FEDERAL COURT OF AUSTRALIA

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

Citation:	J.J. Richards & Sons Pty Ltd v Fair Work Australia [2012] FCAFC 53
Parties:	**J.J. RICHARDS & SONS PTY LTD and AUSTRALIAN MINES AND METALS ASSOCIATION INC. v FAIR WORK AUSTRALIA and TRANSPORT WORKERS' UNION OF AUSTRALIA**
File number:	VID 812 of 2011
Judges:	**JESSUP, TRACEY AND FLICK JJ**
Date of judgment:	20 April 2012
Catchwords:	**INDUSTRIAL LAW** – protected action ballot order – no need for bargaining with employer to have commenced **STATUTORY CONSTRUCTION** – need to promote object or purpose of legislation – not a warrant to re-draft legislation **REMEDIES** – refusal in exercise of discretion – lack of utility
Legislation:	*Acts Interpretation Act 1901 (Cth)* s 15AA *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16 *Fair Work Act 2009* (Cth) ss 3, 50, 54, 171 – 173, 180 – 182, 185, 186, 228 – 230, 231, 236 – 240, 242, 243, 408 – 411 – 413, 415, 418, 436 – 443, 460, 539, 546, 562, 570 *Federal Court of Australia Act 1976* (Cth) s 20, 22, 23 *Migration Act 1958* (Cth) s 424A *Sex Discrimination Act 1984* (Cth) *Industrial Arbitration Act 1940* (NSW) *Infertility Treatment Act 1995* (Vic) s 8
Cases cited:	*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, cited *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41, 239 CLR 27, cited *Application of The News Corp Ltd, Re* (1987) 15 FCR 227, cited *Australian Boot Trade Employés' Federation v Whybrow*

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

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

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

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

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION **VID 812 of 2011**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**J.J. RICHARDS & SONS PTY LTD** **First Applicant**
	AUSTRALIAN MINES AND METALS ASSOCIATION INC. **Second Applicant**
AND:	**FAIR WORK AUSTRALIA** **First Respondent**
	TRANSPORT WORKERS' UNION OF AUSTRALIA **Second Respondent**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE OF ORDER:	**20 APRIL 2012**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. There be no orders as to costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION | VID 812 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

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

AUSTRALIAN MINES AND METALS ASSOCIATION INC.
Second Applicant

AND: FAIR WORK AUSTRALIA
First Respondent

TRANSPORT WORKERS' UNION OF AUSTRALIA
Second Respondent

JUDGES: JESSUP, TRACEY AND FLICK JJ
DATE: 20 APRIL 2012
PLACE: MELBOURNE

REASONS FOR JUDGMENT

JESSUP J

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

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

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

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

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

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> ....
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; ....

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

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

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

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

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

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

> *Employer to notify each employee of representational rights*
> (1) An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:
> (a) will be covered by the agreement; and
> (b) is employed at the notification time for the agreement.
>
> *Notification time*
> (2) The ***notification time*** for a proposed enterprise agreement is the time when:

> (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
> (b) a majority support determination in relation to the agreement comes into operation; or
> (c) a scope order in relation to the agreement comes into operation; or
> (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.
>
> *When notice must be given*
>
> (3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:
> (a) an application has been made under section 437; and
> (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
> (2) FWA must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
> (3) A protected action ballot order must specify the following:
> (a) the name of each applicant for the order;
> (b) the group or groups of employees who are to be balloted;
> (c) the date by which voting in the protected action ballot closes;
> (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

(4) If FWA decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:
   (a) the person that FWA decides, under subsection 444(1), is to be the protected action ballot agent; and
   (b) the person (if any) that FWA decides, under subsection 444(3), is to be the independent advisor for the ballot.

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

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

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

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

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

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

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

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

protected action ballot order.

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

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

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

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

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

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

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

Associate:

Dated: 20 April 2012

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION **VID 812 of 2011**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**J.J. RICHARDS & SON PTY LTD** **First Appellant** **AUSTRALIAN MINES AND METALS ASSOCIATION INC.** **Second Appellant**
AND:	**FAIR WORK AUSTRALIA** **First Respondent** **TRANSPORT WORKERS' UNION OF AUSTRALIA** **Second Respondent**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE:	**20 APRIL 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

TRACEY J

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

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

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

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

Associate:

Dated: 20 April 2012

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION **VID 812 of 2011**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**J.J. RICHARDS & SONS PTY LTD** **First Applicant** **AUSTRALIAN MINES AND METALS ASSOCIATION INC.** **Second Applicant**
AND:	**FAIR WORK AUSTRALIA** **First Respondent** **TRANSPORT WORKERS' UNION OF AUSTRALIA** **Second Respondent**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE:	**20 APRIL 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

FLICK J

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

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

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

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

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

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

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

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

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

THE FAIR WORK ACT

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

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

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

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

45 Section 443 provides in part as follows:

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

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

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

> **Pattern bargaining**
> *Pattern bargaining*
> (1) A course of conduct by a person is ***pattern bargaining*** if:
> (a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and
> (b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and
> (c) the course of conduct relates to 2 or more employers.
> *Exception–genuinely trying to reach an agreement*
> (2) The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.
> (3) For the purposes of subsection (2), the factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular

> employer, include the following:
>
> (a) whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;
>
> (b) whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees;
>
> (c) whether the bargaining representative is meeting the good faith bargaining requirements.
>
> (4) If a person seeks to rely on subsection (2), the person has the burden of proving that the subsection applies.
>
> *Genuinely trying to reach an agreement*
>
> (5) This section does not affect, and is not affected by, the meaning of the expression "genuinely trying to reach an agreement", or any variant of the expression, as used elsewhere in this Act.

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

> **Common requirements that apply for industrial action to be protected industrial action**
>
> *Common requirements*
>
> (1) This section sets out the ***common requirements*** for industrial action to be protected industrial action for a proposed enterprise agreement.
>
> *Type of proposed enterprise agreement*
>
> (2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.
>
> *Genuinely trying to reach an agreement*
>
> (3) The following persons must be genuinely trying to reach an agreement:
>
> (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement--the bargaining representative;
>
> (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement--the bargaining representative of the employee.

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

ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION

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

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

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

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

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

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

> [5] The proposition that a court can introduce words into an Act of Parliament offends a fundamental principle of our constitutional law. It is no part of the function of any judge to amend legislation. The task of the courts is to determine what Parliament meant by the words it used, not to determine what Parliament intended to say ...
>
> [6] In order to construe the words actually used by parliament, it is sometimes necessary to give them an effect as if they contained additional words. This is not, however, to introduce words into the Act. This involves the construction of the words actually used. Judicial statements which appear to have been prepared to countenance something more than this, should be so understood.
>
> [7] The most frequently cited formulations are:
>
> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."
>
> *Thompson v Goold & Co* [1910] AC 409 at 420, per Lord Mersey; and
>
> "...we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."
>
> *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444 at 445, per Lord Loreburn LC.
>
> To similar effect is the following formulation:
>
> "Additional words ought not to be read into a statute unless they are required in order to make the provision intelligible."
>
> *Wills v Bowley* [1983] 1 AC 57 at 78B.
>
> [8] The process by which words omitted by inadvertence on the part of the draftsperson may be supplied by the court, must remain capable of characterisation as a process of construction of the words actually used.

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

THE ABSENCE OF ANY REQUIREMENT TO BARGAIN

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

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

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

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

58 It is ultimately concluded that s 443(1)(b) is to be construed such that Fair Work Australia cannot reach a state of satisfaction that an "*applicant ... is ... genuinely trying to reach an agreement with the employer*" unless:

- an applicant has approached the employer and informed the employer of the general ambit of that for which agreement is sought; and
- the employer has foreshadowed – even in the most general of terms – its attitude as to the proposed agreement.

More may be required. Much may well depend upon the factual scenario in which the terms of s 443(1)(b) are to be applied. But such a minimum statement of that which is required is sufficient to dispose of the present *Application*. Contrary to the submissions advanced on behalf of the Applicants, the terms of s 443(1)(b) do not require:

- bargaining to have commenced within the meaning of and for the purposes of s 173, found within Part 2-4, of the *Fair Work Act*.

59 So much, it is concluded, follows from the natural and ordinary meaning of the phrase "*trying to reach an agreement ...*". It is difficult to conclude that any person can try to reach an agreement with another in the absence of a disclosure of that for which consensus is sought. One person may wish to reach an agreement with another. But, until the general content of the proposed agreement is disclosed, it cannot be said that he has even attempted to reach an agreement. Until disclosed, it is not known whether the other person will readily embrace the proposed agreement or shun it or (perhaps) embrace the concept of an agreement but wish to vary one or other of its terms. Until disclosed, the person seeking agreement has not even tried to solicit the response of the other. Unless the disclosure is genuinely with a view to reaching agreement, it could well be said that the attempt to reach an agreement falls short of a person even trying to reach agreement. The addition of the word "*genuine*" – on

one approach to construction – perhaps adds little. But the addition of that term serves to emphasise the importance of a person actually trying to solicit agreement. Until a proposed agreement has been disclosed to the prospective parties, and a response solicited, an applicant has not even tried to reach agreement – let alone genuinely tried to reach agreement.

60 The Transport Workers' Union, in the present proceeding, satisfied that requirement by writing to J.J. Richards on 24 December 2010. Rightly or wrongly, J.J. Richards indicated its response in the terms it did in its letter dated 7 January 2011. That exchange of correspondence was sufficient to satisfy the precondition to the exercise of the power conferred by s 443(1).

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

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

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

> FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:
>
> (a) an application has been made under section 437; and
>
> (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted and bargaining has commenced.

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

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

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

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

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

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

- s 240.

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

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

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

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

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

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

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

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

THE REFUSAL OF RELIEF – THE LACK OF UTILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The object of the granting of the writ of mandamus being, as before stated, to prevent a failure of justice, and to provide an immediate and efficacious remedy, it follows that it will not be granted if, when granted, it would be nugatory, in accordance with the maxim, *Lex non cogit ad inutilia*. For the principle upon which alone the Court of B. R. exercises this high prerogative power is, that a strong political necessity for such remedy exists, and that without it the ends of justice must be defeated.
>
> So the Court will refuse it, if it be manifest that it must be vain and fruitless, or useless, or cannot have a beneficial effect. ...
>
> So it will be refused where it is clearly unnecessary, as where, by reason of an offer or concession from the other side, the object of the writ is attained (*a*). So the Court will not grant it to command the performance of anything in future which has always been voluntarily done before. ...
>
> So the Court will refuse it if it see that it must ultimately fail. Thus, to a mandamus to make a sewers' rate to reimburse an expenditor, it was returned that the writ was not delivered till the 12th February, and that the commission expired four days afterwards, and that therefore the defendants had not time, &c. The Court, on allowing the return, said that a peremptory mandamus could not be granted, it appearing there was then no power in any body to execute the writ.
>
> So the Court will see that the object of the mandamus is for some proper and definite purpose, and not for the gratification of mere curiosity. ...

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

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

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

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

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

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

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

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

> *The discretionary issue*
>
> [219] *Considerations favourable to relief*: Having come so far in this reasoning, and established, as I have attempted to do, a legal foundation for the exercise by this Court of its original jurisdiction, it would require substantial reasons of a discretionary kind to refuse relief.
>
> [220] In a sense, this proposition also reflects considerations of principle and practicality. As to principle, if a party can demonstrate an error in the interpretation of federal and State legislation that has resulted in an order by a federal judge, purporting to invalidate in large part a public statute of a State, the correction of that error in properly constituted proceedings is not merely a matter of interest to the immediate parties. It is also one that affects all of the people of the Commonwealth living under its *Constitution* and laws. By covering cl 5 of the *Constitution*, all courts, judges and people of every State and of every part of the Commonwealth are bound by the *Constitution* and laws made by the Federal Parliament. If it could be shown that, erroneously, a State law has been held unconstitutional, the sooner that error is corrected, one might say, the better.
>
> [221] Furthermore, the issue presented by the substantive arguments of the moving parties, even if confined for present purposes to those of the relator in the second proceedings, are objectively important. They are important to Ms Meldrum and, by inference, to Dr McBain who originally initiated his test case before Sundberg J. They are important to other persons in the positions of Ms Meldrum and Dr McBain who might wish to be relieved of any doubt concerning the correctness of Sundberg J's decision, and the eventually binding force of the order which gave it effect. On the face of things, the prospect of further and later unsettling litigation by well resourced parties should be removed if it can be by a decision on the substantive question, one way or the other.

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

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

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

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

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

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

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

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

Taylor and Hardie JJ agreed.

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

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

CONCLUSIONS

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

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

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

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

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

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

Associate:

Dated: 20 April 2012