] PN655-PN672 (AB, tab 8, pages 93-94).

[18] The appellant relies on *Australian Postal Corporation v CEPU* (2010) 191 IR 1 at [60] in this context and submits that there was (and is) no evidential basis for any finding that any of the relevant respondents in this case believed reasonably, that Exhibit R3 was permitted. The appellant also queries the relevance of this in any event: *Airport Fuel Services v TWU* (2010) 195 IR 384.

[19] The appellant relies on *Airport Fuel Services v TWU* (2010) 195 IR 384 at [22].

[20] [2009] FWAFB 368; (2009) 189 IR 407

[21] Ibid at [35]-[37]

[22] [2010] FWAFB 9963 at [84]-[90]

[23] [2011] FWAFB 1686 at [6]-[11]

[24] (2010) 189 IR 262

[25] [2010] FWAFB 344; (2010) 191 IR 1

[26] Ibid at paragraphs [56], [58]-[59]

[27] Section 436

[28] (2010) 195 IR 384

[29] [2010] FWAFB 4889; (2010) 197 IR 355

[30] Ibid at paragraph [28]

[31] (2012) 201 FCR 297

[32] Ibid at 312 [58]-[59]

[33] Ibid at [33]

[34] See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at [408]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]

[35] *Coles Supermarkets (Australia) Pty Ltd v AMIEU* [2015] FWDFB 379 at [49]

[36] See paragraph 664 of the Explanatory Memorandum to the *Fair Work Bill 2008*

[37] [2010] FWAFB 9441 at [93]

[38] [2010] FWAFB 9963 at [67] per Lawler VP and Bissett C

[39] [2010] FWAFB 4889 at [24]

[40] [2011] FWAFB 3377 at [40]-[41]

[41] [2011] FWAFB 1686 at [6]-[11]

[42] 29 Ch. D. 50 at 58

[43] Applied in *Evans v Bartlam* [1937] AC 473 at 488 per Lord Wright and cited with approval in *Kostokanellis v Allen* [1974] VR 596 and *Dix v Crimes Compensation Tribunal* [1993] 1 VR 297. Also see *JJ Richards and Sons Pty Ltd v FWA* [2012] FCAFC 53 (20 April 2012) at [30] per Jessup J (with whim Tracey J agreed) and at [63] per Flick J (with whom Tracey J agreed).

[44] (2004) 138 IR 362

[45] Ibid at paragraph [109]

[46] Transcript of the proceedings at first instance, Mr Mooney's evidence at paragraphs 398-403

[47] Transcript of the proceedings at first instance at paragraph 405, also see paragraph 412

[48] Ibid at paragraphs 672 and 703-704

[49] Ibid at paragraph 424

[50] Transcript of the proceedings at first instance, Mr Mooney at paragraph 402 and Mr Vickers at paragraphs 1419 and 1423

[51] *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1789) 167 CLR 513 at 519. See also *Re Polites; Ex parte Hoyts Corporation Pty Limited* (1991) 173 CLR 78 and *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583

[52] (1985) 159 CLR 550 at [32]

[53] (2011) 192 FCR 78 at [25]

[54] (1978) 20 ALR 323 at 343. Also see *Re Association of Architects of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J; and *Edghill v Kellow-Falkiner Motors Pty Ltd* [2000] AIRC 1084 (30 March 2000)