DECISION

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

Maritime Union of Australia, The
v
Maersk Crewing Australia Pty Ltd
(B2015/1574)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT WATSON
DEPUTY PRESIDENT GOSTENCNIK

SYDNEY, 31 MARCH 2016

Application for a protected action ballot order – proper construction of ss.437(1) and (2A) – 'notification time'.

[1] This decision deals with some important legal issues which have arisen in the context of an application by the Maritime Union of Australia (the MUA) for a Protected Action Ballot Order (a 'PABO') in respect of its members employed by Maersk Crewing Australia Pty Ltd (Maersk) to whom the *Maersk Crewing Australia Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Greenfields Agreement 2010* (the '2010 Maersk Agreement') applied. It is convenient to first set out the relevant facts, which are not in dispute.

[2] The nominal expiry date of the 2010 Maersk Agreement is 31 July 2013. On 16 January 2013 Maersk agreed to bargain, or initiated bargaining, giving a Notice of Employee Representational Rights (the 'January 2013 NERR') to employees who would be covered by the agreement described in the notice. For present purposes it is relevant to note that the January 2013 NERR stated:

> 'Maersk Crewing Australia gives notice that it is bargaining in relation to an enterprise agreement, the Maersk Crewing Australia Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Greenfields Agreement 2013, which is proposed to cover employees that are currently engaged in the classifications contained in the Maersk Crewing Australia Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Greenfields Agreement 2010.'

[3] It is common ground that the proposed agreement referred to in the January 2013 NERR was an 'MUA only' enterprise agreement, that is the MUA was the only employee

organisation to be covered by the proposed agreement and the MUA is the only union with coverage of the classifications contained in the agreement. The MUA and Maersk engaged in bargaining after the January 2013 NERR was issued. It is also common ground that the January 2013 NERR did not comply with s.174(1A) of the *Fair Work Act 2009* (Cth) (FW Act) and was not a valid NERR.

[4] On 15 October 2015 Maersk agreed to bargain, or initiated bargaining, giving a NERR (the 'October 2015 NERR') to employees who would be covered by the agreement described in that notice (Maersk's proposed agreement). Maersk's proposed agreement covers employees falling within the coverage of three unions – the MUA, the Australian Institute of Marine and Power Engineers (AIMPE) and the Australian Maritime Officers Union (AMOU).

[5] On 12 November 2015 a majority of employees covered by the October 2015 NERR voted *not* to approve Maersk's proposed agreement.

[6] On 3 December 2015 the MUA provided a proposed 'MUA only' enterprise agreement to Maersk and on 10 December 2015 the MUA filed an application for a PABO. The PABO application was heard by Commissioner Williams on 23 December 2015 and during the course of that hearing Maersk applied for the matter to be referred to a Full Bench pursuant to s.615A of the FW Act. The s.615A referral application was granted on the basis that the Full Bench would determine the various legal issues and then remit the PABO application to Commissioner Williams for determination.

[7] Maersk contends that, properly construed, s.437(2A) read with s.437(1) mean that an application for a PABO cannot be made before the 'notification time' for the proposed enterprise agreement. Further, it is submitted that because the notification time triggers the requirement for the employer to give the NERR for the proposed enterprise agreement, these provisions mean that the Commission cannot make a PABO unless the employer has given a valid NERR for the proposed agreement. Applying those propositions to the present matter, Maersk submits that no valid NERR has been given for the MUA's proposed agreement and, further, there is no notification time in respect of the MUA's proposed agreement. On this basis it is submitted that the application is incompetent under s.437(1) and should be dismissed.

[8] In the alternative Maersk contends that the Commission should dismiss the application as it cannot be satisfied that the applicant has been, and is, genuinely trying to reach an agreement (within the meaning of s.443(1)(b)) because the proposed agreement could not be approved by the Commission.

[9] Maersk's contentions turn on the proper construction of ss 437 and 443 of the FW Act. Section 437 deals with who may apply for a PABO and relevantly provides as follows:

> **437 Application for a protected action ballot order**
>
> *Who may apply for a protected action ballot order*
>
> (1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to the FWC for an order (a ***protected action ballot order***) requiring a protected

> action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.
>
> (2) Subsection (1) does not apply if the proposed enterprise agreement is:
>
> (a) a greenfields agreement; or
>
> (b) a multi-enterprise agreement.
>
> (2A) Subsection (1) does not apply unless there has been a notification time in relation to the proposed enterprise agreement.
>
> Note: For ***notification time***, see subsection 173(2). Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).

[10] 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.[1]

[11] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[2] (*Alcan*) the High Court described the task of legislative interpretation in the following terms:

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

[12] Subsection 437(1) provides that a bargaining representative of an employee who will be covered by 'a proposed enterprise agreement' may apply to the Commission for a PABO. Subsection 443(1)(a) requires an application to have been made under s.437 in order for the Commission to be empowered to make a PABO.

[13] The proper construction of the expression 'a proposed enterprise agreement' in s.437(1) was considered by a Full Bench of the Commission in *Mermaid Marine Vessel Operations Pty Ltd v The Maritime Union of Australia (Mermaid Marine)*[3] as follows:

> '[42] It is to be observed from the above, that the Act variously makes reference to a "proposed agreement", or the "proposed enterprise agreement" and "proposed single-enterprise agreement" to describe in a particular context the same concept, that is, the agreement that is being proposed by a party wishing to bargain or by one that is actually bargaining. That this is so seems to be confirmed by the Explanatory Memorandum to *Fair Work Bill 2008* and its description of the use of the phrase "proposed enterprise agreement" in Parts 2-4 and 3-3 as "a generic term", and its reference to the decision in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Union (No 2)* in which French J referred to the use of the words "proposed agreement" in s. 170MI of the *Workplace Relations Act 1996* as a "generic term [that] allows for a variety of possibilities". The content of a proposed agreement need not be settled nor need the scope of a proposed agreement be agreed between the bargaining parties for that which is proposed by one party to bear the character of a proposed agreement or proposed enterprise agreement for the purposes of the Act…

> [46] When read in context, "a proposed enterprise agreement" in s.438(1) seems to us to mean no more than the agreement the bargaining representative applying for an order under s. 447 is proposing at the time the application for a protected action ballot order is made. It is that agreement to which the ballot will relate and it is employees represented by the bargaining representative who fall within the scope of that agreement (or a group of such employees) who will vote on questions of particular industrial action. That the Appellant does not agree with the scope of the proposed agreement or would prefer a broader scope or that the bargaining parties have bargained for a broader scope previously is, for the purpose of identifying the proposed enterprise agreement to which s.438(1) might relate, irrelevant in considering whether s.438(1) prohibits an application being made.' (footnotes omitted)[4]

[14] The views expressed in *Mermaid Marine* were subsequently endorsed by the Full Bench in *Skilled Offshore Pty Ltd v AMWU and others (Skilled Offshore)*.[5]

[15] *Mermaid Marine* and *Skilled Offshore* stand for the proposition that all that is required for there to be 'a proposed enterprise agreement' within the meaning of ss. 437(1) and 443(1) of the FW Act is an 'agreement [which] the bargaining representative applying for an order under [s.437] is proposing at the time the application for a protected action ballot order is made'.[6] Further, in *MUA v Swire Pacific Ship Management (Australia) Pty Ltd (Swire)*[7]the Full Bench characterised a 'proposed enterprise agreement' as something that one of the parties wants to negotiate: 'There need not be a developed draft, and it may simply be an idea or a series of claims…'[8] While *Mermaid Marine*, *Skilled Offshore*, and *Swire* were all decided before the commencement of s.437(2A), we are not persuaded that the introduction of s.437(2A) affects the reasoning in those cases in respect of this issue.

[16] We should also add that the decision in *Mermaid Marine* should not be taken as suggesting that an application under s. 437(1) of the FW Act may only be made in relation to an agreement proposed by a PABO applicant. *Mermaid Marine* was concerned with resolving a contention that because the scope of the agreement proposed by the employer covered employees who were also covered by an operative enterprise agreement whose nominal expiry date had not yet passed and was not due to pass for some significant period, the PABO applicant was prevented, by reason of s.438 (1), from making the application. However the PABO applicant in *Mermaid Marine* was proposing an agreement which was narrower in scope than the agreement proposed by the employer covering only those employees who were not otherwise covered by the operative enterprise agreement. It is in that context that paragraph [46] in *Mermaid Marine* is to be understood.

[17] Therefore, it seems to us plainly permissible that a bargaining representative of an employee who will be covered by an agreement proposed by the employer, may apply for a protected action ballot order to determine whether employees wish to engage in particular protected industrial action for that agreement.

[18] As we have mentioned, Maersk contends that the insertion of s.437(2A) means that in order for a PABO application to have been validly made under s.437(1) there must have been a 'notification time' for the proposed enterprise agreement and there must also have been a valid NERR given within 14 days of the 'notification time'. We accept the first contention but reject the second.

[19] Subsection 437(2A) was inserted by the *Fair Work Amendment Act* 2015 (Cth) and commenced operation on 27 November 2015. The MUA's application for a PABO was made on 10 December 2015 and therefore s.437(2A) applies to that application.

[20] Subsection 437(2A) provides that an application for a PABO, under s.437(1), cannot be made unless there has been a 'notification time' in relation to the 'proposed enterprise agreement'. The term 'notification time' is used elsewhere in the Act and is defined in s. 173(2). The legislative note to s.437(2A) directs attention to the definition of notification time in s.173(2). Section 40A of the FW Act provides that that *Acts Interpretation Act* 1901 (Cth) (the AI Act) as in force on 25 June 2009 applies to the FW Act. At that time s.13 of the AI Act provided, :

> '(3) No marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act.'

[21] Despite the fact that marginal notes do not form part of the FW Act they may be used as aid to construction.[9] While a note cannot govern the text of the FW Act,[10] it should not be disregarded.[11]

[22] The legislative note to s.437(2A) refers to the definition of 'notification time' in s.173. Section 173 provides as follows:

> '**173 Notice of employee representational rights**
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> *Employer to notify each employee of representational rights*
>
> (1) An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:
>
> (a) will be covered by the agreement; and
>
> (b) is employed at the notification time for the agreement.
>
> Note: For the content of the notice, see section 174.
>
> *Notification time*
>
> (2) The ***notification time*** for a proposed enterprise agreement is the time when:
>
> (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
>
> (b) a majority support determination in relation to the agreement comes into operation; or
>
> (c) a scope order in relation to the agreement comes into operation; or
>
> (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.
>
> Note: The employer cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).
>
> *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.
>
> *Notice need not be given in certain circumstances*

> (4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.
>
> *How notices are given*
>
> (5) The regulations may prescribe how notices under subsection (1) may be given.'

[23] The only definition in the FW Act of the 'notification time' for a proposed enterprise agreement is in s.173(2). Having regard to the context and the legislative note, and the need to give effect to the legislative intention, it is clear that the reference in s.437(2A) to a '*notification time in relation to the proposed enterprise agreement'*, means a notification time within the meaning of s.173(2). No party contended otherwise.

[24] Contrary to Maersk's contention, we are not persuaded that s.437(2A) requires that there has been a notification time in respect of the enterprise agreement proposed by the PABO applicant. As we have mentioned, the reference to 'a proposed enterprise agreement' in s.437(1) refers relevantly to the enterprise agreement proposed by the applicant at the time the PABO application is made.[12] Subsection 437(2A) provides that a PABO application cannot be made 'unless there has been a notification time *in relation to* the proposed enterprise agreement' (emphasis added). The subsection does not require there to have been a notification time for the particular agreement proposed by the PABO applicant. It is sufficient that there has been a notification time 'in relation to' the agreement proposed by the PABO applicant.

[25] The expression 'in relation to' is one 'of broad import'.[13] In *O'Grady v Northern Queensland Co Ltd* McHugh J observed that the expression 'requires no more than a relationship, whether direct or indirect, between two subject matters'.[14] Context is important in determining the connection to which a statutory provision is referring. In *Travelex Ltd v Commissioner of Taxation*, French CJ and Hayne J said ((2010) 241 CLR 510 at [25]):

> 'It may readily be accepted that 'in relation to' is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ. It may also be accepted that 'the subject matter of the enquiry, the legislative history, and the facts of the case' are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply 'in relation to' rights [citations omitted].'

[26] The legislative purpose in the enactment of s.437(2A) is to ensure that protected industrial action cannot be taken until after bargaining has commenced – that is, after the time when the employer agrees to bargain, or initiates bargaining (or one of the other circumstances constituting the 'notification time' within the meaning of s.173(2)). To import into s.437(2A) a requirement that the 'notification time' must be in respect of the agreement proposed by the PABO applicant would mean (relevantly in the context of the present matter) that the employer must have agreed to bargain or have initiated bargaining for a proposed enterprise agreement with precisely the same scope as that sought by the PABO applicant. Such a construction would have the effect of removing scope from the matters in bargaining in support of which employees can engage in protected industrial action. This would be the

case because a bargaining representative would only be able to apply for a PABO in relation to a proposed enterprise agreement containing the scope proposed by, or agreed with, the employer.

[27] A consequence of the construction proposed by Maersk is that by not agreeing on the scope of the proposed enterprise agreement, an employer would be able to prevent employees from engaging in protected industrial action unless they have first obtained a majority support determination, scope order or low paid authorisation. It seems to us that such a consequence is inimical to the scheme of the FW Act.[15] The scope of a proposed enterprise agreement can itself be the subject of bargaining and bargaining within the meaning of the FW Act may have commenced even though the parties disagree about the scope of the proposed enterprise agreement. As the Full Bench observed in *Stuartholme School v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane*,:

> '[t]he terms of [s237] unambiguously suggest that bargaining may have commenced under the Fair Work Act even though the parties to the bargaining process are in disagreement about the scope of the proposed agreement'.[16]

[28] Importantly, in the absence of a scope order, the parties to a proposed enterprise agreement are entitled to continue to bargain over the scope of the agreement until that matter is settled through bargaining. If there is a notification time in relation to the proposed agreement, protected industrial action in support of a claim for a particular scope may be taken.

[29] The construction we have adopted is entirely consistent with the legislative note to s.437(2A). As set out earlier, the Note states:

> 'For ***notification time***, see subsection 173(2). Protected industrial action cannot be taken until bargaining has commenced <u>including where the scope of the proposed enterprise agreement is the only matter in dispute</u>.' (emphasis added)

[30] The Note clearly contemplates that the scope of a proposed enterprise agreement may be the subject of bargaining and that protected industrial action may be taken in support of a claim for a particular scope.

[31] As we have mentioned, Maersk contends that because the 'notification time' in s.173(2) triggers the requirement for the employer to give the NERR in respect of the proposed enterprise agreement it follows that the Commission cannot make a PABO unless the employer has given a valid NERR for the proposed enterprise agreement. We reject this contention. Maersk's contention imports an additional precondition which simply is not found in the text of section 437(2A).

[32] It is important to appreciate the role of the NERR in respect of a proposed enterprise agreement and the persons who will be covered by that agreement. The NERR provides employees with important information about the nature of a proposed enterprise agreement and the employees' right to appoint a bargaining representative to assist them in bargaining for the agreement or a matter before the Commission about bargaining for the agreement. The NERR also sets out the default position for union members, that is, they will be represented by their union if they do not appoint a bargaining representative.[17]

[33] Subsection 437(2A) makes no express reference to any requirement that there be a valid NERR in respect of the 'proposed enterprise agreement', and nor does such a requirement arise by necessary implication. The 'mischief' to which s.437(2A) is directed is quite limited. As we have mentioned, its purpose is to ensure that protected industrial action cannot be taken until after the employer agrees to bargain, initiates bargaining, or is required to bargain by the issue of a relevant majority support determination or scope order.

[34] Contrary to Maersk's contention, s.437(2A) defines the commencement of bargaining by reference to a 'notification time' within the meaning of s.173(2), not by the giving of a NERR. As observed by Hatcher VP in *Transport Workers' Union of Australia v Hunter Operations Pty Ltd*[18] ('*Hunter*'), the definition of 'notification time' in s.173(2)(a), 'indicates that an employer's agreement to bargain is a single event which happens at a particular point in time'. Hence, s.437(2A) refers to a point in time – the 'notification time' – not what the FW Act prescribes must be done by an employer at that point in time (ie issue a NERR within 14 days of the 'notification time': ss 173(1) and (3)).

[35] As Hatcher VP observed in *Hunter*[19], 'an employer may agree to bargain expressly in writing or orally, or … an employer may be inferred to have agreed to bargain through its conduct (such as by commencing to actually engage in bargaining in relation to a proposed enterprise agreement)'. The issuing of an NERR may evidence that the employer has agreed to bargain, but the requirement to issue the NERR arises once the employer has agreed to bargain or has initiated bargaining – it is not a prerequisite for bargaining.[20] Whether an employer has agreed to bargain or has initiated bargaining in relation to a proposed enterprise agreement is a question of fact. An NERR is an indicator of employer intention – but not necessarily the determining factor.

[36] Maersk's reliance on *ResMed Limited v AMWU (ResMed)*[21] in support of its contention[22], is misplaced. The extract from *ResMed* cited by Maersk is *obiter* and irrelevant to determining the proper construction of s.437(2A).

[37] If accepted, Maersk's construction of ss 437(1) and (2A) could produce outcomes which are plainly contrary to the scheme of the FW Act and the purpose of s.437(2A). An employer could deny its employees the right to engage in protected industrial action simply by failing to give a valid NERR, even though the employer had agreed to bargain or had initiated bargaining for an enterprise agreement with those employees. The purpose of s.437(2A) is to prevent employees engaging in protected industrial action to pressure an employer to agree to bargain. But once an employer has agreed to bargain, or has initiated bargaining for a proposed enterprise agreement, employees may[23] engage in protected industrial action to support their claims in relation to their proposed enterprise agreement (including a claim about the scope of such an agreement).

[38] Maersk's construction would also give rise to anomalous outcomes. A PABO application could be made shortly after the 'notification time' (i.e. within the 14 day period in which a NERR is to be given: s.173(3)) but before a valid NERR is issued. But no valid PABO application would be made *after* the 14 day period specified in s.173(3), *unless* a valid NERR had been issued by the employer. We note that counsel for Maersk submitted that in

each of the circumstances referred to a PABO application could not be made. In respect of the first example it was submitted that as there was no valid NERR 'at that point in time' the Commission could not be satisfied that the 'proposed enterprise agreement' (in the context of s.437(1)) could be approved under the FW Act[24]. We reject this submission. In such circumstances the Commission would be entitled to proceed on the basis that the employer would comply with the terms of s.173(3).

[39] The relevant extract from the Explanatory Memorandum to the *Fair Work Amendment Bill 2014* also supports the construction we have adopted:

> '**Item 56 – After subsection 437(2)**
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> 144. This item inserts new subsection 437(2A), which provides that an application for a protected action ballot order cannot be made unless there has been a 'notification time' in relation to the proposed enterprise agreement. The legislative note underneath the provision directs the reader to the definition of *notification time* in subsection 173(2).
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> 145. The Fair Work Review Panel recommended that the Fair Work Act be amended so that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained (recommendation 31). This recommendation concerns the 'strike first, talk later' issue that was considered by the Full Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53. Item 56 implements that recommendation.
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> 146. The Fair Work Review Panel further recommended that the Fair Work Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement (see *Stuartholme v Independent Education Union* [2010] FWAFB 1714 and *MSS Security v LHMU* [2010] FWAFB 6519) (recommendation 31). The amendment implements this recommendation by including a legislative note to make clear that disagreement over the scope of a proposed enterprise agreement does not, of itself, prevent the taking of protected industrial action.
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> 147. The new subsection does not displace any of the existing requirements under the Fair Work Act relating to the taking of protected industrial action. These requirements include that an applicant for a protected action ballot order must be genuinely trying to reach agreement from the notification time until a protected action ballot order is made (paragraph 443(1)(b)), the common requirements for industrial action to be protected industrial action (section 413) and the notice requirements for industrial action (section 414).'

[40] It is plain from the Explanatory Memorandum that s.437(2A) was introduced to implement a recommendation of the Fair Work Review Panel. The relevant extracts from the Review Panel's report[25] are set out below:

> The industrial action provisions of the FW Act have not significantly changed from Work Choices. However, the addition of the good faith bargaining provisions represents a significant change to the overall bargaining framework. The Panel received submissions from a number of employer groups suggesting that the industrial action provisions sit uncomfortably with the new bargaining rules and for that reason the Panel has given this matter considerable attention…

Submissions have questioned whether industrial action should continue to be available as a legitimate means of *persuading* an unwilling employer to bargain, in light of the new capacity to *require* an employer to bargain through the use of a majority support determination. This has most clearly been ventilated in the *JJ Richards*[26] litigation.

The policy underpinning the FW Act about whether industrial action was intended to be available to persuade an unwilling employer to bargain is not clear. There are no express statements to this effect. Nor are there any express policy statements that this mechanism, previously available under Work Choices, was intended to be removed.

Under the FW Act, the issue was first considered by a Full Bench of FWA in *Ford Motor Company of Australia Pty Ltd v CEPU and Ors.*[27] In that case, even though bargaining had been ongoing for some months, there was a dispute about the scope of the proposed agreements. The unions applied for a protected action ballot order in respect of its proposed scope. Ford opposed the order, arguing that the unions were not genuinely trying to reach an agreement, as there had been no bargaining about an agreement with the unions' scope. The Full Bench found that the protected industrial action provisions were 'premised on the basis that negotiations, or bargaining, for an enterprise agreement to be made under the Act must be in train before protected industrial action may be organised or engaged in'.[28] As Ford had not agreed to the unions' proposed scope, a ballot order could not be issued.

The outcome in *Ford* meant that not only was protected industrial action unavailable when an employer had not agreed to bargain, it was not possible to take industrial action to support or advance a party's preferred scope for an agreement. However, two subsequent Full Benches rejected this approach.[29]

In *JJ Richards*, which followed, the employer simply refused to bargain.[30]… the key legal issue in *JJ Richards* was whether a protected action ballot order can be made before bargaining has commenced, or whether the TWU was first required to obtain a majority support determination to force the employer to do so.[31] At first instance, Commissioner Harrison granted the ballot order,[32] finding that 'the Act does not require a bargaining agent to seek a majority support determination, good faith bargaining orders, or scope orders as a prerequisite to seeking a protected action ballot order where an employer refuses to commence bargaining'.[33] This decision was upheld on appeal by a Full Bench, and confirmed by the Full Federal Court of Australia while the Review was underway.[34]

Numerous employers and some other parties expressed serious concern with the policy implications of the Full Bench decision in *JJ Richards* (now confirmed by the Full Federal Court)[35] and proposed that the FW Act should be amended to provide that bargaining must be occurring, either through the agreement of the employer or via a majority support determination, before a protected action ballot can be sought and granted.[36]

While the law is now settled, we do not think this is the appropriate outcome from a policy perspective. Given the legislature has sought to codify the circumstances in which an employer can be positively required to bargain, we consider it incongruous for industrial action to be available to bring pressure to bear on an employer to bargain outside of those circumstances.

The mechanism to compel bargaining under the good faith bargaining provisions, a majority support determination, requires the support of a majority of the employees to be covered by a proposed agreement.[1] In contrast, industrial action can be taken by a minority of employees to

[1] FW Act, s. 237(2).

> be covered by a proposed enterprise agreement.[2] Viewed this way, the capacity for protected industrial action to be taken to persuade an unwilling employer to bargain tends to undermine the majority support determination provisions, and represents a clear 'disconnect' with the new bargaining regime in the FW Act.
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> However, to allay any doubt, we consider the scope of a proposed enterprise agreement to be a legitimate matter for bargaining. In our view, bargaining for a proposed enterprise agreement can commence whether the scope of the proposed agreement has been agreed or not. Our view is consistent with that of the Full Bench in both *Stuartholme* and *MSS Security* and contrary to the view of the Full Bench in *Ford*. The absence of agreement about scope should not preclude the taking of protected industrial action.

Recommendation 31: The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.

[41] As reflected in the Explanatory Memorandum, s.437(2A) implements the first aspect of recommendation 31.The Note clarifies that bargaining can be taken to have commenced for the purpose of s.437(2A), even where the scope of the proposed enterprise agreement is the only matter in dispute. To that extent the Note relates to the second part of recommendation 31, although as we earlier observed the Note is not part of the FW Act. It follows that if bargaining can begin with an employer proposing a broadly scoped agreement and when scope is in dispute, a bargaining representative proposing a more narrowly scoped agreement may apply for a protected action ballot order in relation to that proposed agreement.

[42] The Explanatory Memorandum and the extract from the report of the Fair Work Review Panel make it clear that the legislative purpose in enacting s.437(2A) was to overcome the effect of the decision in *JJ Richards* and ensure that protected industrial action cannot be taken until after bargaining has commenced.

[43] In *J.J Richards*[37] the applicants 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) may be made even though bargaining between an employer and employees had 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

[2] FW Act, ss. 437(5), s. 459.

> 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.
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> 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."

[44] 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."[38]

[45] 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.'[39]

[46] Subsection 437(2A) was enacted for a limited purpose – to overcome the effect of the decision in J.J Richards and ensure that protected industrial action cannot be taken until after bargaining has commenced – that is, after the time when the employer agreed to bargain, or initiates bargaining (or one of the other circumstances constituting the 'notification time' within the meaning of s.173(2)). Hence, for the purposes of s.437(2A), the commencement of bargaining is defined by reference to s.173(2), not by the giving of a NERR.

[47] We reject Maersk's contention that because the 'notification time' in s.173(2) triggers the requirement for the employer to give the NERR in respect of the proposed enterprise agreement, the Commission cannot make a PABO unless the employer has given a valid NERR for the proposed enterprise agreement. The validity of a NERR is not determinative in deciding whether a PABO application can be made under s.437(1). However, a NERR is relevant to the factual enquiry of whether the employer has agreed to bargain in relation to a proposed agreement.

[48] As we have mentioned, Maersk also submits that no valid NERR has been given for the MUA's proposed enterprise agreement. We also reject that submission.

[49] It is common ground that the October 2015 NERR is a valid NERR. In our view the NERR is evidence of the agreement by Maersk to bargain for an agreement with respect to employees to whom the notice relates. There is no evidence to the contrary. As we have mentioned, the October 2015 NERR was given to employees who would be covered by the enterprise agreement described in the notice (Maersk's proposed agreement). Maersk's proposed agreement covers employees covered by three unions – the MUA, the AIMPE and the AMOU. The scope of the MUA's proposed enterprise agreement is narrower – it is an 'MUA only' enterprise agreement'. Contrary to Maersk's submission, we are satisfied that the October 2015 NERR is a valid NERR for the purpose of the MUA's proposed enterprise agreement. This is so because the scope of the MUA's proposed enterprise agreement falls within the scope of the Maersk proposed enterprise agreement. Different considerations would arise if the scope of the MUA's proposed enterprise agreement had been wider than the Maersk proposed agreement, but that is not the case. We do not propose to express a view about alternative factual scenarios in the absence of full argument about such matters. In the circumstances before us the facts of this matter do not appear to present an impediment to the present application.

[50] Maersk also submits that the Commission cannot make a PABO in this matter as the requirement in s.443(1)(b) cannot be satisfied. This submission is premised on the proposition that the October NERR is not a valid NERR for the purpose of the MUA's proposed enterprise agreement. For the reasons give above, at [49], we have rejected that proposition and it follows that Maersk's submission in respect of s 443(1)(b) cannot stand.

[51] While it is not necessary for us to consider further the merits of Maersk's s 443(1)(b) submission we note that s 443(1)(b) directs the Commission's attention to the applicant's

prior conduct at the time the application for a protected action ballot order is determined.[40] If accepted, Maersk's proposed construction would focus attention not on the conduct of the PABO applicant but on the conduct of the employer. A consequence of Maersk's proposed construction would be that if the employer, through error or design, fails to comply with the terms of ss. 173(1) and (3) then the bargaining representative for the employees is prohibited – through no fault of its own – from obtaining a PABO. The legislature cannot have intended that the genuineness of the employees' bargaining representative's efforts to reach an agreement be assessed by reference to the actions of the employer, over which the bargaining representative has no control.

[52] Further, the submission put by Maersk in the present matter is essentially the same as that put by the employer in *Skilled Offshore,* that is, where the proposed enterprise agreement the subject of a PABO application is one that could not be approved by the Commission because the requirements of ss. 173(1) or (3) have not been complied with, the requirements of ss 437(1) and 443(1) cannot be met. The *Skilled Offshore* Full Bench rejected this submission:

> '[29] We reject this submission for the following reasons. Sections 437(1) and 443(1) do not define the expression "proposed enterprise agreement", nor do they refer to provisions associated with approval of enterprise agreements such as s.173 of the FW Act. The requirements of s.173, for example, must have been satisfied in relation to an enterprise agreement which has been "made" under s.182 and in relation to which an application for approval has been lodged under s.185, but there is no requirement under the FW Act for the "proposed enterprise agreement" being considered at the time of an application for a protected action ballot order to satisfy the conditions that must be met in order for an enterprise agreement to be approved. All that is relevantly required in order for there to be a "proposed enterprise agreement" within the meaning of ss.437(1) and 443(1) of the FW Act is an "agreement [which] the bargaining representative applying for an order under [s.437] is proposing at the time the application for a protected action ballot order is made". It would be an unwarranted gloss on the statute to read into it the later requirements associated with approval of an enterprise agreement that has been "made".'

[53] The *Skilled Offshore* Full Bench found that, on the proper construction of ss. 437(1) and 443(1), it was not required to resolve the factual issue of whether s.173 had been complied with.[41]

[54] We acknowledge that *Skilled Offshore* was decided before s.437(2A) commenced, but we are not persuaded that the introduction of s.437(2A) affects the reasoning in that case in respect of this issue.

[55] It is also relevant to observe that the adoption of a construction of s.443(1)(b) which would require the Commission, in each case, to determine whether the employer had complied with the requirements of ss.173(1) and (3), is inconsistent with the object of Division 8 of Part 3-3 and the scheme of the FW Act.

[56] In summary, we have reached the following conclusions:

1. Subsection 437(2A) provides that an application for a PABO, under s.437(1), cannot be made unless there has been a 'notification time' (within the meaning of s.173(2)) *in relation to* the enterprise agreement proposed by the PABO

applicant. The subsection does not require there to have been a notification time for the particular enterprise agreement proposed by the PABO applicant. It is sufficient that there has been a notification time 'in relation to' the agreement proposed by the PABO applicant.

2. Subsection 437(2A) was enacted for a limited purpose – to overcome the effect of the decision in *J.J Richards* and ensure that protected industrial action cannot be taken until after bargaining has commenced – that is, after the time when the employer agreed to bargain, or initiates bargaining (or one of the other circumstances constituting the 'notification time' within the meaning of s.173(2)). Hence, for the purposes of s.437(2A), the commencement of bargaining is defined by reference to s.173(2).

3. We reject the Maersk contention that because the 'notification time' in s.173(2) triggers the requirement for the employer to give the NERR in respect of the proposed enterprise agreement, the Commission cannot make a PABO unless the employer has given a valid NERR for the proposed enterprise agreement. Whether a valid NERR has been given in respect of the proposed enterprise agreement is not determinative in deciding whether a PABO application can be made under s.437(1). Where employer agreement is the relevant "notification time' factor, a NERR is relevant to the factual enquiry of whether the employer has agreed to bargain in relation to a proposed agreement.

4. The October 2015 NERR is a valid notice in relation to the MUA's proposed agreement. The October 2015 NERR is also evidence that Maersk has agreed to bargain in relation to an agreement covering the employees specified in the MUA's proposed agreement. It follows that Maersk's submissions in respect of s.437(2A) and s.443(1)(b) must be rejected.

[57] We remit the MUA's application for a PABO to Commissioner Williams for determination.

PRESIDENT

Appearances:

Mr M Ritter SC with Ms E Palmer for the Applicant
Mr T Caspersz with Mr J Hulmes for the Respondent

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[1] 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]

[2] (2009) 239 CLR 27 at para 47.

[3] [2014] FWCFB 1317

[4] [2014] FWCFB at paragraphs [42] and [46]

[5] [2015] FWCFB 7399 at [27]

[6] *Mermaid Marine* [2014] FWCFB 1317 at [46] and *Skilled Offshore* [2015] FWCFB 7399 at [29]

[7] [2014] FWCFB 2587.

[8] Ibid at [34].

[9] See s.15AB(2)(a) of the *Acts Interpretation Act* 1901 (Cth); *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 722 at 745

[10] *Re The News Corp Ltd* (1987) 15 FCR 227 at 240

[11] *Shuster v Minister for Immigration and Citizenship* (2008) 167 FCR 186 at 189

[12] Although as we note at [16] – [17], an application for a protected action ballot order may also be made in relation to a enterprise agreement proposed by an employer

[13] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374 per Toohey and Gaudron JJ

[14] Ibid at 376. Also see *Office of the Premier v Herald and Weekly Times Pty Ltd* [2013] VSCA 79 at [71]; and *Nordland Papier AG v Anti-Dumping Authority* [1999] 161 ALR 120 at [25].

[15] See *MSS Security* [2010] FWAFB 6519 at [19]

[16] [2010] FWAFB 1714 at [24]

[17] *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042 at [20]; *Swire at* [33].

[18] [2014] FWC 7469 at [52]

[19] [2014] FWC 7469 at [50]

[20] *Hunter* [2014] FWC 7469 at [53]

[21] [2015] FCAFC 195

[22] Maersk's submissions of 5 February 2016, at paragraph [14].

[23] Subject to Part 3 – 3, Division 8 of Chapter 3 of the FW Act

[24] Transcript of 22 February 2016, at paras 62-63.

[25] 'Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation at pp 175-177

[26] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

[27] [2009] FWAFB 1240.

[28] [2009] FWAFB 1240, [32].

[29] *Stuartholme School and Ors v Independent Education Union of Australia* [2010] FWAFB 1714; *MSS Security Pty Ltd v LHMU* [2010] FWAFB 6519.

[30] See [2011] FWAFB 3377, [5].

[31] *JJ Richards and Sons Pty Ltd v TWU* [2011] FWAFB 3377, [7].

[32] *Transport Workers' Union of Australia v JJ Richards and Sons Pty Ltd* [2011] FWA 973.

[33] ibid. [24].

[34] *JJ Richards and Sons Pty Ltd v TWU* [2012] FCAFC 53.

[35] [2010] FWAFB 9963, [2011] FWAFB 3377.

[36] ACCI, pp. 14 112–113; Ai Group, p. 128; Allens Arthur Robinson, p. 5; AMMA, pp. 14, 106; AMIF, pp. 15–16; BHP, p. 11; BCA, pp. 50–51; Business SA, p. 8; HIA, pp. 45–46; HR Nicholls, p. 8; MBA, pp. 63–64; NECA, p. 5; Rio Tinto, pp. 5, 14; WA Government, pp. 3–4; Woodside, p. 15.

[37] (2012) 201 FCR 297

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

[39] Ibid at [33]

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

[41] *Skilled Offshore Full Bench* at paragraph [31]