FairWork Commission

DECISION

Fair Work Act 2009
Schedule 4, item 5—amendments made by the *Fair Work Amendment Act 2013*

Consultation clause in modern awards
(AM2013/24)

JUSTICE ROSS, PRESIDENT
SENIOR DEPUTY PRESIDENT WATSON
COMMISSIONER WILSON

MELBOURNE, 23 DECEMBER 2013

Consultation about changes to regular rosters and ordinary hours of work - Fair Work Amendment Act 2013 - Schedule 4 of the Fair Work Act 2009 - s.145A - meaning of 'consult' - model term to be inserted in all modern awards.

Introduction

[1] The *Fair Work Amendment Act* 2013 (the 2013 *Amendment Act*) amends the *Fair Work Act 2009* (the FW Act) by inserting a new provision, s.145A, which provides that all modern awards must include a term requiring employers to consult employees about a change to their regular roster or ordinary hours of work. For convenience we refer to this term as the 'relevant term'. The 2013 *Amendment Act* also inserts a new schedule into the FW Act, Schedule 4. Schedule 4 requires the Commission to make a determination varying modern awards by 31 December 2013, to include a term of the kind mentioned in s.145A.

[2] In order to facilitate the variation of modern awards consistent with the Commission's new statutory obligations, we issued a Statement[1] on 7 November 2013 setting out a draft relevant term. The Statement made it clear that the draft relevant term did not represent the concluded view of the Commission regarding the nature of the variation necessary to give effect to the requirement to insert the relevant term in all modern awards by 31 December 2013.

[3] All interested parties were provided with an opportunity to make submissions in respect of the draft consultation term, in relation to any modern award. Thirty-nine written submissions were received and posted on the Commission's website. We also conducted an oral hearing on 13 December 2013 to provide interested parties with a further opportunity to make submissions.

[4] We propose to deal with the legislative context first and then the form and content of the relevant term.

Legislative Context

[5] We turn first to the source of our power to make determinations varying modern awards to include a term of the kind mentioned in s.145A.

[6] It is important to note that in these proceedings we are *not* varying modern awards pursuant to s.145A, as that provision has not yet commenced operation (s.145A commences operation on 1 January 2014). Rather, the power we are presently exercising is conferred by Schedule 4 of the FW Act, in particular:

> **5. Part 4 of Schedule 1 to the amending Act**
>
> ... ***Transitional provision***
>
> "(3) If:
>
> (a) a modern award is made before 1 January 2014; and
>
> (b) the modern award is in operation on that day; and
>
> (c) immediately before that day, the modern award does not include a term (the relevant term) of the kind mentioned in section 145A (as inserted by item 19 of Schedule 1 to the amending Act);
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> then the FWC must, by 31 December 2013, make a determination varying the modern award to include the relevant term.
>
> (4) A determination made under subclause (3) comes into operation on (and takes effect from) 1 January 2014.
>
> (5) Section 168 applies to a determination made under subclause (3) as if it were a determination made under Part 2-3."

[7] These transitional provisions were inserted into a new schedule to the FW Act by Schedule 7 of the 2013 *Amendment Act*. The transitional provisions commenced on the date the 2013 *Amendment Act* received Royal Assent, 28 June 2013.

[8] The transitional provision requires the Commission to make a determination varying certain modern awards by 31 December 2013, to include a term of the kind mentioned in s.145A. The modern awards which are to be so varied are those made before 1 January 2014, in operation on that day and immediately before that day do not include a term of the kind mentioned in s.145A. It seems to us that all 122 modern awards meet the prerequisites in the transitional provision and no party contended to the contrary. It follows that we are obliged to make determinations varying all 122 modern awards.

[9] In varying modern awards to include a term of the kind mentioned in s.145A the Commission is acting pursuant to the statutory directive in sub-clause 5(3) of Schedule 4. Sub-clause 5(3) is the source of the Commission's power to make determinations in the manner contemplated in clause 5 of Schedule 4. No party in these proceedings demurred from that proposition. An issue which arises from the source of our powers in the present proceedings is the application of the modern awards objective in s.134 of the FW Act. Section 134 states:

> **134 The modern awards objective**
>
> *"What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[10] The reference to 'this Part' in s.134(2)(a) is a reference to Part 2-3 of the FW Act. In making determinations varying modern awards to include the relevant term the Commission is exercising powers under Schedule 4 of the FW Act. Importantly, it is *not* exercising modern award powers within the meaning of s.134(2) because it is not, relevantly, performing functions or powers under Part 2-3 of the FW Act (s.134(2)(a)). It follows that the modern awards objective does not apply by force of s.134(2), but that does not mean that the modern awards objective is irrelevant to our task. Section 138 of the FW Act is important in this regard, it states:

"A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

[11] Relevantly, s.138 provides that a modern award 'must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective'. The relevant term is a term which is required to be included in a modern award. To comply with s.138 the

formulation of such a term must be in terms 'necessary to achieve the modern awards objective'. As stated in the Explanatory Memorandum to what is now s.138:

> "527. ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations."

[12] The FW Act does not directly specify the consequences of non-compliance with s.138 (as it does in relation to non-compliance with s.136, see s.137) but that does not mean that the Commission is at liberty to ignore s.138. Two other considerations also need to be borne in mind.

[13] First, the source of the power we are exercising is in a schedule to the FW Act and the schedule is deemed to form part of the FW Act.[2] In construing the transitional provisions in the schedule, s.15AA of the *Acts Interpretation Act* 1901 requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the FW Act, not to rewrite it, in the light of its purpose.[3]

[14] The objects of the FW Act are set out in s.3. Relevantly, s.3(b) provides:

> "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:
>
> > ... (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum term and conditions through ... modern awards."

[15] The purpose of an Act can also be discerned from the scheme of the Act and its provisions. It is apparent from the scheme of the FW Act that modern awards together with the National Employment Standards are intended to operate as a safety net of minimum terms and conditions underpinning collective bargaining. Section 134 is central to that legislative purpose.

[16] The second consideration is that the exercise of our powers under the transitional provision, before 31 December 2013, may be contrasted with the situation after 1 January 2014. On 1 January 2014, s.145A commences operation. Any modern award made after that date must include a term of the kind mentioned in s.145A. Section 145A is in Part 2-3 of the FW Act. Hence, inserting a term of the kind mentioned in s.145A will involve the exercise of modern award powers and attract the application of the modern awards objective.

[17] If the modern awards objective did not apply to these transitional proceedings then it is conceivable that the form of the relevant term we insert into modern awards may be different from that which would be inserted in any modern award made *after* 1 January 2014. It seems unlikely that such an anomalous outcome was intended by the legislature. An Act is to be construed on the prima facie basis that the provisions are intended to give effect to harmonious goals.[4]

[18] We have proceeded on the basis that the modern awards objective applies to these transitional proceedings. Accordingly, we have taken into account the matters set out at s.134(1)(a) to (h).

[19] The transitional provisions oblige us to make determinations varying modern awards to include a term 'of the kind mentioned in s.145A'. We now turn to consider s.145A.

[20] Section 145A provides as follows:

> **145A Consultation about changes to rosters or hours of work**
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> (1) Without limiting paragraph 139(1)(j), a modern award must include a term that:
>
> (a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and
>
> (b) allows for the representation of those employees for the purposes of that consultation.
>
> (2) The term must require the employer:
>
> (a) to provide information to the employees about the change; and
>
> (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
>
> (c) to consider any views about the impact of the change that are given by the employees.

[21] The words in s.145A are to be construed according to their ordinary meaning having regard to their context and legislative purpose. The words are to be read by reference to the language of the Act as a whole.[5]

[22] We turn first to the text of s.145A. The introductory words in s.145A(1) refer to s.139(1)(j) which provides:

> "s.139(1) A modern award may include terms about any of the following matters:
>
> ... (j) procedures for consultation, representation and dispute settlement"

[23] Sub-section 145A(1) then sets out the parameters of the relevant term. In particular the relevant term must require the employer 'to *consult* employees about a change to their regular roster or ordinary hours of work'. For the purpose of that consultation the relevant term must be one which '*allows for* the representation of those employees'.

[24] Before turning to the meaning of the word 'consult' in this context three other observations may be made about s.145A(1).

[25] The first is that s.145A does not confer a right on an employer to change an employee's regular roster or ordinary hours of work. It is not a source of power in that sense. The employer's power to change an employee's regular roster or hours of work must be found elsewhere - either in the contract of employment or in an industrial instrument, such as a modern award or enterprise agreement.

[26] Second, the obligation is to 'consult employees about a change to *their* regular roster or ordinary hours of work'. Hence, only those employees directly affected by such a change are required to be consulted (subject to what we say later about an affected employee's representative).

[27] Third, the relevant term must include a term which '*allows for* the representation of those employees'. The word 'allows' is permissive - it does not require an employee to be represented but if they choose to be then the employer is to respect that choice and consult with the employee and their representative. So much is clear from the language of s.145A(1)(b) which allows for the representation of affected employees 'for the purposes of that consultation'. We now turn to the word 'consult'.

[28] The obligation in s.145A(1)(a) is 'to consult [with] employees'. In this context the word 'consult' is used as a verb and is defined in the Oxford Dictionary in these terms:

> "Consult with. To take counsel with; to seek advice from."

[29] The definition in the Macquarie Dictionary (5th Edition) is in similar terms:

> "**1.** To seek counsel from; ask advice of. **2.** to refer to for information. **3.** to have regard for (a person's interest, convenience, etc.) in making plans. - *v.i* **4.** (sometimes fol. by *with*) to consider or deliberate; take counsel; confer [L. Deliberate, take counsel]"

[30] The word 'consult' means more than the mere exchange of information. As Young J said in *Dixon v Roy*[6]:

> "The word 'consult' means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response." [citations omitted]

[31] The right to be consulted is a substantive right, it is not to be treated perfunctorily or as a mere formality.[7] Inherent in the obligation to consult is the requirement to provide a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action. As Logan J observed in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (QR)*:[8]

> "... A key element of that content [of an obligation to consult] is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according the nature and circumstances of the case. In other words, what will amount to "consultation" has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto.
>
> To elaborate further on the ordinary meaning and import of a requirement to "consult" may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action,

> even, perhaps, with detailed elaboration, "this is what is going to be done" and saying to that person "I'm thinking of doing this; what have you got to say about that ?". Only in the latter case is there "consultation. ..."

[32] We respectfully adopt his Honour's observations. Similar to the obligation to accord a person procedural fairness, the precise content of an obligation to consult will depend on the context. The extent and significance of a proposed change, in terms of its impact on the affected employees, will have a bearing on the extent of the opportunity to be provided. Hence a change of limited duration to meet unexpected circumstances may mean that the opportunity for affected employees to express their views may be more limited than would be the case in circumstances where the proposed change is significant and permanent. It is also relevant to note that while the right to be consulted is a substantive right, it does not confer a power of veto. Consultation does not amount to joint decision making.[9]

[33] Some of the ordinary incidents of a requirement to consult are reflected in s.145A(2), that is:

- to provide information about the change; and
- to provide an opportunity for affected employees to give their views about the impact of the change; and
- to consider any views about the impact of the change that are given by the employees.

[34] An issue in contention in these proceedings was whether a term of the kind mentioned in s.145A required an employer to consult employees about a *proposed* 'change to their regular roster or ordinary hours of work' or whether the obligation to consult could be satisfied *after* a definite decision to implement a change has been made or a change has been implemented.

[35] The ordinary meaning of the word 'consult' and the legislative context and purpose leads us to conclude that the requirement in s.145A is to consult employees about *proposed* changes to 'their regular roster or ordinary hours of work'. It is said against such a construction that the word 'proposed' does not condition the word 'consult' in s.145A. But it is implicit in the obligation to consult that a *genuine* opportunity be provided for the affected party to attempt to persuade the decision maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent 'consultation' is robbed of this essential characteristic.[10] As Sachs LJ observed in a case concerning the statutory obligation to consult in relation to decisions regarding variations in public transport routes:

> "Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes event by its withdrawal. I start accordingly from the viewpoint that any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals - before the mind of the executive becomes unduly fixed."[11]

[36] The legislative purpose and context is also important. The provision which inserts s.145A into the FW Act appears in Schedule 1 of the 2013 *Amendment Act*. Schedule 1 is titled 'Family Friendly measures'. The insertion of s.145A into the FW Act is one of a number of measures intended to assist employees to balance their work and family or caring

responsibilities. So much is clear from the title to Schedule 1, the nature of the other measures contained in that schedule and the reference in s.145A(2)(b) to providing employees with an opportunity to give their views about the impact of the change in their regular roster or ordinary hours of work, 'including any impact in relation to their family or caring responsibilities'.

[37] Interpreting s.145A such that the obligation to consult could be satisfied *after* a definite decision has been made or *after* a change had been implemented would be antithetical to its legislative purpose. Once a change has been implemented the disruption to family or caring responsibilities has already occurred. Section 145A is intended to provide an opportunity to inform the employer of the impact of a change to an employee's regular roster or ordinary hours of work and so that the employer may consider those views. As submitted by the Australian Retailers Association:

> "It is implicit from the requirements of s.145A of the FW Act that consultation needs to occur prior to the proposed change being implemented and with sufficient time for employees to raise any concerns, and for employers to give consideration to those concerns."[12]

[38] The clear intent of the provision is that the employer be provided with the employee's views about the impact of the change so that those views may be considered *before* the change is implemented or a definite decision is made. The Revised Explanatory Memorandum confirms that legislative purpose, it states:

> "43. Item 19 inserts new section 145A, which relates to changes to regular rosters or ordinary hours of work. New paragraph 145A(1)(a) provides that modern awards must include a term that requires employers to genuinely consult with employees about changes to their regular roster or ordinary hours of work.
>
> 44. 'Regular roster' in new paragraph 145A(1)(a) is not defined. It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award. The employer will be required to inform employees about the proposed change to their regular roster or ordinary hours of work and invite employees to give their views on the impact of the proposed change (particularly any impact upon the employees; family and caring responsibilities), and consider those views.
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> 45. The amendments will ensure that employers cannot unilaterally make changes that adversely impact upon their employees without consulting on the change and considering the impact of those changes on those employees; family and caring responsibilities.
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> 46. New paragraph 145A(1)(b) provides that the term must allow for the representation of those employees for the purposes of the consultation. A person representing an employee for the purposes of new paragraph 145A(1)(b) could be an elected employee or a representative from an employee organisation.
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> 47. New subsection 145A(2) sets out the consultation process to be included in the term of the modern award. The term must require an employer to consult with employees about a change to a regular roster or ordinary hours of work by:
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> • providing information to the employees about the change;

- inviting employees to give their views about the impact of the change (including any impact in relation to their family and caring responsibilities); and
- considering any views put forward by those employees about the impact of the change.

Illustrative example
Gabrielle has worked 4 days a week with Wednesdays off for several years. Her employer knows that she has school aged children and that she cares for her elderly mother on her day off. Her employer has decided to change the arrangements under which Gabrielle works such that she will no longer be able to take Wednesdays off. Before changing her regular rostered hours of work, in accordance with the consultation term included in the applicable modern award, Gabrielle's employer will be required to provide information to her about the proposed change, give her an opportunity to raise with her employer the impact of the proposed change on her (including in the context of her family and caring responsibilities) and require the employer to consider Gabrielle's views on that impact before making any changes.

48. The dispute resolution mechanisms of the relevant workplace instrument will apply to the operation of the consultation term.

49. Compliance with consultation terms, including the new requirements in relation to regular rosters and ordinary working hours, will continue to be enforceable by application to a Court." [emphasis added]

[39] Before turning to the form and content of the relevant term we wish to deal with two other matters. The first concerns the relevance of the model consultative term prescribed under s.205(3) of the FW Act and the second concerns the relationship between the obligation to consult required by the relevant term and other provisions within a modern award.

[40] Section 205 of the FW Act provides that enterprise agreements must include a consultation term. Section 205 was amended by the 2013 *Amendment Act.* The amended s.205 provides as follows :

"s.205 (1) An enterprise agreement must include a term (*a **consultation term***) that :

(a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:
(i) major workplace change that is likely to have a significant effect on the employees; or
(ii) a change to their regular roster or ordinary hours of work; and
(b) allows for the representation of those employees for the purposes of that consultation.

(1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer
(a) to provide information to the employees about the change; and
(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
(c) to consider any views given by the employees about the impact of the change.

(2) If an enterprise agreement does not include a consultation term, the model consultation term is taken to be a term of the agreement.

(3) The regulations must prescribe the **model consultation term** for enterprise agreements."

[41] Regulation 2.09 of the *Fair Work Regulations* 2009 provides that for purposes of s.205(3) of the FW Act the model consultation term is set out in Schedule 2.3. For convenience we refer to this as the prescribed model consultation term.

[42] The *Fair Work Amendment Regulation 2013 (No 2)* amended Schedule 2.3 to take account of the amendments to s.205 of the FW Act made by the 2013 *Amendment Act.* The amended s.205 and the amended schedule 2.3 commence operation on 1 January 2014 and apply to enterprise agreements made after that date.[13]

[43] A number of parties suggested that the prescribed model consultation term may be relevant to the determination of the type of term to be inserted into modern awards in compliance with the obligation to include a term of the kind mentioned in s.145A. Further, the ACTU submitted that in the absence of any submissions by the Commonwealth in these proceedings the prescribed model consultation term could be taken to represent the Commonwealth's view as to an appropriate consultation clause in the context of s.145A.[14]

[44] We are not persuaded that the prescribed model consultation term is relevant to our determination of the term to be inserted in modern awards to meet the requirements of the transitional provision, for two reasons. First, there is a clear distinction between the context and purpose of the prescribed model consultation term and the task we are undertaking. The prescribed model consultation term is a default provision which is taken to be a term of an enterprise agreement if that agreement does not include a consultation term of the type required by s.205. The parties to enterprise agreements are free to agree on a different formulation of the consultation term, provided the term they agree upon complies with s.205. While ss.145A and 205 are expressed in the same terms (insofar as they deal with consultation about changes to regular rosters or ordinary hours of work), the context is different. Section 205 operates in the context of collective bargaining whereas s.145A is directed at modern awards which operate as part of a safety net of minimum terms and conditions underpinning collective bargaining (see ss.3, 134 and 193). For the same reasons the Commonwealth's views to the form of a consultation clause to give effect to s.145A cannot be inferred from the form of the prescribed model consultation term.

[45] Second, as a general proposition delegated legislation made under an Act (such as the *Fair Work Regulations*) should not be taken into account for the purposes of interpretation of the act itself. As Brennan J observed in *Webster v McIntosh*: 'the intention of Parliament in enacting an Act is not to be ascertained by reference to the terms in which a delegated power to legislate has been exercised'.[15] There are some limited exceptions to this general proposition[16] but we are not persuaded that any of those exceptions apply in the present context.

[46] We now turn to the relationship between the obligation to consult required by the relevant term and other provisions within a modern award.

[47] A number of parties[17] contended that the obligation to consult set out in the relevant term should be read subject to other provisions of the modern award such that the other provisions displaced the obligation to consult. An example serves to illustrate the proposition. If a modern award contained a provision which allowed an employer to vary an employee's regular roster on the giving of a specified period of notice (say 7 days) then the obligation to consult imposed by the relevant term would not apply.

[48] We are not persuaded that the relevant term was intended to operate in the manner contended. As mentioned earlier, s.145A is not a source of power in that it does not confer a right on an employer to change an employee's regular roster or ordinary hours of work. The source of such a power must be found elsewhere - either in the contract of employment or in an industrial instrument, such as a modern award. It is significant that s.145A was enacted against the background of existing provisions in modern awards which provide employers with the right to change an employee's regular roster or ordinary hours of work. It is also significant that s.145A does not state that the obligation to consult is subject to any other provisions in a modern award.

[49] If the proposition advanced were accepted it would, to a significant extent, effectively render s.145A nugatory. The obligation to consult would have no operation in circumstances where the modern award entitled an employer to change an employee's regular roster or ordinary hours of work. We are not persuaded that such a proposition is consistent with the terms of s.145A or its legislative purpose.

[50] Section 145A is intended to impose a new, additional obligation to consult employees in circumstances where their employer proposes to change their regular roster or ordinary hours of work. There is no conflict between the imposition of such an obligation and existing modern award provisions permitting the variation of a regular roster or ordinary hours of work on the giving of a specified period of notice or pursuant to a facilitative provision. There is no impediment to the employer complying with both provisions. The employer may still implement the proposed change on the giving of the requisite notice, but will now be required to consult the employees affected before implementing such a change. As we have mentioned such consultation must provide the affected employees with a genuine opportunity to attempt to persuade the employer to adopt a different course of action. For these reasons the relevant term will make it clear that it is to be read in conjunction with other award provisions concerning the scheduling of work and notice provisions.

[51] We now turn to the form and content of the relevant term.

Form and Content of the Relevant Term

[52] We turn first to the form of the relevant term. The issue in contention is whether a model relevant term should be inserted in all modern awards or whether the relevant term should be tailored to meet the particular circumstances said to arise in particular modern awards. For the reasons which follow, we have decided, at this stage, to adopt the first course and make a determination varying all modern awards in the same terms.

[53] We accept the submission by Australian Business Industrial that while the Commission is not required to create a model relevant term to be inserted in all modern awards 'it would be desirable for a reasonable degree of comity between modern awards on this issue'.[18] Given the time constraint imposed by the transitional provision and the limited material before us the development of a model clause is the most practical way of discharging our statutory obligations.

[54] A number of parties sought to tailor the draft relevant term to the circumstances of a particular modern award. All of these proposals were contentious. For example, Independent Schools Victoria proposed that the terms to be inserted in the *Educational Services Teachers Award 2010* and the *Educational Services Schools General Staff Award 2010* make it clear

that an educational timetable prepared by a school to schedule student activities and academic classes is not a regular roster for the purpose of the relevant term.[19] This proposition was opposed by the Independent Education union.[20] Contested bar table statements were made in support of the position of each party. In our view this issue should be the subject of further consideration in the 4 yearly review of modern awards which will commence early in the new year and be determined on the basis of evidence presented by any interested party. The practical reality is that the timeframe envisaged in the transitional provision does not allow that process to occur as part of these proceedings. We make it clear that we are not expressing a view as to the merits of the proposal advanced by Independent Schools Victoria.

[55] We take the same view of the other award specific proposals advanced in these proceedings. All of the proposals were contested and in some cases interested parties had not had a sufficient opportunity to consider the proposal. These issues should be the subject of further consideration in the context of the 4 yearly review. Any party seeking to have such matters dealt with as a matter of urgency should advise the President's chambers (chambers.ross.j@fwc.gov.au). In the event that disputes arise regarding the practical operation of the relevant term they can be dealt with in accordance with the dispute settlement term in the relevant modern award.

[56] We now turn to the content of the relevant term. At the outset we note that there was some debate in the proceedings about the extent to which we could depart from the express terms of s.145A in our determination of the content of the term required to be inserted by the transitional provision. In this context, Australian Business Industrial referred to the implied power to do such things that are ancillary to the express power[21] conferred by Schedule 4 to the FW Act and submitted that the scope of the implied power was 'very limited'.[22]

[57] The conferral of an express power (such as that in Schedule 4 to the FW Act) is said to carry with it powers that are 'necessary' for, or 'incidental' to or 'consequential' upon the exercise of the power granted.[23] As the High Court observed in *Plaintiff M47/2012 v Director-General of Security*:

> "Where a statute expressly confers upon a person or a body a power or function or a duty, any unexpressed ancillary power necessary to the exercise of the primary power or function, or discharge of the duty, may be implied."[24]

[58] The scope of the implied power is, of course, subject to a consideration of the relevant statutory context. It is unnecessary for us to dwell on the scope of the implied power in the present context because there is an applicable statutory provision which is relevant to the scope of our task. Section 142 of the FW Act deals with incidental and machinery terms in modern awards. Subsection 142(1) states:

> "(1) A modern award may include terms that are:
>
> (a) incidental to a term that is permitted or required to be in the modern award; and
>
> (b) essential for the purpose of making a particular term operate in a practical way..."

[59] The relevant term is a term that is 'required to be in a modern award' and sub-section 142(1)(b) provides that we may include terms that are incidental to the relevant term and 'essential for the purpose of making [the relevant term] operate in a practical way'.

[60] There may well be a degree of overlap between the scope of s.142(1)(b) and the implied term but it is unnecessary for us to determine the extent of that overlap in these proceedings.

[61] It is convenient to set out the draft which was included in our Statement of 7 November 2013. As we have mentioned the draft relevant term did not represent our concluded view regarding the nature of the term necessary to give effect to the transitional provisions in Schedule 4 of the FW Act:

> **"X.2 Consultation about changes to rosters or hours of work**
>
> **(a)** Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.
>
> **(b)** The employer must:
>
> **(i)** provide to the employee or employees affected and their representatives, if any, all relevant information about the proposed change, provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests;
>
> **(ii)** invite the employee or employees affected to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities);
>
> **(iii)** commence the consultation as early as practicable; and
>
> **(iv)** give prompt consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives."

[62] During the course of the hearing on 13 December 2013, the parties were invited to comment on the range of issues raised in the submissions in relation to the terms of the draft relevant term.

[63] Three particular issues arose in relation to draft clause X.2(a). We have already dealt with the first issue, whether the sub-clause should refer to a 'change' or a 'proposed change'. For the reasons already given (see paragraph [28] to [38] above) the clause will refer to proposed changes. For the same reasons we are not attracted to the proposition that consultation only be required after a 'definite decision' has been made to introduce a change.

[64] The second issue concerns whether the clause should be limited to 'permanent' changes to an employee's regular roster or ordinary hours of work. This proposition was advanced by a number of employer organisations, including the Australian Federation of Employers and Industries, the Housing Industry Association and Restaurant and Catering Australia.[25] Further, the Aged and Community Services Association proposed that the obligation to consult *not* apply in the following circumstances:

> "(ii) any change made to an employee's regular roster or ordinary hours of work to enable the service of the organisation to be carried on in the case of:
>
> (a) an employee's unplanned absence;
>
> (b) where another employee is absent from duty at short notice;

(c) in an emergency; or

(d) circumstances outside the control of the employer."

[65] Similarly, the Australian Hotels Association sought an exemption in respect of changes due to 'operational requirements in line with seasonal fluctuations' or 'exceptional circumstances'. The Australian Security Industry Association sought to restrict the operation of the relevant term to changes which will have a 'significant effect'.

[66] We are not persuaded that limiting the obligation to consult to permanent changes or in the manner proposed by the Aged and Community Services Association, the Australian Hotels Association and a number of other employer organisations would result in a term 'of the kind mentioned in s.145A'. The obligation to consult referred to in s.145A(1) attaches to 'a change' to an employee's 'regular roster or ordinary hours of work'. In this regard we note that the Revised Explanatory Memorandum to what became the 2013 *Amendment Act* states:

> "regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement ..." [emphasis added]

[67] There is no legislative warrant to limit the operation of the relevant term to changes of a particular character, a point conceded by a number of employer organisations.[26] We also note that any such limitation would give rise to some definitional issues as to the meaning of the word 'permanent' in this context.

[68] The third issue concerns the reference to an employee's 'regular roster or ordinary hours of work'. The Australian Retailers Association and Clubs Australia submitted that we should provide a definition of 'regular roster'. The Australian Hotels Association and Restaurant and Catering Australia submitted that the relevant term should only apply to 'regular *and systematic*' rosters. We are not persuaded to accede to these submissions. No definition of 'regular roster' is suggested in s.145A and given that we are dealing with a model clause it would be problematic to construct a definition that would meet the diverse circumstances of all modern awards: This issue can be further considered in the context of the 4 yearly review.

[69] We now turn to draft clause X.2(b)(i):

> **(b)** The employer must:
>
> **(i)** provide to the employee or employees affected and their representatives, if any, all relevant information about the proposed change, provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests;

[70] We have been persuaded to make three changes to the draft sub-clause. We will remove the words 'all relevant' before the word 'information' and insert the following after the words 'proposed change':

> "(for example, information about the nature of the change to the employees' regular roster or ordinary hours of work and when that change is proposed to commence)."

[71] The retention of the words 'all relevant' is, we think, unnecessary and may give rise to practical difficulties. The example now provided gives some guidance as to what information must be provided, as a minimum. The use of such an example was proposed by the ACTU and received a measure of support from the Ai Group.[27] No party opposed the proposal. The provision of an illustrative example is consistent with our obligation to ensure that modern awards are simple and easy to understand (see s.134(1)(g)).

[72] The other change we will make is to remove the words 'provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests'. Such a proviso is no longer necessary as the requirement to provide 'all relevant' information has been deleted.

[73] The requirement in draft clause X.2(b)(i) that employers provide information about the proposed change to an employees' representative, if any, attracted some opposition. For example, Motor Traders Association submitted that the employee's representative should act more as a witness than a representative and opposed any requirement to provide information about a proposed change to the employee's representative.[28] A number of other employer organisations (eg Australian Childcare Centres Association, Australian Hotels Association and the Australian Retailers Association) also opposed any requirement to provide information to an employee's representative. We are not persuaded by the submissions advanced on behalf of the Motor Traders Association and others. As we have mentioned, the relevant term must allow for the representation of the employees affected by a proposed change to their regular roster or ordinary hours of work. If an affected employee chooses to be represented then the employer must respect that choice and consult with the affected employee *and their representative*.

[74] Paragraph 145A(1)(b) allows for the representation of affected employees 'for the purposes of that consultation'. The provision of information and an opportunity to provide their views about the impact of the change are incidents of the consultation process envisaged by s.145A. It follows that an employee's representative, if any, should be provided with information about the proposed change and be given an opportunity to provide their views about the impact of such a change.

[75] The ACTU and a number of individual unions submitted that the information required to be provided to the affected employees and their representatives should be provided 'in writing'. It was proposed that the words 'in writing' be inserted after the word 'provide' in draft clause X(b)(i). Further, it was submitted that in certain circumstances the employer should be required to translate such information into an appropriate language. In this regard, the ACTU supported a provision in the following terms:

> "Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposed change and the employer's response."

[76] In support of these proposals the ACTU relied on the terms of the model flexibility term in modern awards and the provisions relating to the approval of enterprise agreements.

[77] Section 144 of the FW Act provides that a modern award must include a flexibility term enabling an employee and his or her employer to agree on an individual flexibility arrangement varying the effect of the award in order to meet the genuine needs of the

employee and employer. Sub-section 144(2)(b) provides that such individual flexibility arrangements are taken to be a term of the relevant modern award. Sub-section 144(4)(e) provides that any individual flexibility agreement must be in writing. Clause 7.7 of the model 'award flexibility term' is in broadly the same terms as the ACTU sought in these proceedings.[29] But the context is very different. Individual flexibility arrangements vary the effect of the relevant modern award. In the term we are considering the employer is exercising an existing right to vary an employee's regular roster or ordinary hours of work (albeit that right does not flow from s.145A, but from either the contract of employment or an industrial instrument) - no variation to the effect of the modern award is contemplated. The relevant term will simply impose an obligation to consult affected employees and their representatives, if any.

[78] The same observation may be made in relation to the ACTU's reliance on the agreement approval process. Section 186(2)(a) provides that before approving an enterprise agreement (that is not a greenfields agreement), the Commission must be satisfied that 'the agreement has been *genuinely agreed* to by the employees covered by the agreement'. Section 188 deals with what constitutes genuine agreement in this context:

> **"188 When employees have genuinely agreed to an enterprise agreement**
>
> An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
>
> (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
>
> (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
>
> (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
>
> (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees."

[79] The pre-approval steps referred to in s.188(a)(i) include, relevantly, the requirement in s.180(5):

> "(5) The employer must take all reasonable steps to ensure that:
>
> (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
>
> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees."

[80] Section 180(6) is also relevant, it states:

> "(6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:
>
> (a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a bargaining representative for the agreement."

[81] But, importantly, these provisions relate to enterprise agreements. An enterprise agreement operates to displace the modern award which would otherwise apply to the relevant employees (see s.57 and ss.52 and 54 of the FW Act).

[82] It is also important to note that the obligation to provide a copy of the individual flexibility arrangement and the proposed enterprise agreement 'in writing' is specified in the FW Act (see s.144(4)(e) and (f) and s.180(2)). No such requirement is specified in s.145A.

[83] We are not persuaded to include the provisions sought. The relevant term is intended to operate in a range of circumstances and across different industries and businesses. The requirements proposed would impose an unwarranted regulatory burden on business (see s.134(1)(f)) and would be particularly burdensome for small and medium sized businesses (see s.3(g)).

[84] For completeness we note that the TCFUA and AMWU supported the inclusion of these provisions in the awards in which they had an interest. The TCFUA's proposal was put on the basis of what was said to be widespread non-compliance in the industries concerned.[30] The AMWU submitted that such a provision would assist enforcing award compliance.[31] On the limited material before us we are not prepared to include the provisions sought in those modern awards. This issue can be the subject of further consideration in the 4 yearly review of modern awards, which will commence shortly.

[85] We now turn to draft sub-clause X.2(b)(ii):

> **(b)** The employer must:
>
> > **(ii)** invite the employee or employees affected to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities);

[86] The ACTU and a number of unions sought two changes to the draft sub-clause:

- the inclusion of the words 'and their representatives' after the words 'employees affected'; and
- the addition of the following words at the end of the draft sub-clause: 'and allow them a reasonable time to respond'.

[87] We are persuaded to make the first change proposed, for the reasons given at [73] to [74] above, but not the second.

[88] As to the second proposal we are not persuaded, on the limited material before us, that such a provision is incidental to the relevant term and 'essential for the purpose of making [the relevant term] operate in a practical way', within the meaning of s.142(1)(b). This proposal can be reconsidered in the light of experience in the practical application of the relevant term at the workplace level.

[89] BHP Billiton filed a written submission which sought, among other things, a change to bracketed words in draft sub-clause X.2(b)(ii). Specifically, it was submitted that the words

'including any impact in relation to' be deleted and replaced with the words 'particularly on'. It was submitted that such a change was necessary to obviate the risk that 'employees may think they are invited to give views well beyond what is relevant'.

[90] A number of organisations opposed the change proposed. For example, Australian Business Industrial submitted that the proposal involved a departure from the text of s.145A and was not necessary.[32] The ACTU, the Shop Distributive and Allied Employees' Association and the Australian Hotels Association opposed the change on the basis that it may act to limit the scope of the invitation for affected employees to provide their views in a manner not contemplated by s.145A.[33]

[91] We are not persuaded to adopt the amendment proposed by BHP Billiton. It is an unwarranted departure from the text of s.145A.

[92] We now turn to draft sub-clause X.2(b)(iii):

> **(b)** The employer must:
>
> ... **(iii)** commence the consultation as early as practicable; and

[93] We have been persuaded to delete this draft sub-clause on the basis that it is unnecessary. The relevant term imposes an obligation to consult in relation to proposed changes. The relevant term clearly envisages that consultation will take place *before* a proposed change to an employee's regular roster or ordinary hours of work is implemented. In such circumstances draft sub-clause X.2(b)(iii) is unnecessary.

[94] We now turn to draft sub-clause X.2(b)(iv):

> **(b)** The employer must:
>
> **(iv)** give prompt consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.

[95] For the reasons we have set out at paragraph [93] above the word 'prompt' should be deleted. It is unnecessary and may give rise to disputation.

[96] The ACTU proposed the insertion of the words 'decide within a reasonable time whether' in lieu of the words 'give prompt consideration'. For the same reasons (see paragraph [93]) we are not persuaded that these words are incidental to the relevant term and 'essential for the purpose of making [the relevant term] operate in a practical way', within the meaning of s.142(1)(b).

[97] The ACTU also proposed the addition of the words 'may be reasonably accommodated' at the end of the draft sub-clause'. In this context the ACTU relied on s.29(2) of the FW Act and a number of State and Territory statutes that impose a requirement to reasonably accommodate a person with certain attributes.[34] We are not persuaded that s.29(2) supports the amendment sought by the ACTU. The relevant State and Territory laws will continue to have force despite any inconsistent provision in a modern award. This amendment is related to the other ACTU proposed amendment and for the same reason we are not persuaded to make the change sought.

[98] Two additions to the draft clause were proposed.

[99] The ACTU proposed the insertion of a new paragraph X.2(b)(v) in these terms:

> "[The employer must] respond in writing to each affected employee and their representatives (if any):
>
> - addressing the matters raised by them; and
>
> [option 1]
>
> - giving notice of any change to the regular roster or ordinary hours of work in accordance with the applicable provision of this Award (if any)
>
> [option 2]
>
> - giving x days notice of any change to the regular roster or ordinary hours of work."

[100] We are not persuaded to adopt the changes in the form proposed. We have already rejected a proposal that the employer provide information about the proposed change 'in writing' and for the same reasons we reject the proposition that a response be provided in writing. Nor are we persuaded to adopt either option 1 or option 2. It seems to us that in each instance the options impose additional obligations beyond those contemplated by s.145A. Option 2 imposes a requirement to give a certain period of notice before implementing any change to an employee's regular roster or ordinary hours of work. This proposal may conflict with other provisions in a modern award and in any event is clearly outside the scope of s.145A. Option 1 suffers from a similar defect. It may operate to delay the giving of notice in accordance with another provision of the modern award, until the consultation process has been completed.

[101] We do, however, see some merit in a provision requiring the employer to inform the affected employee and their representative, if any, of the outcome of their consideration of the views provided to them regarding the impact of the proposed change. However, a provision in those terms was only the subject of limited argument in the proceedings before us and given the time constraint imposed by the transitional provision it is not practical to seek the views of interested parties before we are obliged to make a determination. In the circumstances we propose to give this issue further consideration in the context of the 4 yearly review.

[102] The second addition to the draft clause was proposed by a number of employer organisations, including the Australian Meat Industry Council, Business SA, the Civil Contractors Federation and Master Builders Australia, namely, a new sub-clause X.2(c) in these terms:

> "The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours."

[103] It was submitted that such an exclusion would clarify the scope of operation of the relevant term and was consistent with the modern awards objective.

[104] We note that a provision in the form sought is consistent with the observation in the Revised Explanatory Memorandum to what became the 2013 *Amendment Act* (set out at paragraph [37] above):

> "It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employer has irregular, sporadic or unpredictable working hours."

[105] We are satisfied that the change proposed is incidental to the relevant term and 'essential for the purposes of making [the relevant term] operate in a practical way', within the meaning of s.142(1)(b) of the FW Act, and consistent with the modern award objective. The exclusion will assist in reducing regulatory burden and making the relevant term simpler and easier to understand (see s.134(1)(f) and (g)).

[106] For completeness we note that the CFMEU submitted that aspects of the existing consultation term in modern awards (dealing with significant change) be amended to bring it into conformity with the relevant term. Such a proposal falls outside the determination of a term of the kind mentioned in s.145A and accordingly falls outside the scope of the present proceedings.

[107] We will make a determination varying all modern awards to insert a clause in the following terms:

Consultation about changes to rosters or hours of work

(a) Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.

(b) The employer must:

(i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);

(ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and

(iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.

(c) The requirement to consult under this clause does not apply where an employee has irregular, sporadic or unpredictable working hours.

(d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

[108] We are satisfied that such a determination meets our obligation under the transitional provisions in Schedule 4 of the FW Act to vary relevant modern awards to include a term of the kind mentioned in s.145A and is consistent with the achievement of the modern awards objective.

[109] To the extent that the determination includes matters beyond the express terms of s.145A we are satisfied that such matters are incidental to a term of the kind mentioned in s.145A and essential for the purpose of making that term operate in a practical way, within the scope of s.142(1) and the implied power.

Appearances:

A. McCarthy on behalf of the Australian Nursing and Midwifery Federation
S. Burnley on behalf of the Shop, Distributive and Allied Employees Association
V. Wiles on behalf of the Textile, Clothing and Footwear Union of Australia
T. Clarke on behalf of the Australian Council of Trade Unions
J. Watson on behalf of the United Firefighters' Union of Australia
M. Nguyen on behalf of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
A. Odgers on behalf of the Independent Education Union of Australia
L. Izzo on behalf of Australian Business Industrial
N. Tindley on behalf of the Australian Retailers Association and the Recruitment and Consulting Services Association
T. McDonald on behalf of Clubs Australia Industrial
K. Knopp on behalf of Independent Schools Victoria and five other independent school associations in Australia
W. Chesterman on behalf of the Victorian Automobile Chamber of Commerce and the Motor Trades Associations of Queensland, New South Wales, South Australia and Western Australia.
S. Kraemer on behalf of the Master Plumbers, Mechanical Services Association of Australia.
A. Ch'ng on behalf of the Australian Chamber of Commerce and Industry, the Australian Federation of Employers and Heavy Industries and the Australian Public Transport Industrial Association.
G Johnson on behalf of Australian Meat Industry Council
A. Grayson on behalf of the Maritime Union of Australia
J. Gunn on behalf of Community Connections Solutions Australia
G. Parkes on behalf of Restaurant and Catering Australia
S. Maxwell on behalf of Construction, Forestry, Mining and Energy Union
R. Baonza on behalf of the Civil Contractors Federation in New South Wales.
B. Ferguson on behalf of the Australian Industry Group and the National Road Transport Operators Association.
M. Howard Housing Industry Association
G. Boyce on behalf of the Aged and Community Services Employers
H. Wallgren on behalf of Business SA
T. E. Evans on behalf of the Australian Hotels Association Queensland
S. Hills on behalf of the South Australian Mine Industry Association
J. Minchinton and *K. Garth* on behalf of the Australian Hotels Association
R. Calver and B. Rea on behalf of the Master Builders of Australia

Hearing details:

2013.
Melbourne:
December 13

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[1] [2013] FWCFB 8728.

[2] s.13(1) *Acts Interpretation Act* 1901.

[3] *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; *R v L* (1994) 49 FCR 534 at 538.

[4] *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J; *Project Blue Sky Inc and Others* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at [70] per McHugh, Gummow, Kirby and Hayne JJ.

[5] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

[6] BC910541 26 September 1991.

[7] *Port Louis Corporation v Attorney-General of Mauritis* (1965) AC 1111 at 1124; *TVW Enterprises Ltd v Duffy and Others* (1985) 60 ALR 687 at 694 per Toohey J.

[8] [2010] FCA 591 at [44] to [45] A subsequent appeal against his Honour's decision failed in relation to the decision to convict QR of a breach of the relevant enterprise agreement. The appeals against sentence were upheld, but only to the extent of setting aside the penalties of $390,000; $231,000 and $33,000 in relation to the appellants and inserting the sums of $192,200; $112,000 and $16,000. (2010) 204 IR 142.

[9] *CPSU v Vodafone Network Pty Ltd* Print PR911257, 14 November 2001 per Smith C (as he then was).

[10] *Construction, Forestry, Mining and Energy Union v The Newcastle Wallsend Coal Company Pty (Wallsend)* Print R0234, 21 December 1998 AIRC (Ross VP, MacBean SDP and Deegan C).

[11] *Sinfield v London Transport Executive* (1970) 1 Ch 550 at 558; cited with approval in *Wallsend,* at [76] and in *Maswan v Escada Textilvertriels T/A Escada* [2011] FWA 4239 at [20] per Watson VP.

[12] ARA written submission at paragraph [12].

[13] See sub-item 5(2) in Schedule 7 of the 2013 *Amendment Act.* As to when an enterprise agreement is 'made' see s.172 of the FW Act.

[14] Transcript of 13 December 2013 at PN [95] to [97].

[15] (1980) 32 ALR 603 at 606. Also see *Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 at 577-578 and *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244 per Mason CJ and Gaudron J.

[16] For example, if the regulations and principal act form part of a legislative scheme it may be useful to refer to them to ascertain the nature of the scheme: *Brayson Motors Pty Ltd (in liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651 at 652 per Mason J.

[17] For example, Ms Kraemer on behalf of the Master Plumbers and the Mechanical Services Association of Australia, Transcript 13 December 2013 at PN [476] to [478] and Mr Chesterman on behalf of the Motor Traders Association at PN [483] to [487].

[18] ABI written submission at paragraph [17].

[19] Transcript of 13 December 2013 at PN [423] to [462].

[20] Ibid at PN [225] to [237].

[21] *See Plaintiff M47/2012 v The Director General of Security* [2012] HCA 46; *Transport Workers Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26 at paragraphs [37] and [38].

[22] Transcript 13 December 2013 at PN [377].

[23] See *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 at 478 per Lord Selborne LC; *The Trolly, Draymen and Carters Union of Sydney and Suburbs v The Master Carriers Association of New South Wales* (1905) 2 CLR 509 at 516-517 per Griffith CJ and 523-524 per O'Connor J; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 574 per Dixon CJ, Williams, Webb and Taylor JJ; *R v Gough; Ex parte Australasian Meat Industry Employees' Union* (1965) 114 CLR 394 at 406 per Barwick CJ, 416 per Windeyer J and 422 per Owen J; *Re Sterling; Ex parte Esanda Ltd* (1980) 30 ALR 77 at 83; *Dunkel v Deputy Commissioner of Taxation* (NSW) (1990) 27 FCR 524 at 528; *Australian Securities Commission v Bell* (1991) 32 FCR 517 at 528 per Sheppard J; *Johns v Connor* (1992) 35 FCR 1 at 10; and *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25 at 35 per Mildren J, with whom Martin CJ agreed.

[24] (2012) 86 ALJR 1372 at [48].

[25] AFEI written submissions at paragraph [28]; Transcript of 13 December 2013 at PN [319] and [325] respectively.

[26] Ai Group at PN [203] of the Transcript of 13 December 2013 and Australian Business Industrial at PN [383].

[27] Transcript of 13 December 2013 at PN [179] to [180] and [212].

[28] Transcript 13 December 2013 at PN [469].

[29] See *Modern Awards Review 2012 - Award Flexibility* [2013] FWCFB 2170 at p 48.

[30] Transcript of 13 December 2013 at PN [264].

[31] Ibid at PN [285].

[32] Ibid at PN [383] to [384].

[33] Ibid at PN [121] to [127], [281] and [347].

[34] Ibid at PN [59] to [79].