FEDERAL COURT OF AUSTRALIA

Sydney Trains v Australian Rail, Tram and Bus Industry Union (Separate Question) [2024] FCA 1479

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| File number: |  |
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| Judgment of: | **WHEELAHAN J** |
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| Date of judgment: | 19 December 2024 |
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| Catchwords: | **INDUSTRIAL LAW** — protected industrial action – employee claim action – separate trial of a claim made by the applicants (the **Rail Agencies**) for a declaration that particular industrial action to be engaged in by their employees was not *protected industrial action* within the meaning of ss 408 and 415 of the *Fair Work Act 2009* (Cth) (**FW Act**) – where the Rail Agencies and the respondents (the **Unions**) had been bargaining for a new enterprise agreement to replace an existing agreement since June 2024 – where the Rail Agencies and the Unions were not agreed as to whether the Rail Agencies were *related employers* within the meaning of s 172(5A), and so whether the proposed enterprise agreement should be a *single-enterprise agreement* or a *multi-enterprise agreement* – where notices of employee representational rights issued by the Rail Agencies described the proposed enterprise agreement as a proposed single-enterprise agreement – where the Unions had applied for, and obtained, *protected action ballot orders* – where protected action ballots had subsequently been conducted, and notice given to the Rail Agencies of various forms of proposed industrial action in support of claims made in relation to the proposed enterprise agreement – where the Fair Work Commission subsequently, on 6 December 2024, issued a *single interest employer authorisation*, which by force of s 172(5) required the Rail Agencies not to bargain for any enterprise agreement other than a *single interest employer agreement*, a type of *multi-enterprise agreement* – where the Rail Agencies submitted that the making of the single interest employer authorisation had the result that the proposed industrial action was no longer protected because it was not “authorised by a protected action ballot” within the meaning of s 409(2) of the FW Act – *held*: the statutory expression “proposed enterprise agreement” is a generic expression, which is not pitched at a level of specificity that includes a fixed or immutable type of enterprise agreement – the making of the single interest employer authorisation did not affect the character of the “proposed enterprise agreement” – declaration refused. |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) (as at 25 June 2009) s 13, 15AA*Fair Work Act 2009* (Cth) ss 3(f), 12, 40A, 54(2), 58(2), 171(a), 172, 172(2), 172(3), 172(3A), 172(5), 172(5A), 172(5A)(c), 173(1), 173(2), 173(2)(a), 173(2)(aa), 173(2)(c), 173(2)(e), 173(3), 173(4), 176, 179, 180, 182(2), 184, 226(4)(a), 228, 229, 231, 234(2), 235(1)(c), 235(5), 235(6), 235(6)(b), 236(1), 237(1), 238, 238(1), 240(2)(c), 240A(1), 240A(4), 242, 242(1), 243(1), 243(3A), 248, 249, 249(1), 249(1)(b)(iv), 249(1B), 249(1D), 249(2), 249(3), 408, 408(a), 409, 409(1), 409(1)(c), 409(1)(d), 409(2), 413(1), 413(2), 413(4), 414, 414(1), 415, 436, 437, 437(1), 437(2), 437(2A), 437A, 438, 443, 443(1), Sch 1, Pt 13, Div 11, item 66*Fair Work Amendment Act 2015* (Cth) Sch 1, item 56*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)*Workplace Relations Act 1996* (Cth) ss 170MI, 170ML(2)(e), 423*Transport Administration Act 1988* (NSW) |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27*Aldi Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53; 262 CLR 593*Australian Rail, Tram and Bus Industry Union v Sydney Trains* [2024] FWC 1915*Australian Rail, Tram and Bus Industry Union v Sydney Trains* [2024] FWC 3419*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503*JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; 201 FCR 297*Legal Services Board v Gillespie-Jones* [2013] HCA 35; 249 CLR 493*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Sydney Trains* [2023] FWCA 423*Sydney Trains v Australian Rail, Tram and Bus Industry Union* [2024] FCA 1411*SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362*Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737; 138 IR 362Browne D, *Ashburner’s Principles of Equity* (2nd ed, Butterworth & Co, Ltd, 1933)Herzfeld P and Prince T, *Interpretation* (3rd ed, Thomson Reuters, 2024) |
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| Division: | Fair Work Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 98 |
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| Date of hearing: | 16 December 2024 |
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| Counsel for the Applicants: | Mr S Meehan SC with Mr M Minucci and Mr M Garozzo |
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| Solicitor for the Applicants: | Kingston Reid |
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| Counsel for the Respondents: | Mr L Saunders |

ORDERS

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|  | NSD 1770 of 2024 |
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| BETWEEN: | SYDNEY TRAINSFirst ApplicantNSW TRAINSSecond Applicant |
| AND: | AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNIONFirst RespondentCOMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIASecond RespondentAUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS UNION (and others named in the Schedule)Third Respondent |

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| order made by: | WHEELAHAN J |
| DATE OF ORDER: | 19 December 2024 |

THE COURT ORDERS THAT:

1. There be judgment for the respondents on the applicants’ claim for relief in paragraph 1 of the originating application.

2. Paragraph 1 of the orders made on 8 December 2024 be discharged.

3. The proceeding be listed for case management on 31 January 2025 at a time to be advised.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

1 The applicants in this proceeding are Sydney Trains and NSW Trains. Each is a statutory corporation constituted under the *Transport Administration Act 1988* (NSW). I will refer to them collectively as the **Rail Agencies**. By their originating application, the Rail Agencies seek various forms of relief arising out of industrial action that the respondents (the **Unions**) have organised and, subject to the orders of the Court, propose to continue.

2 On 8 December 2024, Perram J as Duty Judge made interlocutory orders the practical effect of which was to restrain the Unions from continuing industrial action relating to the Sydney rail network, which also affected non-metropolitan services: see *Sydney Trains v Australian Rail, Tram and Bus Industry Union* [2024] FCA 1411 (***Sydney Trains***). Paragraph [1] of the orders made by Perram J was in the nature of an interlocutory injunction. His Honour made the order upon being satisfied that the Rail Agencies had established a *prima facie* case that the industrial action was not *protected industrial action* within the meaning of s 408 of the *Fair Work Act 2009* (Cth) (**FW Act**), and that the balance of convenience favoured making the order.

3 After the proceeding was docketed to me, I made an order on 10 December 2024 for the separate trial on a final basis of the question whether the Rail Agencies are entitled to a declaration in the terms sought by paragraph [1] of their originating application –

A declaration pursuant to section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) that the notified industrial action organised by the Respondents, as set out in the Notices of Protected Industrial Action (together, **the Notices**) (copies of which are included in Annexure 26 to the Abbas Affidavit), is not, and would not be, protected industrial action for the purposes of ss 408 and 415 of the *Fair Work Act 2009* (Cth) (**FW Act**).

4 For the reasons that follow, the Rail Agencies have not established that the notified industrial action is not, and would not be, protected industrial action. Accordingly, the declaration sought by the Rail Agencies must be refused.

## Material facts

5 Much of the background to this proceeding was set out by Perram J at [1]–[19] of his Honour’s reasons for giving interlocutory relief. In summary, the key material facts are as follows.

6 There is currently in operation a single-enterprise agreement that covers the Rail Agencies, several registered organisations that include the Unions, and the employees referred to in the agreement: *Sydney Trains and NSW TrainLink Enterprise Agreement 2022* (the **2022 Agreement**). The 2022 Agreement was approved by the Fair Work Commission on 10 February 2023, and commenced operation on 17 February 2023: *Sydney Trains* [2023] FWCA 423. At the time of approval, the Commission considered the Rail Agencies to be *single interest employers*, which was the subject of a definition in s 172(5) of the FW Act that was repealed by amendments made in 2022: see *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**2022 FW Amendment Act**). That characterisation qualified the Rail Agencies to enter into a single-enterprise agreement under s 172 of the FW Act as then in force.

7 The 2022 Agreement reached its nominal expiry date on 1 May 2024. It remains in operation because it has not been replaced or otherwise terminated, and there is continued application: FW Act ss 54(2) and 58(2).

8 The Rail Agencies and the Unions have been in the process of bargaining for a new enterprise agreement, to replace the 2022 Agreement, since around the time of its nominal expiry date –

(a) on 15 April 2024, the Unions (which, together with two additional unions, are known collectively as the **Combined Rail Unions**: see *Sydney Trains* at [3] (Perram J)) served a log of claims;

(b) on 31 May 2024, Sydney Trains (and, it appears, NSW Trains) served a notice of employee representational rights, to which I will return;

(c) from June 2024, the Rail Agencies began to meet with the Combined Rail Unions to engage in bargaining for a new enterprise agreement, with 30 bargaining meetings having occurred so far; and

(d) from 6 December 2024, in circumstances that I will address, the bargaining between the Rail Agencies and the Combined Rail Unions must be directed towards making a *single interest employer agreement*.

9 For industrial action engaged in to support employees’ claims in industrial bargaining to be *protected industrial action*, it is necessary for the industrial action to be authorised by a protected action ballot: FW Act ss 408(a), 409(1)(d), 409(2). Between 18 July 2024 and 2 September 2024, each of the Unions applied to the Commission for a protected action ballot order under s 437 of the FW Act. In each of those applications, the relevant union stated in the supporting declaration in answer to question 1.3 that the proposed agreement was not a *greenfields agreement* or a *cooperative workplace agreement*. (For this purpose, I leave aside a complication involving the fifth respondent’s attempts to secure a protected action ballot order.)

10 Between 1 August 2024 and 4 September 2024, the Commission made protected action ballot orders as sought by each of the Unions. The first decision of 1 August 2024 in relation to an application by the Australian Rail, Tram and Bus Industry Union (**RTBU**) was accompanied by reasons which addressed some issues that were contested on the application: *Australian Rail, Tram and Bus Industry Union v Sydney Trains* [2024] FWC 1915. The Commission’s reasons record at [8] that in the lead-up to the bargaining, the Unions requested that the Rail Agencies bargain for a *single interest employer agreement*. They did so on the ground that there had been an operational change which is referred to in the Commission’s reasons as the “Accountability Change”. The Unions had contended that this change had the consequence that the Rail Agencies did not meet the criteria for *related employers* in s 172(5A), because they were not engaged in a common enterprise. The Rail Agencies rejected this request, and maintained that they were *related employers* entitled to bargain for a single-enterprise agreement. The Commission also recorded at [13] the following submissions made on behalf of the Rail Agencies –

(1) If, as the RTBU contends, the Rail Agencies are not capable of making a single enterprise agreement, the agreement they are negotiating must necessarily be a cooperative workplace agreement. Applications for protected action ballot orders cannot be made in relation to cooperative workplace agreements (s 437(2)(b));

(2) If the Rail Agencies are in fact related employers, (as the Commission has already found they were in 2022), it will mean that the RTBU’s concern that the Rail Agencies cannot enter the 2024 Agreement is unfounded, and the RTBU’s ‘threshold claim’ will not present the barrier the RTBU contends it does; and

(3) If the Rail Agencies are related employers, a single interest employer authorisation is not available, because related employers cannot enter into a multi-enterprise agreement (s 172(3)).

11 The Commission held at [18]–[20] that notwithstanding the Accountability Change, the Rail Agencies were *related employers* because they were engaged in a common enterprise, and evidently did not find it necessary to address the other submissions referred to above.

12 The relevant employees of the Rail Agencies were then balloted in accordance with the terms of the protected action ballot orders. Those ballots resulted in the proposed forms of industrial action specified in the protected action ballot orders being authorised. On various dates beginning on 5 September 2024, the Unions gave notice to the Rail Agencies of their intention to take protected industrial action, in the form of employee claim action: see FW Act s 414. There is no dispute that the proposed industrial action, at least prior to 6 December 2024, was authorised by a protected action ballot for the purposes of s 409(2).

13 On 27 September 2024, the RTBU applied to the Commission for a *single interest employer authorisation* under s 248 of the FW Act. The questions in the standard-form application completed on behalf of the RTBU referred repeatedly to “the proposed multi-enterprise agreement”. On 6 December 2024, the Commission conducted a hearing via Microsoft Teams and granted the authorisation in relation to the Rail Agencies: *Australian Rail, Tram and Bus Industry Union v Sydney Trains* [2024] FWC 3419. The reasons record at [5] that the Rail Agencies consented to the application, and that it was supported by other union bargaining representatives.

14 The practical effects of the single interest employer authorisation are that the Rail Agencies are now precluded by s 172(5) from –

(a) making any enterprise agreement with their employees other than a single interest employer agreement; and

(b) initiating bargaining, agreeing to bargain, or being required to bargain with those employees for any other kind of enterprise agreement.

15 On 8 December 2024, the Rail Agencies approached the Court on an urgent basis, and obtained the interlocutory relief that was the subject of the orders of Perram J.

## Succinct statement of the issue before the Court

16 The issue before the Court on this separate trial is essentially whether, as a result of the single interest employerauthorisation made on 6 December 2024, the protected action ballot orders and the notices of proposed industrial action are no longer effective to bring any industrial action foreshadowed by the notices within the scope of *protected industrial action* for the purposes of s 408 of the FW Act.

## The material features of the legislation

17 I will address the material features of the legislation in order to place in context the parties’ submissions.

18 Part 2-4 of the FW Act is about enterprise agreements. One of the objects of Part 2-4 stated in s 171(a) is 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”. This object aligns with one of the objects of the Act as a whole, as expressed in s 3(f).

19 The Act provides for different types of enterprise agreements. Sections 172(2) and (3) of the Act distinguish between a *single-enterprise agreement* and a *multi-enterprise agreement*, and the definition of *enterprise agreement* in s 12 includes both. The outcome of a successful bargaining process contemplated by the Act is the making of either a single-enterprise or a multi-enterprise agreement: *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; 201 FCR 297 (***JJ Richards***) at [15] (Jessup J). The statutory concept of a multi-enterprise agreement carries with it certain sub-sets, namely a *single interest employer agreement*, a *cooperative workplace agreement*, and a *supported bargaining agreement*: see the definitions of those terms in s 12.

20 Where there are two or more employers, the circumstances in which a single-enterprise agreement and a multi-enterprise agreement may be made are circumscribed by s 172 of the Act, which fixes on the circumstances of the making of the agreement: *Aldi Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53; 262 CLR 593 at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ). The current form of s 172 is partly the product of amendments effected by the 2022 FW Amendment Act, the relevant provisions of which commenced on 6 June 2023. If two or more employers are *related employers*, then they may make a single-enterprise agreement: s 172(2). What constitutes a *related employer* is the subject of the criteria in s 172(5A) –

*Related employers*

(5A) Two or more employers are ***related employers*** if:

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

(b) the employers are related bodies corporate; or

(c) the employers carry on similar business activities under the same franchise and are:

(i) franchisees of the same franchisor; or

(ii) related bodies corporate of the same franchisor; or

(iii) any combination of the above.

21 If two or more employers are *not* all related employers, then they may make a multi-enterprise agreement: s 172(3). The necessary implication on the face of ss 172(2) and (3) is that two or more employers who are not all related employers may make a multi-enterprise agreement, but not a single-enterprise agreement. There is an express exception to the reverse of this proposition in the case of business activities carried on under a franchise, where two or more employers that are related employers may make a multi-enterprise agreement: s 172(3A).

22 The 2022 amendments effected a conceptual change from a *single interest employer agreement* being a type of single-enterprise agreement, to being a multi-enterprise agreement: see the Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)at [1007].

23 Under s 248 of the FW Act, application may be made to the Commission for a *single interest employer authorisation* –

**248 Single interest employer authorisations**

(1) The following may apply to the FWC for an authorisation (a ***single interest employer authorisation***) under section 249 in relation to a proposed enterprise agreement that will cover two or more employers:

(a) those employers;

(b) a bargaining representative of an employee who will be covered by the agreement.

(2) The application must specify the following:

(a) the employers that will be covered by the agreement;

(b) the employees who will be covered by the agreement;

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.

24 Section 249(1) of the Act mandates the making of a single interest employer authorisation if the conditions and requirements set out therein are satisfied –

**249 When the FWC must make a single interest employer authorisation**

*Single interest employer authorisation*

(1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that:

(i) at least some of the employees that will be covered by the agreement are represented by an employee organisation; and

(ii) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation; and

(iii) if the application was made by 2 or more employers under paragraph 248(1)(a)—the requirements of subsection (1A) are met; and

(iv) if the application was made by a bargaining representative under paragraph 248(1)(b)—each employer either has consented to the application or is covered by subsection (1B); and

(v) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and

(vi) if the requirements of subsection (3) are met—the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement.

25 In the present case, the application to the Commission was made by a bargaining representative of an employee, namely the RTBU. The Rail Agencies consented to the application, thereby engaging the first limb of s 249(1)(b)(iv), and rendering s 249(1B), and its reference to s 249(1D), inapplicable.

26 It is necessary to observe some further features of s 249.

27 *First*, the authorisation is made in relation to a “proposed enterprise agreement”: s 249(1). By the use of this expression, the section does not distinguish between a single-enterprise agreement and a multi-enterprise agreement as being the foundation for the application. The reference to a “proposed enterprise agreement” is pitched at a generic level, which is a topic to which I will return.

28 *Secondly*, the terms of s 249(2) are significant –

*Franchisees*

(2) The requirements of this subsection are met if the employers carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

29 These requirements coincide with the circumstances that permit the making of a single-enterprise agreement in a franchise situation under s 172(5A)(c). In the result, in these circumstances applicant employers who qualify for a single-enterprise agreement are not precluded from applying for a single interest employer authorisation. In oral submissions, senior counsel for the Rail Agencies accepted this to be the position.

30 *Thirdly*, the same can be said for the requirements for common interest employers in s 249(3), which is relevant to the situation of the Rail Agencies –

*Common interest employers*

(3) The requirements of this subsection are met if:

(a) the employers have clearly identifiable common interests; and

(b) it is not contrary to the public interest to make the authorisation.

31 There is nothing in s 248 or s 249 that would preclude employers that are *related employers* from seeking a single interest employer authorisation under s 248 on the ground that they are *common interest employers*. Again, in oral submissions, senior counsel for the Rail Agencies accepted this to be the position.

32 If the Commission makes a single interest employer authorisation in relation to a proposed enterprise agreement, then certain consequences follow. For present purposes, and as I alluded to earlier, the principal consequence is that by reason of s 172(5), the only type of enterprise agreement that may then be bargained for and made is a single interest employer agreement –

(5) Despite any other provision of this Part, if an employer is specified in a single interest employer authorisation that is in operation:

(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and

(b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees.

33 The statutory conception of a multi-enterprise agreement includes a single interest employer agreement as a result of the definition in s 12 –

***single interest employer agreement***: a multi-enterprise agreement is a single interest employer agreement if a single interest employer authorisation was in operation in relation to the agreement immediately before the agreement was made.

34 Sections 234(2) and 240(2)(c) of the Act, concerning applications for intractable bargaining declarations and applications to deal with bargaining disputes, also treat single interest employer authorisations as attaching to multi-enterprise agreements. If there were to be any doubt about the classification by the Act of a single interest employer agreement as a multi-enterprise agreement, that doubt would be resolved by recourse to the Revised Explanatory Memorandum to the 2022 Bill at [1007], to which I have already referred.

35 There are several respects in which the Act treats the making of a single-enterprise agreement and a multiple-enterprise agreement differently. Some of the procedural steps are different. Under s 182(2), a multiple-enterprise agreement is made when a majority of the employees of at least one of the employers who cast a valid vote approve the agreement. There is no requirement that a majority of all employees of all employers approve the agreement, but under s 184 before the application for approval is made, the bargaining representative must vary the agreement so that it is expressed to cover only the employers whose employees approved the agreement, and the employees of each of those employers. In a case such as the present, this gives rise to the possibility that a proposed multi-enterprise agreement in the form of the single interest employer agreement might be approved by the employees of only one of the Rail Agencies and not the other.

36 Once the nominal expiry date of the 2022 Agreement passed, the Unions and their members were in a position, subject to compliance with the procedures mandated by the FW Act, to take protected industrial action for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement, which action is referred to in s 409(1) as *employee claim action*. Industrial action organised or engaged in for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement that has not been the subject of a ballot, and which has not been specified in a notice, would not be protected industrial action within the meaning of the FW Act. The procedures referred to include a protected action ballot, and the giving of notice: ss 409(2), 413(4), 414.

37 It is also a requirement that the industrial action must not relate to a proposed enterprise agreement that is a *greenfields agreement* or a *cooperative workplace agreement*: s 413(2). There is no evidence that the Unions or the Rail Agencies ever proposed a cooperative workplace agreement. On the contrary, I have already noted that by the standard-form declarations that accompanied each of the applications for a protected action ballot order, the representatives of the Unions in answer to Question 1.3 stated that the proposed agreement was not a greenfields agreement or a cooperative workplace agreement.

38 On 31 May 2024, the Rail Agencies issued notices of employee representational rights, which is a requirement of s 173(1) of the FW Act in relation to an employer that will be covered by a proposed single-enterprise agreement. Prior to the amendments effected by the 2022 FW Amendment Act, the notice requirement under s 173(1) extended to all proposed enterprise agreements that were not greenfields agreements, and was not limited to single-enterprise agreements. Under s 173(3), the employer must give the notice under s 173(1) as soon as practicable, and not later than 14 days after the *notification time* for the agreement.

39 The *notification time* is the subject of a definition in s 173(2) –

*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

(aa) the employer receives a request to bargain under subsection (2A) in relation to 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 supported bargaining authorisation in relation to the agreement that specifies the employer comes into operation; or

(e) a single interest employer authorisation in relation to the agreement that specifies the employer comes into operation.

40 Despite its location in s 173, immediately following s 173(1) and preceding s 173(3), it is clear that a notification timemay be applicable to both a single-enterprise agreement and a multi-enterprise agreement. That is because the definition of *notification time* in s 12 and s 173(2) refers to a “proposed enterprise agreement” thereby not drawing any distinction. In addition, some elements of s 173(2) would ordinarily apply only to a single-enterprise agreement (paras (aa), (b), and (c)), or only to a multi-enterprise agreement (paras (d) and (e)). Paragraph (a), on the other hand, which refers to the time when the employer agrees to bargain, or initiates bargaining, is, on its face, capable of applying to both, as it did prior to the amendments that were made to s 173 by the 2022 FW Amendment Act. As Jessup J observed in *JJ Richards* at [7] in relation to s 173(2) of the Act as it then stood –

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).

41 Counsel for the parties accepted that it remains the case that “bargain”, its grammatical derivatives, and the initiating of bargaining are not the subject of definitions in the FW Act, save that “the day bargaining starts” for a proposed agreement is the subject of s 235(6), but only for the purposes of calculating the *end of the minimum bargaining period* referred to in s 235(5). It also remains the case that, as Jessup J observed in *JJ Richards* at [14], although “bargaining” is not defined in the Act in terms, s 231 concerning bargaining orders effectively leaves it to the Commission, 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, thereby shaping the course of bargaining in that situation.

42 In addition, *notification time* is deployed in other provisions of the Act which are concerned with a multi-enterprise agreement, or which are applicable to enterprise agreements generically: see ss 226(4)(a), 235(6)(b), 240A(1) (express reference to notification time for a proposed multi-enterprise agreement), 437(2A), and Sch 1, Pt 13, Div 11, item 66.

43 The upshot is that the several instances of the *notification time* in s 173(2) are not to be regarded as mutually exclusive. One can conceive of situations where more than one notification time might occur in relation to a proposed enterprise agreement during the course of the process of bargaining. To take a simple example, a proposed single-enterprise agreement might be the subject of a request to bargain (s 173(2)(aa)), an agreement by the employer to bargain (s 173(2)(a)), and a scope order (s 173(2)(c)). The possibility that there might be more than one instance of a notification time is recognised by s 173(4), which eliminates the possibility that ss 173(1) and (3) might require the giving of a notice of employee representational rights upon every occurrence of a notification time –

*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.

44 This understanding is consistent with the shift effected by the FW Act away from a formal *bargaining period* that had been the subject of s 170MI, and subsequently s 423, of the *Workplace Relations Act 1996* (Cth) (**WR Act**), where the formal bargaining period was initiated by giving a written notice. The notice of employee representational rights required by s 173(1) is not a notice that commences some formal bargaining period, but it may provide evidence that bargaining for a proposed enterprise agreement is imminent, has been initiated, or has commenced.

45 Part 3-3 of the FW Act is concerned with industrial action. A key concept is *protected industrial action* for a proposed enterprise agreement, which is defined at a high level in s 408 as being: (a) *employee claim action*; (b) *employee response action*; and (c) *employer response action*. Each of these statutory concepts is the subject of further elaboration. Relevant to this case is *employee claim action*, in respect of which s 409(1) provides –

**409 Employee claim action**

*Employee claim action*

(1) ***Employee claim action*** for a proposed enterprise agreement is industrial action that:

(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and

(b) is organised or engaged in, against an employer that will be covered by the agreement, by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

46 The balance of s 409 sets out the additional requirements referred to in s 409(1)(d), and they relevantly include that the industrial action be authorised by a protected action ballot order: s 409(2).

47 Section 437, which is within Subdivision B of Division 8 of Part 3-3, provides for a bargaining representative of an employee who will be covered by a proposed enterprise agreement to make an application to the Commission for a protected action ballot order. Relevantly, ss 437(1), (2) and (2A) provide –

**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 cooperative workplace 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).

…

48 The legislative note to s 437(2A) forms part of the body of the FW Act, because it was included in the legislative text that was inserted after s 437(2) by the *Fair Work Amendment Act 2015* (Cth) Sch 1, item 56. The note was also referred to in the Explanatory Memorandum for the Fair Work Amendment Bill 2014 (Cth) at [144]. The note is navigational and explanatory of the provision. It is therefore outside the terms of s 13 of the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009 which excludes “marginal notes” from being part of an Act: see FW Act s 40A; Herzfeld P and Prince T, *Interpretation* (3rd ed, Thomson Reuters, 2024) at [5.140].

49 The purpose of s 437(2A) which is evident from its text (including the legislative note), can therefore be seen as requiring that a process of bargaining for a proposed enterprise agreement be on foot before an application for a protected action ballot order can be made. The section achieves this purpose by requiring that there has been *a* notification time in relation to the proposed enterprise agreement, being one of the events captured by s 173(2), all of which are indicative of the commencement of a bargaining process in some form. Part of the legislative context of s 437(2A) is the decision of the Full Court in *JJ Richards*, where it was held that a protected action ballot order could be made under s 443(1) even if bargaining had not commenced. The Explanatory Memorandum for the 2014 Bill confirms at [145] that the purpose of s 437(2A) was to address *JJ Richards*, which was perceived as construing the FW Act as authorising a “strike first, talk later” approach to bargaining.

50 Section 437A gives effect to an application for a protected action ballot order in relation to a multi-enterprise agreement as if the application were multiple applications, one in relation to each employer.

51 Section 443 provides that the Commission must make a protected action ballot order in relation to a proposed enterprise agreement if an application has been made under s 437, and the Commission 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.

52 Returning to other requirements for there to be *protected industrial action*, s 409(1)(c) refers to the common requirements set out in Subdivision B, which relevantly include –

(a) the industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or a cooperative workplace agreement — s 413(2); and

(b) the notice requirements in s 414 must have been met — s 413(4).

53 As to s 413(2), there is no evidence that the Rail Agencies and the Unions have proposed a greenfields agreement, or a cooperative workplace agreement, and as I have mentioned the Unions disclaimed that intention in their declarations that accompanied the applications for protected ballot orders.

54 As to s 413(4), but for the claimed consequences of the single interest employer authorisation of 6 December 2024, it is not disputed that the Unions have given notice of industrial action, or that the notices have occurred after the declaration of the results of protected action ballots.

55 If industrial action is *protected industrial action* for a proposed enterprise agreement, then the principal consequence is that, in relation to that industrial action, there is a qualified immunity from suit under s 415.

56 Many of the provisions to which I have referred are amongst a number of provisions which appear in Part 2-4 and Part 3-3 of the FW Act which use the expression “proposed enterprise agreement” without distinguishing between a single-enterprise agreement and a multi-enterprise agreement. Those provisions include –

(a) s 173(2) — the *notification time* for a proposed enterprise agreement;

(b) s 176 — the ascertainment of *bargaining representatives* for a proposed enterprise agreement that is not a greenfields agreement;

(c) s 179 — disclosure obligations of bargaining representatives for a proposed enterprise agreement;

(d) s 180 — pre-approval requirements for a proposed enterprise agreement;

(e) s 248 — application for a single interest employer authorisation;

(f) s 249 — making a single interest employer authorisation;

(g) ss 408, 413(1) — protected industrial action for a proposed enterprise agreement;

(h) ss 409(1), 414(1) — employee claim action for a proposed enterprise agreement;

(i) s 437(1) — application for a protected action ballot order by a bargaining representative of an employee who will be covered by a proposed enterprise agreement; and

(j) s 443(1) — the requirement that the Commission make a protected action ballot order in relation to a proposed enterprise agreement if the conditions in that subsection are met.

57 These provisions may be compared to other sections of the FW Act which authorise an application to the Commission specifically by reference to either a proposed single-enterprise agreement, or a proposed multi-enterprise agreement: ss 236(1), 237(1), 238(1), 240A(1), 240A(4), 242, 243(1), 243(2A), 437A.

58 The extrinsic material supports a generic interpretation of the expression “proposed enterprise agreement” when appearing in Part 2-4 and Part 3-3 of the FW Act. The Explanatory Memorandum to the Fair Work Bill 2008(Cth) states at [643] –

643. The term ‘proposed enterprise agreement’ is a generic term that is used in Part 2-4 and in Part 3-3 (Industrial action) to describe ‘an agreement’ that is being negotiated with a view to being approved as an enterprise agreement (see the observations of French J in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737; 138 IR 362). A proposed agreement can be an idea, or it can be a series of claims on behalf of a group of employees whose bargaining representatives seek to negotiate with the employer with a view to it becoming an agreement that is ultimately approved by FWA.

59 As the Explanatory Memorandum indicates, the generic nature of the expression “proposed enterprise agreement” is supported by the observations of French J in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737; 138 IR 362 (***Wesfarmers***) in relation to some corresponding provisions of the WR Act which deployed the expression “proposed agreement” in –

(a) s 170MI, which concerned the initiating of a *bargaining period*; and

(b) s 170ML(2)(e), concerning the taking of protected action during the bargaining period for the purpose of “supporting or advancing claims made in respect of the proposed agreement”.

60 In relation to the expression “proposed agreement”, French J stated at [54]–[56] and [59] –

54 Section 170MI(1) provides, inter alia, that if an organisation of employees “wants to negotiate an agreement under Division 2 or 3” then it may initiate a bargaining period “for negotiating the proposed agreement”. The notice required by s 170MI(2) is a written notice that the initiating party “intends to try … to make an agreement with the other negotiating parties … and to have any agreement so made certified under Division 4”. The notice must, by virtue of s 170MJ, be accompanied by particulars of “… the matters that the initiating party proposes should be dealt with by the agreement”.

55 These provisions give content to the words “proposed agreement” in s 170MI(1). The “proposed agreement” referred to in that subsection is “an agreement” that the initiating party “wants to negotiate”. The initiation of the bargaining period is not therefore conditioned on the existence of a draft agreement proposed by the initiating party which, if signed then and there by the negotiating parties, could be certified. This is made clear by s 170MI(2) which contemplates an intention by the initiating party to negotiate “an agreement”. *That generic term allows for a variety of possibilities including that:*

*(a) The initiating party has little or no idea of what the final agreement will contain but is open to a variety of outcomes.*

 (b) The initiating party intends to secure an agreement containing certain terms and conditions but is open to a variety of possibilities for the balance of the agreement.

(c) The initiating party intends to secure an agreement based on terms and conditions which it has formulated as a draft for discussion.

56 *The “proposed agreement” in s 170MI(1) therefore is used in a generic sense to describe the desired outcome which is “an agreement”.* The requirement that the particulars accompanying the initiating notice specify the matters that the initiating party proposes should be dealt with does not demand a specification of terms and conditions but rather of topics. Nor does it require that the matters be exhaustive of all matters that could find their way into a final agreement. These provisions govern the beginning of a process of negotiation. It would be antithetical to their objects to require that the initiating party have defined an agreement capable of certification from the outset.

…

59 … In my opinion, consistently with the use of the words “proposed agreement” in s 170MI, *the “proposed agreement” in s 170ML(2)(e) is the desired end point, described generically, of the negotiation process.* It does not require that there be in existence a draft of a certifiable agreement which has been prepared or is proposed by the organisation undertaking the industrial action. On the other hand, it does not exclude the possibility that industrial action may occur at a point when such a draft has come into existence.

(Emphasis added.)

61 The main point to draw from the observations of French J in *Wesfarmers*, which are given elevated significance by [643] of the Explanatory Memorandum, is that for the purposes of Part 2-4 and Part 3-3 of the FW Act, a “proposed enterprise agreement” may be no more than a proposal directed to a desired outcome, the ideas for which may be undeveloped, or fluid.

## The parties’ submissions

### The Rail Agencies’ submissions

62 The Rail Agencies submitted that the single interest employer authorisation made on 6 December 2024 has the result that the industrial action notified by the Unions is not protected industrial action.

63 The Rail Agencies submitted that for the relevant industrial action to be protected, it must meet the definition of *employee claim action* in s 409(1) of the FW Act, where by force of ss 409(1)(d) and 409(2), the industrial action “must be authorised by a protected action ballot” to constitute employee claim action.

64 The Rail Agencies next submitted that a protected action ballot may only occur in accordance with the terms of a protected action ballot order: FW Act s 449. The Rail Agencies drew attention to ss 437(1) and (2A), which I have set out above, and relied on the fact that the notification timereferred to in s 173(2)(e), namely the making of a single interest employer authorisation, occurred only on 6 December 2024, and therefore subsequent to the previous ballot orders of the Commission and the notices by the Unions.

65 The Rail Agencies submitted that, as at the dates of the protected action ballot orders that purported to authorise the taking of the relevant industrial action, the “proposed enterprise agreement” was the enterprise agreement identified in the notice of employee representational rights served by the Rail Agencies on 31 May 2024. The Rail Agencies submitted that this “proposed enterprise agreement” was a single-enterprise agreement.

66 The Rail Agencies submitted that the effect of the single interest employer authorisation is that the Rail Agencies are now only permitted to make a single interest employer agreement.

67 The Rail Agencies submitted that the single interest employer authorisation has thus changed the character of the bargaining between the Rail Agencies and the Unions, by changing the nature of the enterprise agreement that can be made as a result of the bargaining process. On this footing, the Rail Agencies submitted that the “proposed agreement” in relation to which the Rail Agencies and the Unions are now bargaining is *not* the same proposed agreement in relation to which the employees were balloted in accordance with the terms of the protected action ballot orders. Moreover, the Rail Agencies submitted that the protected action ballot orders made by the Commission could not have been made in relation to a proposed single interest employer agreement, because the single interest employer authorisation was not yet in force, and that the Unions could not have applied for such an order in relation to a single interest employer agreement, because there had not been a notification time in relation to such an agreement as contemplated by s 173(2)(e). The Rail Agencies submitted that the notification time “for the proposed ‘single interest employer agreement’ is 6 December 2024”.

68 The Rail Agencies relied on a concept of “bargaining streams”. They submitted that bargaining for a proposed multi-enterprise agreement takes place under one “stream”, which is “materially differentiate[d]” from “bargaining under the single enterprise agreement bargaining stream”. Relevant differences on which the Rail Agencies relied included that –

(a) the Commission is not empowered to make either a *scope order* or a *majority support determination* in respect of a multi-enterprise agreement: see FW Act ss 236(1) and 238;

(b) the Commission is empowered to make a *supported bargaining authorisation* in relation to a proposed multi-enterprise agreement, but not a proposed single-enterprise agreement: s 242(1); and

(c) a bargaining representative for a proposed multi-enterprise agreement may apply for a *voting request order* under s 240A(1) after the notification time, which the Rail Agencies claimed to be the time when the single interest employer authorisation comes into operation, whereas in the case of a single-enterprise agreement, the notification time would be different.

69 The Rail Agencies also relied on s 235(6), which relates to intractable bargaining declarations. Section 235(6) provides for the day on which bargaining starts for the purposes of the calculation of the *end of the minimum bargaining period* under s 235(5). Relevantly, s 235(6) deems “the day bargaining starts for a proposed agreement” to be the day that a single interest employer authorisation comes into operation, if one is in operation, and otherwise the notification time for the proposed agreement.

70 The Rail Agencies accordingly submitted that the protected action ballot orders that purported to authorise the relevant industrial action were spent, and do not authorise the notified industrial action. For this reason, the Rail Agencies submitted that the notified industrial action is not employee claim action, as it has not been authorised by a protected action ballot as required by s 409(2). The Rail Agencies submitted that the bargaining process is “reset” when a single interest employer authorisation comes into operation.

71 More generally, the Rail Agencies submitted that the applicable notification time for the purposes of an application for a protected action ballot order under s 437(1) is, pursuant to s 173(2)(e), the time when the single interest authorisation comes into operation. Thus, the Rail Agencies submitted, an application under s 437(1) for a protected action ballot order cannot be validly made in relation to a proposed single interest employer agreement until the single interest employer authorisation comes into operation. The practical consequence, the Rail Agencies submitted, is that the protected action ballot orders that have already been made by the Commission in this case can have no operation in relation to the proposed single interest employer agreement for which the Rail Agencies and the Unions are now bargaining.

### The Unions’ submissions

72 The Unions submitted that the question in this proceeding revolved around the meaning of the statutory expression “proposed enterprise agreement”. The Unions submitted that the expression “proposed enterprise agreement” is generic. By this, the Unions meant that the words “proposed enterprise agreement” should not be construed as requiring that a proposed enterprise agreement have a fixed and immutable character, such that a different “proposed enterprise agreement” comes into existence if there is a change in the nature of the enterprise agreement that is the subject of bargaining. The Unions made this submission in relation to several provisions of the FW Act, including ss 409 and 437(2A).

73 The Unions submitted that this construction should be adopted because it accords with the text, context and purpose of Part 3-3 of the FW Act.

74 With respect to text, the Unions submitted that there was no textual warrant for the Rail Agencies’ proposed construction, given that provisions including ss 409 and 437(2A) refer to a “proposed enterprise agreement”, rather than a proposed agreement of some particular type. The Unions submitted that, when the FW Act conveys an intention to refer to a proposed enterprise agreement of some type, it specifically identifies the type of agreement that is intended.

75 Additionally, the Unions submitted that the expression “proposed enterprise agreement” sits within a statutory context concerned with the essentially practical process of negotiating documents to govern the terms of an employment relationship at the level of the “shop floor”, thereby favouring a straight-forward interpretation rather than one that adopts a technical approach.

76 Counsel for the Unions also referred to provisions of the WR Act which created the statutory concept of a *bargaining period*. The Unions submitted that the effect of subsequent amendments to the industrial relations legislation was to streamline the process of bargaining, which was inconsistent with the idea that a “proposed enterprise agreement” must be of a fixed type.

77 The Unions submitted that their proposed construction also accorded with the purposes of relevant parts of the FW Act. The Unions relied upon s 436, which provides that the object of Division 8 of Part 3-3 (dealing with protected action ballots) is “to establish a fair, simple and democratic process” for determining whether employees wish to engage in particular protected industrial action “for a proposed enterprise agreement”. The Unions submitted that it would be inconsistent with this object to conclude that, when the type of enterprise agreement that is proposed changes, a new proposed enterprise agreement comes into being. To do so, the Unions submitted, would also be inconsistent with the nature of a “proposed” enterprise agreement as something that is necessarily inchoate, until actually made.

78 The Unions submitted that the Rail Agencies’ concept of bargaining “streams” should not be accepted, at least in so far as it suggests that bargaining necessarily occurs in one stream or another. The Unions submitted that the position of franchisee employers — and indeed the facts of this case in so far as a single interest employer authorisation has been made in relation to potentially related employers — illustrated that bargaining does not occur in parallel streams. The Unions submitted that the nature of an enterprise agreement that may result from the bargaining process can be subject to evolution, which, in combination with the practical bent of the legislation, tells against adopting a construction of the statutory expression “proposed enterprise agreement” that includes a great deal of particularity in the description of the proposed agreement.

79 The Unions also submitted that the concept of a *notification time* which is the subject of s 173(2) did not “reset” upon the making of a single interest employer authorisation. Relying upon their submissions in relation to the expression “proposed enterprise agreement”, the Unions essentially submitted that a notification time (including the time specified in s 173(2)(a)) can exist in relation to a proposed enterprise agreement before a single interest employer authorisation comes into effect. When such an authorisation does come into effect, the Unions submitted, the nature of the proposed enterprise agreement becomes fixed by s 172(5), but it is not the case either that the notification time resets, or that there is some new “proposed enterprise agreement” by virtue of that authorisation.

80 Accordingly, the Unions submitted that the relevant industrial action was employee claim action, and protected industrial action within the scope of s 408.

## The Rail Agencies’ submissions must be rejected

81 The issue in this proceeding is resolved by determining the focal length of the expression “proposed enterprise agreement”, where appearing in ss 173(2), 248, 408, 409, 437, and 438 of the FW Act.

82 That determination is to be undertaken by reference to the established principles of statutory construction under which regard is had to text, context, and purpose, where context includes legislative history and extrinsic materials, and where context is to be regarded at the first stage and in its widest sense: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ). The established principles of construction also seek to reconcile any conflicting provisions so as to give effect to the desire to achieve harmonious goals in accordance with the principles essayed in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ). Where there is a constructional choice, a construction that would promote the purpose or object underlying the Act is to be preferred over one that does not, and a construction that would avoid a consequence that appears irrational or unjust is preferable: *Acts Interpretation Act* (as in force on 25 June 2009), s 15AA; *Legal Services Board v Gillespie-Jones* [2013] HCA 35; 249 CLR 493 at [48] (French CJ, Hayne, Crennan and Kiefel JJ).

83 The starting point is that context and legislative history support a construction of the expression “proposed enterprise agreement’ in a generic sense, as I have explained at [56]–[61] above. Consistently with the observations of French J in *Wesfarmers*, a proposed enterprise agreement may be no more than a formless conception. Yet the foundation of the Rail Agencies’ submissions lies in a proposition that to bargain for a proposed enterprise agreement is necessarily to bargain for a proposed enterprise agreement of a particular kind. This proposition found expression in the Rail Agencies’ metaphor of “bargaining streams”. The submission brings to mind Ashburner’s “two streams” of equitable and common law jurisdiction, which were said to “run side by side” and not to “mingle their waters”: see Browne D, *Ashburner’s Principles of Equity* (2nd ed, Butterworth & Co, Ltd, 1933) at p 18. To support their submission that there were “bargaining streams”, the Rail Agencies relied upon the several features of the FW Act, to which I referred at [63]–[69] above. Alongside this premise of “bargaining streams”, the Rail Agencies submitted that the bargaining process between them and the Unions commenced when the Rail Agencies served notices of employee representational rights on 31 May 2024, and not earlier. This submission was deployed to give shape and content to the “proposed enterprise agreement” that was at the centre of the bargaining process.

84 The upshot of the Rail Agencies’ submissions was that bargaining for a proposed enterprise agreement is not just bargaining for *some* enterprise agreement, of whatever description, that may be expected to replace an existing agreement; rather, the process of bargaining for which the FW Act provides necessarily envisages that bargaining is directed to a proposed enterprise agreement which has a particular character, in that it is either a proposed single-enterprise agreement, or a proposed multi-enterprise agreement.

85 No doubt, there are provisions of the FW Act that assume that, at a particular time in the bargaining process, it will be clear that at least one of the bargaining parties proposes a single-enterprise agreement or a multi-enterprise agreement. To take just one example, s 173(1) itself assumes that an employer within a bargaining process will have a perspective on whether a proposed enterprise agreement is a single-enterprise agreement, so that the employer may comply with the obligation under that section to give a notice of employee representational rights to its employees. At the other extreme, at the time of making an enterprise agreement, the character of the agreement is essential, because the procedures for making each kind are different.

86 But the fact that certain provisions of the FW Act assume that, at stages during the bargaining process, it will be possible to discern whether a single-enterprise agreement or a multi-enterprise agreement is proposed does not establish that bargaining for an enterprise agreement occurs in “streams”, as the Rail Agencies submitted. In fact, bargaining for an enterprise agreement does not occur in separated streams. To see why, it is necessary to examine further how the FW Act regulates industrial bargaining.

87 Division 3 of Part 2-4 of the FW Act deals with “Bargaining and representation during bargaining”. But the FW Act does not purport to set up a code that governs every stage and aspect of the bargaining process. Instead, the FW Act makes specific provision for rules concerning bargaining representatives, and various orders or authorisations by the Commission that may be invoked along the course of the bargaining process, such as an application for a scope order for a proposed single-enterprise agreement under s 238, and an application under s 229 for a bargaining order. The FW Act also imposes obligations, such as the obligation in s 173(1) itself, and the *good faith bargaining requirements* in s 228 that operate during the bargaining process. Aside from these specific interventions, however, the FW Act itself does not purport to prescribe when bargaining occurs, how it should proceed or, short of the making of an agreement, when it ends.

88 Contrary to the submissions of the Rail Agencies, bargaining for an enterprise agreement does not necessarily begin when an employer gives notice of employee representational rights under s 173(1). Nothing in s 173(1) purports to deem the bargaining process as commencing when notice is given under that subsection. Indeed, its premise is that there is already a “proposed single-enterprise agreement”, which may well be because such an agreement has been proposed by employees. For present purposes, the relevance of s 173(1) is that its object is the giving of notice, and it is one way, but not the only way, of setting the notification time referred to in s 173(2). The statutory concept of a notification time is deployed in several provisions of the Act as a marker of the commencement of bargaining, but nothing about it purports to comprise the commencement of the bargaining process in the way that a notice given under s 170MI or s 423 of the WR Actcommenced a formal *bargaining period*.

89 And contrary to the submission of the Rail Agencies, it is not the case that s 235(6) of the FW Act provides the key that defines when bargaining for a single interest employer agreement commences for the purposes of the Act in general. That provision simply deems bargaining to have commenced at the specified time for the limited purpose of s 235(5), which is to identify the *end of the minimum bargaining period*, the ascertainment of which is required as one of the conditions for the making of an intractable bargaining declaration under s 235(1)(c).

90 The true position is that the FW Act does not provide for mutually exclusive “bargaining streams”. One example that illustrates this position comes in the context of bargaining involving related franchisees. As I have explained, ss 172(2) and (3) provide that two or more employers that are *related employers* may only make a single-enterprise agreement under s 172(2), whereas two or more employers that are not all related may only make a multi-enterprise agreement under s 172(3). Section 172(3), however, also provides that employers that “are all related employers mentioned in subsection (3A)” may make a multi-enterprise agreement. Those employers are those in a franchise situation that are the subject of s 172(5A)(c), to which I referred at [20] above. Because such employers are taken to be related employers within the meaning of s 172(5A), they may also make a single-enterprise agreement. It therefore appears that employers falling within the scope of s 172(5A)(c) can make either a single-enterprise agreement, or a multi-enterprise agreement.

91 In a case in which these franchisee employers are bargaining with their employees for an enterprise agreement, which it is envisaged will be a single-enterprise agreement, it would be permissible for those bargaining parties then to agree to obtain a single interest employer authorisation by consent. The requirements in s 249(2) coincide with those in s 172(5A)(c), meaning that a single interest employer authorisation may be made in relation to the franchisee employers, provided that the other requirements of s 249 are satisfied. In such a case, s 172(5) requires the franchisee employers only to make a single interest employer agreement, which will be a multi-enterprise agreement. The consequence of the Rail Agencies’ submissions is that the entire bargaining process that has led to the point of making the single interest employer authorisation is “reset” when that authorisation is made. But that is in tension with the scheme of the FW Act, which is that franchisee employers are free to make *either* a single-enterprise agreement *or* a multi-enterprise agreement.

92 Similar considerations arise in this case. The decision of the Commission upon the application of the RTBU for a protected action ballot order to which I referred at [10] above reveals that it has been a point of disputation between the Rail Agencies and the Unions whether the Rail Agencies are *related employers* for the purposes of s 172(5A) of the Act. That decision, which was delivered on 1 August 2024, shows that the Rail Agencies and the Unions were not agreed as to the particular type of enterprise agreement that should, and could, be made to replace the 2022 Agreement. Yet the reality was that the Rail Agencies and the Unions had been attending bargaining meetings since June 2024 to bargain for a proposed enterprise agreement. There is an inference available that the bargaining continued up to the point that the Rail Agencies agreed to consent to the single interest employer authorisation that was made on 6 December 2024. That consent does not carry with it an inference that there was a change in position by the Rail Agencies on the question whether they were *related employers*: as senior counsel for the Rail Agencies accepted, there is nothing that precludes related employers from bargaining for and making a single interest employer agreement on the ground that they have clearly identifiable common interests for the purposes of s 249(3). As this acceptance suggests, to the extent that s 172(3) suggests that related employers cannot make a multi-enterprise agreement, that meaning must be adjusted to accommodate employers subject to single interest employer authorisations, who must make such an agreement.

93 Clearly, the question whether two employers are related employers may be contestable. Accordingly, the type of enterprise agreement that can be made may also be contestable. In that context, it appears that in the course of the bargaining process in this case the Rail Agencies and the Unions agreed that a single interest employer authorisation should be obtained, which has then engaged s 172(5) and requires that the proposed enterprise agreement be a single interest employer agreement, which is a multi-enterprise agreement. That course of events does not alter the fact that at all times since the commencement of bargaining there has been a “proposed enterprise agreement”, being a proposed agreement to replace the 2022 Agreement. The making of the single interest employer authorisation has been one stage in a broader process of bargaining for a proposed enterprise agreement. It may have been the case that, at some earlier stage, the bargaining parties envisaged that a single-enterprise agreement would be made to replace the 2022 Agreement. But the FW Act enables those parties to alter the character of the enterprise agreement in relation to which they are bargaining, as one step along the way in the broader process of bargaining for a replacement agreement. For these reasons, bargaining under the FW Act does not occur in streams that cannot mingle.

94 The broader point is that the Rail Agencies’ submissions adopt an incorrect focal length for identifying the “proposed enterprise agreement” in relation to which bargaining occurs. As noted earlier, s 437(2A) requires that “there has been a notification time in relation to the proposed enterprise agreement”, in circumstances where the different notification times that are the subject of s 173(2) are not all mutually exclusive, and operate as objective markers for the commencement of a bargaining process. The essence of the Rail Agencies’ submission was that “the proposed enterprise agreement” must be identified at a level of specificity that identifies what type of enterprise agreement the proposed enterprise agreement will be. This was wrapped up with the Rail Agencies’ submission that the process of bargaining is necessarily bargaining for a proposed enterprise agreement of a particular kind, which is discerned by asking in what “stream” bargaining is taking place. As should be plain by now, this analysis does not adopt the correct focal length for identifying the “proposed enterprise agreement” referred to in s 437(2A). For the reasons I have explained, bargaining does not occur in “bargaining streams”. The FW Act enables bargaining parties in particular circumstances to shape for themselves the type of enterprise agreement that will result from their bargaining. The precise nature of the enterprise agreement that is expected to result from a bargaining process may change over time. And that was the effect of the single interest employer authorisation in this case.

95 More generally, and consistently with the application of the reasons of French J in *Wesfarmers* to Part 2-4 and Part 3-3 of the FW Act, the scheme of those Parts is that a process of bargaining is directed to a “proposed enterprise agreement” of *some* description. For the bargaining process to be underway, the parties to the negotiations need not have settled on a precise description of the enterprise agreement they wish to have made. The compelling considerations are that the bargaining parties may have different conceptions as to the type of agreement that should be made, and the nature of the proposed enterprise agreement may itself be the subject of bargaining. These considerations strongly tend against the idea that bargaining is necessarily tied to a proposed enterprise agreement of a particular description.

96 Nor do I accept the Rail Agencies’ submission that the only applicable notification time for the proposed enterprise agreement was the time when the single interest employer authorisation was made, as provided for by s 173(2)(e). Once it is understood that bargaining under the FW Act may relate to a “proposed enterprise agreement” at a generic level removed from the particular type of enterprise agreement in contemplation from time to time, the premise of the Rail Agencies’ submission falls away. Further, there is no warrant in the statutory text for the notion that s 173(2)(e) “resets” the notification time of a proposed enterprise agreement. It is not the case that only one of the conditions in s 173(2) can ever be satisfied in relation to a particular proposed enterprise agreement.

97 For these reasons, the Rail Agencies have not shown that the protected action ballot orders were made in relation to some different proposed enterprise agreement from the one that is presently the subject of bargaining between the parties. On the evidence, it is the same proposed enterprise agreement.

98 For these reasons, the declaration must be refused.

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| I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan. |

Associate:

Dated: 19 December 2024

SCHEDULE OF PARTIES

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|  | NSD 1770 of 2024 |
| Respondents |  |
| Fourth Respondent: | ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIETISTS AND MANAGERS, AUSTRALIA |
| Fifth Respondent: | AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION |