

FEDERAL COURT OF AUSTRALIA

Toyota Motor Corporation Australia Limited v Marmara [2014] FCAFC 84

Citation: Toyota Motor Corporation Australia Limited v Marmara [2014] FCAFC 84

Appeal from: Marmara v Toyota Motor Corporation Australia Limited [2013] FCA 1351

Parties: **TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097) v CARMELO JOSEPH MARMARA, PETER JOHN COOK, MICHAEL DEMIANO CREA and ADRIAN RICHARD TAINSH**

File number: VID 1364 of 2013

Judges: **JESSUP, TRACEY AND PERRAM JJ**

Date of judgment: 18 July 2014

Catchwords: **INDUSTRIAL LAW** – Enterprise agreement containing prohibition on the making of further claims – Whether proposal by employer to vary agreement to its advantage was a “further claim” – Whether prohibition was repugnant to provisions of Statute which permitted employer to propose variations to agreement – Whether prohibitions pertained to relationship between employer and its relevant employees – Whether prohibition permitted employer to take “adverse action” against its employees.

Legislation: *Acts Interpretation Act 1901 (Cth)* ss 46, 15AA
Fair Work Act 2009 (Cth) ss 3, 12, 19, 50, 52, 171, 172, 182, 186, 194, 195, 201, 207, 208, 209, 210, 211, 220, 221, 222, 228, 230, 236, 238, 253, 340, 341, 417
Workplace Relations Act 1996 (Cth)
Workplace Relations Amendment (Work Choices) Act 2005 (Cth) s 494

Cases cited: *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) 130 FCR 524
Broadcasting Company of Australia Pty Ltd v The Commonwealth (1935) 52 CLR 52
Carbines v Powell (1925) 36 CLR 88
Construction, Forestry, Mining and Energy Union v Newlands Coal Pty Ltd [2006] FCAFC 71
Ex parte Lawes [1908] SALR 130
Ex parte Reid (1943) 43 SR (NSW) 207

Federal Capital Commission v Laristan Building and Investment Co Pty Ltd (1929) 42 CLR 582
Gibson v Mitchell (1928) 41 CLR 275
Grech v Bird (1936) 56 CLR 228
In re The Metropolitan Abattoirs Acts 1908-1930 [1932] SASR 184
IRA, L & AC Berk, Ltd v The Commonwealth (1930) 30 SR (NSW) 119
JJ Richards & Sons Pty Ltd v Fair Work Australia (2012) 201 FCR 297
Morton v Union Steamship Company of New Zealand Ltd (1951) 83 CLR 402
Plaintiff M47/2012 v Director-General of Security (2012) 292 ALR 243
R v Commissioner of Patents; Ex parte Martin (1953) 89 CLR 381
R v Portus; Ex parte City of Perth (1973) 129 CLR 312
Re Media, Entertainment and Arts Alliance (1993) 178 CLR 379
Shanahan v Scott (1957) 96 CLR 245
United Firefighters' Union of Australia v Transfield Services Australia Pty Ltd (2007) 167 IR 252
Wells v Finnerty (1910) 12 WALR 41

Date of hearing: 26 & 27 May 2014

Place: Melbourne

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 130

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**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 1364 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

**BETWEEN: TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED
(ACN 009 686 097)
Appellant**

**AND: CARMELO JOSEPH MARMARA
First Respondent**

**PETER JOHN COOK
Second Respondent**

**MICHAEL DEMIANO CREA
Third Respondent**

**ADRIAN RICHARD TAINSH
Fourth Respondent**

JUDGES: JESSUP, TRACEY AND PERRAM JJ

DATE OF ORDER: 18 JULY 2014

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Declaration 1 and Order 2 made by the primary Judge on 12 December 2013 be set aside.
3. The respondents' initiating application made on 20 November 2013 be dismissed.
4. The cross-appeal be dismissed.

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

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JUDGES: JESSUP, TRACEY AND PERRAM JJ

DATE: 18 JULY 2014

PLACE: MELBOURNE

REASONS FOR JUDGMENT

- 1 The Toyota Motor Corporation of Australia (TMCA) Workplace Agreement (Altona) 2011 (“the Agreement”) is an enterprise agreement made under s 182, and approved by the Fair Work Commission (“the Commission”) under s 186, of the *Fair Work Act 2009* (Cth) (“the FW Act”). The Agreement applies (within the meaning of s 52 of the FW Act) to the appellant, Toyota Motor Corporation of Australia Limited (“Toyota”), to employees of Toyota at its manufacturing site and customer service division warehouse at Grieve Parade, Altona, and, pursuant to a note made by the Commission under s 201(2) of the FW Act, to the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (“the Union”). Included amongst the employees to whom the Agreement applies are the respondents, Carmelo Joseph Marmara, Peter John Cook, Michael Demiano Crea and Adrian Richard Tainsh, who were the applicants below.

2 Clause 4 of the Agreement provides as follows:

This comprehensive Agreement resolves the enterprise bargaining claims by The Parties and shall operate seven days from the date of approval by FWA and will nominally expire on 6 March 2015.

TMCA and the Union agree to start negotiations for renewal of this Agreement, three months prior to its expiry.

The parties agree they will not prior to the end of this agreement:

- make any further claims in relation to wages or any other terms and conditions of employment; and
- take any steps to terminate or replace this Agreement without the consent of the other parties.

Written commitments as outlined in the letter to FVIU chairperson dated 16 September 2011 will be honoured by all parties.

3 The third subparagraph of cl 4 (commencing “The parties agree ...”) provided the basis for the conclusion of the primary Judge in his reasons of 12 December 2013 that Toyota had contravened s 50 of the FW Act, which provides that “a person must not contravene a term of an enterprise agreement”. On the same day, his Honour made a declaration and an order in the following terms:

THE COURT DECLARES THAT:

1. By proposing variations to the Toyota Motor Corporation Australia (TMCA) Workplace Agreement (Altona) 2011 (“Agreement”) on 11 and 15 November 2013 as set out at paragraphs 15 and 16 of the Court’s reasons for judgment of this date (“Proposed Variations”), the respondent contravened section 50 of the *Fair Work Act 2009* (Cth).

AND THE COURT ORDERS THAT:

2. The respondent (whether by itself, its servants or agents) be restrained from conducting, organising, promoting or facilitating a vote to approve the Proposed Variations. Nothing in this order is intended to restrain the respondent from making any claim to remove or vary the “no extra claims component of cl 4” of the Agreement (within the meaning of paragraph 13 of the reasons for judgment of the Court).

4 The present proceeding is an appeal by Toyota against the making of that declaration and that order. The respondents have cross-appealed against the second sentence in the above order (commencing “Nothing in this order ...”).

5 Paragraphs 15 and 16 of the reasons of the primary Judge, referred to in the declaration set out above, were in the following terms:

15 On 11 November 2013, an Executive Director of Toyota, Chris Harrod,

wrote to employees further explaining the need for changes to the Agreement. That letter referred to a “need to bring forward part of our 2015 Workplace Agreement (WPA) negotiations” and reiterated that in order to deliver scheduled pay increases, it was necessary to remove “out dated and uncompetitive terms and conditions” from the Agreement. That same day, Toyota sent an email to employees outlining 27 proposed variations to the Agreement.

16 On 15 November 2013, employees were notified of two further proposed variations and an amendment to one of the proposed variations. The proposed variations as they had been described to employees at 15 November 2013, may be summarised as follows:

- (i) reduction in the minimum Christmas shutdown period from 21 days to 8 days (ie from 25 December to 1 January);
- (ii) reduction in the minimum notice period from 2 months to 1 month where Toyota needs to change a ‘rostered day off’ to a ‘programmed day off’ or vice versa;
- (iii) instead of employees being required to be available to work a maximum of 20 hours overtime each month, employees must be available to work a minimum of 20 hours overtime each month;
- (iv) reduction in paid training days for elected union representatives from 10 days per year (which can be pooled so that extra days can be taken by individuals if necessary) to 5 days in the first year of being an elected representative and 2 days per year thereafter (with no pooling allowed);
- (v) removal of a 4 hour paid leave allowance to donate blood;
- (vi) inclusion of a requirement for a medical certificate to be provided for each day of paid sick leave taken instead of employees having 5 days of paid sick leave without providing a medical certificate; and the inclusion of a requirement that employees notify their supervisor of an absence at least half an hour prior to the commencement of their shift instead of employees being required to notify management of their absence within the first hour after the commencement of their shift;
- (vii) removal of a requirement for Toyota to hire 8 trade apprentices each year;
- (viii) where an employee is required to move between areas of the Plant on the same shift, the current process for selection will remain but where agreement cannot be reached there will be no resort to the problem resolution procedure (ie issuing of a grievance) specified in the Agreement;
- (ix) simplification of the counselling and disciplinary process to reduce the number of steps required to be taken by management while extending the time periods for employees to take corrective action;
- (x) reduction in the number of steps to be taken as part of the problem resolution procedure, narrowing the definitions of ‘problem’ and ‘grievance’ and attempting to resolve problems within 24 hours of a problem being raised;
- (xi) reduction in wash up time for particular employees with corresponding extension in rest period to standardise work practices across the Plant;
- (xii) last shift prior to Christmas shutdown to be extended from a 5 hour shift to a full 8 hour shift;

- (xiii) changes to shift pattern for ‘trades employees’ including a new requirement for all trades employees to work on weekends, reduction in overtime rates on weekends, restrictions on taking ‘programmed days off’ and a reduction in paid training hours;
- (xiv) increased term for temporary fixed term contracts, increased scope for Toyota to retain temporary fixed term contractors and a reduction in the rate of pay for such contractors;
- (xv) removal of a confined space allowance currently paid to employees working in confined spaces or in stooped or cramped positions;
- (xvi) removal of a first-aid allowance currently paid to trained first-aid officers;
- (xvii) removal of a respiratory allowance currently paid to paint shop employees who wear air fed respiratory equipment;
- (xviii) removal of a dirt money allowance currently paid to employees who perform work that is unusually dirty or offensive;
- (xix) removal of an electrical licensing allowance currently paid to licensed electrical workers;
- (xx) no new competency skill payments to be paid to technical, engineering, clerical employees or supervisors;
- (xxi) no new qualification payments to be paid to technical, engineering, clerical employees or supervisors;
- (xxii) removal of payments currently made to employees who need to travel for work outside of ordinary work hours;
- (xxiii) reduction in Sunday overtime rate of pay from double time and a half to double time;
- (xxiv) reduction in overtime rates of pay for technical, clerical, engineering employees and supervisors;
- (xxv) removal of annual leave loading (or shift premium, where applicable) paid to employees;
- (xxvi) removal of a \$700 annual reimbursement payment for employees who obtain income protection insurance;
- (xxvii) removal of shift premiums paid to employees taking long service leave;
- (xxviii) removal of a meal allowance paid to employees required to work overtime for more than two hours without being notified on the previous day or earlier; and
- (xxix) removal of a requirement that where employees do not have a 30 minute unpaid meal break within six hours of the time they attend for work, employees working beyond six hours be paid time and a half until they receive a meal break.

6 The primary Judge noted that the variations to the Agreement sought by Toyota were “significant”. His Honour had not been addressed in detail with respect to the extent to which the proposed variations would have reduced the entitlements which employees had under the Agreement in its then terms, but his Honour noted that Toyota did not challenge the

characterisation which the respondents gave to the proposals, namely, that they amounted to an attempt by Toyota to bring forward the re-negotiation of the Agreement.

7 The respondents contended that Toyota's proposals of 11 and 15 November 2013 were further claims within the meaning of cl 4 of the Agreement. The primary Judge accepted that contention. From that point, Toyota advanced three main arguments against the respondents' case that it had contravened cl 4 of the Agreement. First, it was contended that, if the Agreement were to be construed as proposed by the respondents, it would be inconsistent with, or repugnant to, the relevant provisions of the FW Act. We shall refer to this contention as the "repugnancy point". Secondly, it was said that the no further claims term in cl 4 of the Agreement was an "objectionable term" within the meaning of s 12 of the FW Act, and thus an "unlawful term" within the meaning of s 194. As such, the term was of "no effect" pursuant to s 253(1)(b). And thirdly, it was said that the term was "not a term about a permitted matter" and thus of "no effect" pursuant to s 253(1)(a).

8 The primary Judge rejected each of those contentions advanced on behalf of Toyota. With respect to the repugnancy point, his Honour accepted that the no further claims term would have been invalid on account of inconsistency with, or repugnancy to, the FW Act were it not for the ability of Toyota and its employees to vary the agreement to remove that term from cl 4. That ability, however, removed the potential for inconsistency/repugnancy, and saved the term.

9 Toyota now challenges the primary Judge's conclusion that its proposals of 11 and 15 November 2013 were "further claims" within the meaning of cl 4. By cross-appeal, the respondents challenge his Honour's conclusion that the no further claims term in cl 4 could be removed from the Agreement by variation: they contend that any proposal for such a variation would also be a "further claim", and thus prohibited by the term itself. Toyota challenges his Honour's conclusion that the ability to remove the term avoids the consequences of cl 4 being *pro tanto* invalid. Finally, Toyota also challenges his Honour's conclusions under s 253 of the FW Act.

10 In the circumstances, the following issues now arise for resolution:

- (1) Were the proposals of 11 and 15 November 2013 "further claims" within the meaning of cl 4 of the Agreement?
- (2) If yes to (1):

- (a) is the no further claims term in cl 4 invalid on the ground of inconsistency with or repugnancy to the FW Act, and if so, is the term saved from invalidity by the ability of Toyota and its employees to remove it from the Agreement by variation?
- (b) is the relevant term a “permitted matter” within the meaning of s 172 of the FW Act?
- (c) is the relevant term an “objectionable term” within the meaning of s 12 of the FW Act?

11 For reasons which follow, we propose to answer the first question above in the affirmative. We propose to answer yes and no respectively to the two parts of the question identified as issue 2(a). We propose to say yes to issue 2(b) and no to issue 2(c). The resolution of issue 2(a) as we propose would mean that the appeal must be allowed and the cross-appeal dismissed. In other respects, the resolution of the issues which we favour would be consistent with the conclusions reached by the primary Judge.

12 Having thus foreshadowed, broadly, how we intend to dispose of the appeal and the cross-appeal, there are two further preliminary observations which we should make at this stage. The first is to note that the Minister for Employment exercised his right under s 569 of the FW Act to intervene in this appeal. Submissions, generally supportive of the appeal, were made on his behalf which illuminated some aspects of the operation of the legislative provisions with which we are concerned. Although we have not found it necessary to refer further to those submissions in the reasons which follow below, they were of assistance to us, and have been taken into account.

13 The second observation relates to the primary Judge’s disposition of the case which came before him last year. His Honour’s judgment of 12 December 2013 attracted a deal of publicity. There was a good deal of debate about whether the FW Act and the agreement made under it could, or should, have operated to prevent an employer and the majority of its employees from giving effect to a consensus between them to vary the agreement. Any assessment of his Honour’s reasons, however, should be made against the background that the proceeding was commenced on 20 November 2013. Twenty-two days later, the primary Judge published his 144-paragraph judgment dealing with all the substantive issues in the case on a final basis. Although we depart from his Honour’s reasons, in point of detail, in a number of places, in only one, admittedly crucial, respect would we disagree with the main

conclusions reached by his Honour. Otherwise, we consider that those conclusions were unexceptionable. We draw attention to these characteristics of the case so that they might be accorded their appropriate weight in any public assessment of the primary Judge's contribution to the resolution of the issues which arose from the problematic terms in which Toyota and its employees chose to express the settlement of the dispute which existed between them in 2011.

THE STATUTORY FRAMEWORK

14 The provisions of the FW Act that are relevant to the present appeal are to be found in Div 2 of Pt 2-1 and in Pt 2-4 thereof. Chapter 2 of the FW Act deals with the subject "Terms and Conditions of Employment". It is divided into nine parts, Part 2-4 being concerned with "Enterprise Agreements". On any view, the establishment of terms and conditions of employment by enterprise agreement is a central pillar of the regulatory regime established by the FW Act. Indeed, s 3(f) makes it an object of the FW Act to "provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by ... achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action...."

15 The objects of Pt 2-4 are set out in s 171 as follows:

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

16 Division 2 of Pt 2-4 – "Employers and employees may make enterprise agreements" – contains s 172 only. Subsections (1) and (2) thereof provide as follows:

- (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:
 - (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who

will be covered by the agreement;

- (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- (d) how the agreement will operate.

Note 1: For when an enterprise agreement covers an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement will be covered by the agreement if the organisation notifies FWA under section 183 that it wants to be covered.

- (2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a single-enterprise agreement):
 - (a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or
 - (b) with one or more relevant employee organisations if:
 - (i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and
 - (ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of enterprise in section 12).

17 Division 3 of Pt 2-4 is concerned with the subject of bargaining for an enterprise agreement, and with representation for the purpose of bargaining. It provides for an employer that will be covered by a proposed enterprise agreement to give to existing employees who will be covered by the agreement a notice specifying that each employee may appoint a bargaining representative to represent him or her in bargaining for the agreement. The identification and appointment of bargaining representatives is also dealt with in Div 3.

18 Bargaining as such is dealt with further in Div 8 of Pt 2-4. It gives the Commission the power to make a “bargaining order” to ensure that bargaining representatives meet the “good faith bargaining requirements” set out in s 228(1). Such an order may not be made unless the Commission is satisfied, amongst other things, that one of the matters set out in s 230(2) applies, namely:

- (2) [The Commission] must be satisfied in all cases that one of the following applies:
 - (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
 - (b) a majority support determination in relation to the agreement is in operation;

- (c) a scope order in relation to the agreement is in operation;
- (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

A “majority support determination” is a determination by the Commission under s 236 that “a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement”. A “scope order” is an order by the Commission under s 238 which specifies the employer, and the employees, who will be covered by the agreement. In the light of certain submissions made in support of the cross-appeal, it will be necessary to return to ss 238 and 239 in more detail below.

19 Although not directly relevant to the present appeal, some provisions of Pt 3-3 of the FW Act should be noted at this stage. The Part is concerned with industrial action. Division 2 is concerned with “protected industrial action”. Subject to compliance with the requirements of the Division, certain types of industrial action, when taken in the context of a proposed enterprise agreement, are, under Subdiv C, immune from the otherwise applicable provisions of the general law that might expose those taking, or organising, the industrial action to civil suit, either in tort or in contract, for example. These provisions, and the nature of the collective bargaining regime which they imply, have been the subject of judicial discussion previously (eg *Australian and International Pilots Association v Fair Work Australia* (2012) FCR 200, 204-208 [17]-[39], 224-225 [108]-[116] and 231-233 [144]), and it is not presently necessary to enter further upon the detail of the provisions involved.

20 One provision of Pt 3-3 which should be noted, however, is s 417, subs (1) and (2) of which provide as follows:

- (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
 - (a) an enterprise agreement is approved by [the Commission] until its nominal expiry date has passed; or
 - (b) a workplace determination comes into operation until its nominal expiry date has passed;whether or not the industrial action relates to a matter dealt with in the agreement or determination.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) The persons are:
 - (a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or
 - (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

The “nominal expiry date” mentioned in s 417(1)(a) is a reference to a feature of an enterprise agreement which is required under s 186(5), namely, the specification of a date, not more than four years after the day on which the agreement is approved by the Commission (a subject which is dealt with further below), as the nominal expiry date of the agreement. This date has significance under the FW Act in a number of contexts, one of which is the ending of the period during which the prohibition in s 417(1) operates.

21 The outcome of a presumptively successful period of collective bargaining is the making and approval of an enterprise agreement. Division 4 of Pt 2-4 deals with the “approval of enterprise agreements”. There are two levels of approval, one by the relevant employees and one by the Commission. The first is the subject of s 181, subs (1) of which provides as follows:

An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

By subs (3) of this section, the voting for which subs (1) provides may be “by ballot or by an electronic method”.

22 Then s 182(1) provides as follows:

If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is *made* when a majority of those employees who cast a valid vote approve the agreement.

23 Under s 185(1), if an enterprise agreement is made, a bargaining representative for the agreement must apply to the Commission for approval of the agreement. Sections 186 and 187 specify, in some detail, the conditions under which the Commission must approve such an agreement. They are important in the present case. To the extent presently relevant, they read as follows (the Commission being referred to, here and elsewhere in the FW Act, as “FWC”):

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

- (2) The FWC must be satisfied that:
 - (a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and
 -
 - (c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and
 - (d) the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

- (3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.
- (3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

- (4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

- (4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

- (5) The FWC must be satisfied that:
 - (a) the agreement specifies a date as its nominal expiry date; and
 - (b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

- (6) The FWC must be satisfied that the agreement includes a term:
 - (a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:
 - (i) about any matters arising under the agreement; and
 - (ii) in relation to the National Employment Standards; and

- (b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

187 When the FWC must approve an enterprise agreement—additional requirements

Additional requirements

- (1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

- (2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

- (3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

24 The approval of an enterprise agreement by the Commission has consequences under Div 2 of Pt 2-1 of the FW Act. Section 51 provides as follows:

- (1) An enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person.
- (2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

Section 52(1) specifies when an enterprise agreement “applies” to an employee, an employer and an organisation of employees, in the following terms:

An enterprise agreement *applies* to an employee, employer or employee organisation if:

- (a) the agreement is in operation;
- (b) the agreement covers the employee, employer or organisation; and
- (c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

Section 53 deals with the subject of coverage, the detail of which is not of present concern. It is sufficient to note that the Agreement covers Toyota, its employees and the Union.

25 The final provision of Div 2 of Pt 2-1 which must be mentioned here is s 54, as follows:

- (1) An enterprise agreement approved by the FWC operates from:
 - (a) 7 days after the agreement is approved; or
 - (b) if a later day is specified in the agreement-that later day.
- (2) An enterprise agreement ceases to operate on the earlier of the following days:
 - (a) the day on which a termination of the agreement comes into operation under section 224 or 227;
 - (b) the day on which section 58 first has the effect that there is no employee to whom the agreement applies.

Note: Section 58 deals with when an enterprise agreement ceases to apply to an employee.

- (3) An enterprise agreement that has ceased to operate can never operate again.

26 So much for the making, approval and operation of an enterprise agreement. It is next necessary to note the provisions of the FW Act which deal with how, and under what circumstances, an enterprise agreement may be varied or terminated. That is the concern of Div 7 of Pt 2-4.

27 Section 207(1)(a) provides as follows:

The following may jointly make a variation of an enterprise agreement:

- (a) if the agreement covers a single employer – the employer and:
 - (i) the employees employed at the time who are covered by the agreement; and
 - (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC

Relevantly to the present appeal, these employees are referred to as the “affected employees” for the variation.

28 Section 208, which is of considerable importance in the present case, provides as follows:

- (1) An employer covered by an enterprise agreement may request the affected employees for a proposed variation of the agreement to approve the proposed variation by voting for it.
- (2) Without limiting subsection (1), the employer may request that the affected employees vote by ballot or by an electronic method.

29 In the case of a single-enterprise agreement, s 209(1) provides as follows:

If the affected employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is *made* when a majority of the affected employees who cast a valid vote approve the variation.

30 Once a variation has been made as specified in s 209(1), s 210(1) provides that a person covered by the agreement must apply to the Commission for approval of the variation. Section 211 sets out, prescriptively and in some detail, the circumstances in which the Commission must approve the variation.

31 Subdivision C of Div 7 of Pt 2-4 is concerned with the subject “termination of enterprise agreements by employers and employees”. *Mutatis mutandis*, the relevant provisions have much in common with those under which enterprise agreements may be varied. In s 219(1)(a), it is provided, in the case of an agreement covering a single employer, that the employer and the employees covered by the agreement “may jointly agree to terminate” the agreement. Section 220(1) provides as follows:

An employer covered by an enterprise agreement may request the employees covered by the agreement to approve a proposed termination of the agreement by voting for it.

Section 221(1) provides as follows:

If the employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is *agreed to* when a majority of the employees who cast a valid vote approve the termination.

Section 222(1) provides that, if the termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to the Commission for approval of the termination. Section 223 sets out the circumstances under which the Commission must approve the termination.

32 Further to that arising under s 417(1) which we have mentioned above, one of the consequences of the passing of the nominal expiry date of an enterprise agreement is the availability of additional provisions allowing for the termination of the agreement under Subdiv D of Div 7 of Pt 2-4 of the FW Act. Save to note the existence of these provisions, it is unnecessary to enter upon this subject.

33 The above survey identifies only the main provisions of the FW Act which define the architecture and characteristics of the enterprise bargaining, and agreement-making, system thereby established. In dealing with specific issues below, it will be necessary to refer to other provisions, and we shall set out the terms of them in those contexts as they arise.

THE CONSTRUCTION OF CL 4 OF THE AGREEMENT

- 34 Toyota advanced a number of arguments, both before the primary Judge and on appeal, as to why its proposals of 11 and 15 November 2013 were not “further claims” within the meaning of cl 4 of the Agreement. The first was based on the dictionary definition of a “claim”, namely, “a demand for something as due; an assertion of a right to something”: *Oxford English Dictionary*, 2nd ed.
- 35 In the proceeding below, the primary Judge held that Toyota’s argument adopted an overly narrow approach to construction, which resulted in a strained and inapt meaning being ascribed to the word “claim” in the term no “further claims” as used in cl 4. His Honour said that the meaning contended for was inconsistent with the ordinary meaning of “claim” when used in the context of industrial bargaining, and with the intended purpose of the no extra claims component of cl 4 as discerned from its text as well as from the context provided by the remaining text of cl 4, and by other provisions in the Agreement. His Honour said that the ordinary meaning of the word “claim” was not limited to a demand for something as of right, and extended to a contention or demand for something which the claimant regarded or asserted to be due or fitting. In respect of the use of the word “claim” in the context of industrial negotiations, the primary Judge noted that, typically, each of the employer and the employees would make claims designed to improve upon or advance their respective entitlements or interests. Claims made in that context might be reasonable, or they might be what was commonly referred to as “ambit claims”. His Honour considered that to limit the meaning of “claim” to a demand as of right would defy its ordinary understanding in the context of industrial bargaining.
- 36 The primary Judge referred to Toyota’s reliance upon the observation of Dowsett J in *Newlands Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2005) 147 IR 304, made in the context of the relevant employer having offered an employee the opportunity to make an Australian Workplace Agreement under the *Workplace Relations Act 1996* (Cth). Dowsett J said (147 IR at 311-312 [27]):

The word “claim” applies [sic – implies?] an assertion of entitlement, moral or legal. An offer is not a claim. If an employer offers an AWA and an employee accepts, there is no claim. The clause has no relevance.

The primary Judge said that, in that passage, Dowsett J was “defining a claim as an assertion of an entitlement as a means of contrasting a claim from an offer”, and that the reference to

“moral or legal” was intended to be an “illustrative rather than a comprehensive description of the nature of the entitlement which may be asserted when a claim is made”. His Honour added that Dowsett J did not regard the meaning of the word “claim” to be limited to an assertion of a legal right to an entitlement, as was made plain by the reference to “moral”, and that what Dowsett J meant by that descriptor was “the assertion of an entitlement regarded by the claimant as legitimate or, ... an entitlement regarded as due or fitting.”

37 As a matter of ordinary language we accept that a proposal which requires the addressee’s assent, such as an offer to buy a block of land, would not normally be regarded as a claim. However, as the primary Judge considered, to deal with the problem at this level of generality would be to ignore context, which is of paramount importance in this area of the law. His Honour said:

In the context of the scheme for bargaining provided by the FW Act, where agreements are made in resolution of claims pursued through bargaining, a proposal by one party to vary the outcome arrived at in a way which advances its interests is apt to be regarded as a further claim. That is particularly so where the proposed variations are significant and suggest an attempt, as I consider is here the case, to strike a new bargain. Both the ordinary industrial meaning of “claim” and the scheme of the Agreement to which I have referred, are consistent with the construction of “further claims” in cl 4 as encompassing a proposal made by a party to the Agreement to materially change the terms and conditions of employment set out in the Agreement other than in a manner already provided for by the Agreement. Such a proposal is not merely a request or offer, it is also a “further claim” within the intended use of that expression in cl 4.

For reasons which follow, we agree with this passage, and his Honour’s conclusion on this aspect of the case.

38 The word “claim” is historically rooted in the Australian industrial relations vernacular because there was a need for there to be an “industrial dispute” – that is, a disagreement about industrial matters – before the Industrial Relations Commission (“the IR Commission”) and its predecessors could make an award, or certify an agreement, pursuant to legislation which depended for its validity on s 51(xxxv) of the *Constitution*. The “log of claims” was the conventional means by which a party – commonly a union – addressed its demands to the other party. The rejection of those demands stood as prima facie evidence of disagreement, and therefore of a dispute in the constitutional and statutory senses. As Dixon J said as long ago as 1938, “[a] log is not an instrument with a prescribed legal effect. It is nothing but a catalogue of claims supposed to represent the real desires of actual people.”: *R v*

Commonwealth Court of Conciliation & Arbitration; Ex parte Kirsch (1938) 60 CLR 507, 538.

39 It was not only a formal log of claims, intended to supply the jurisdictional basis for the making of an award or the certification of an agreement, that contained “claims”. Once an industrial dispute had been found to exist, and the necessary record made, the parties commonly used the ambit provided by that dispute to add to, and to adjust, the actual wages and conditions of employment that applied from time to time. Thus the parties tended to make “claims” on each other, within ambit, which provided the framework for their negotiations.

40 It was never a requirement that these “claims” amounted to assertions of rights or entitlements, whether legal or moral. That there was no relevant existing legal right or entitlement was, of course, the predicate upon which awards and agreements were made. In the context of industrial negotiations, or award-making proceedings, no doubt some moral or ethical case in favour of the matter claimed would usually be advanced by one party or the other, such as an increase in the cost of living, or some change in the nature of the work, since the previous award or agreement. The wage fixing principles of the 1970s and 1980s, to which we refer below, amounted to an attempt to introduce some organization into the range of circumstances which were considered appropriate to justify wage increases in this sense. But the existence of some legal or moral entitlement to a claimed adjustment was never regarded as a necessary component of the concept of a “claim” as such.

41 In the Australian industrial relations context, what made a communication from one party to the other a claim was, to use the words of Dixon J, that it represented “the real desires of actual people”. “Genuineness” in this sense was the low threshold that a communication needed to cross to come within the traditional concept of a claim. There was not any additional feature which such a communication had to display, such as being in the nature of an assertion of a right or entitlement.

42 On the facts of the present case, the primary Judge found that, “[i]n the course of negotiations for the Agreement, logs of claims were exchanged”. That is, what the bargaining parties wanted, and said they wanted, were the claims which they made on each other. Initially, it was not possible to resolve those claims, and industrial action was taken. Ultimately, agreement was reached, it being noted in cl 4 of the Agreement itself that the Agreement “resolves the enterprise bargaining claims by [t]he [p]arties”.

43 Treating the wrongdoing which the primary Judge attributed to Toyota as the communication to its employees of a desire to have alterations made to the basis upon which the various claims had been resolved in the Agreement, we do not regard it as fatal to the respondents' case that that communication was not expressed as an assertion of some right or entitlement.

44 However, we are not concerned here with the word "claims" in isolation, even in an industrial relations setting. The expression which must be construed, or at least understood, is "further claims". As it happens, this too has a history in the Australian industrial relations vernacular. We commence by returning to the early 1980s, when the expression, or an expression which was in point of substance indistinguishable from that presently under consideration, was first used in national wage case proceedings before the Australian Conciliation and Arbitration Commission ("the C&A Commission").

45 At that time, under the *Conciliation and Arbitration Act 1904* ("the 1904 Act"), the C&A Commission had a general power to vary an award (s 59). A certified agreement was deemed to be an award for all purposes of the 1904 Act (s 28(3)), and thus could be varied by the C&A Commission. There was nothing in the 1904 Act which held the parties to the agreement which they had struck, considerations of that kind being left to the discretion of the C&A Commission in proceedings for variation. It should also be noted that the 1904 Act contained no prohibition upon the taking of industrial action and, although it was contemplated that industrial action might be proscribed by award (see s 33), the then Commonwealth Industrial Court was not empowered to enforce such a proscription by injunction (note the limited effect of s 109 as a result of amendments made by the *Conciliation and Arbitration Act 1970* (Cth)).

46 It was in this statutory environment that, in the proceeding in the C&A Commission which led to the reintroduction of centralised wage determination in September 1983, the federal Government pressed for it to be a condition of the flow into a particular award of a national wage increase that the unions concerned had first given to the C&A Commission what was described as an undertaking that they would not "pursue any extra claims outside national wage, by award or overaward payments, inconsistently with the Principles" of wage fixation: *National Wage Case* (1983) 4 IR 439, 441. That proposal was accepted by the C&A Commission: 4 IR at 442, 451 and 472. Note that there was no suggestion of any undertaking to be given by relevant employers, and the wording of the relevant principle (4 IR at 472) did not so provide. In March 1987, the C&A Commission heard further argument

about this undertaking, and decided that, where it had been given, a statement to that effect should become a term of the award being varied: *National Wage Case March 1987* (1987) 17 IR 65, 77 and 99. Again, the undertaking was to be given only by “a union concerned”. That remained the situation until, and including, the decision of the then IR Commission given on 16 April 1991: *National Wage Case April 1991* (1991) 36 IR 120, 176 and 180.

47 By then, the *Industrial Relations Act 1988* (Cth) (“the 1988 Act”) had replaced the 1904 Act. By definition, an award included a certified agreement (s 4(1)), but the general power to vary awards (under s 113(2)) could, in the case of a certified agreement, be exercised only in specified, limited, situations (such as for the removal of ambiguity or uncertainty) (s 116(1)(d)).

48 With the advent of enterprise bargaining in the early 1990s, a modified approach was called for. The IR Commission –

... sought to devise a mechanism which, consistent with the inherent nature of enterprise bargaining:

...
will require parties to abide by mutually agreed outcomes for a set period and to accept an on-going responsibility for reviewing the effectiveness of their agreement and for its removal or replacement ...;

National Wage Case October 1991 (1991) 39 IR 127, 131. Thus there was introduced a new enterprise bargaining principle which made it a requirement of the certification of an agreement resulting from such bargaining that it make provision for “no further wage or salary increases for its life, except where consistent with a National Wage decision”: 39 IR at 141. It may be noted that, although the terminology of the IR Commission’s reasons was that the “parties” would have to abide by their “mutually agreed outcomes”, it was only “further wage or salary increases” that were proscribed for the life of an agreement.

49 With the introduction of Div 3A into Part VI of the 1988 Act by the *Industrial Relations Legislation Amendment Act 1992* (Cth), the IR Commission’s power to refuse to certify a certified agreement on public interest grounds was confined to a situation in which the agreement did not “apply only to a single business, part of a single business or a single place of work”: see IR Act as so amended, ss 134A(3) and 134F(1)(b). In the view of the Full Bench of the IR Commission, this, and the other prescriptive criteria for the certification of agreements which were introduced by the 1992 amendment, removed its ability to continue the system of imposing discretionary requirements on the content of enterprise agreements

which had been responsive to broad public interest considerations: *National Wage Case October 1993* (1993) 50 IR 285, 298. The new principles then determined did not refer to any circumstances in which a no further claims undertaking would be required of the parties to an award.

50 The enactment of the *Industrial Relations Reform Act 1993* (Cth) prompted the IR Commission to review its then principles of wage determination, which it did in a proceeding leading to a decision on 16 August 1994: *Review of Wage Fixing Principles – August 1994* (1994) 55 IR 144. The principles then adopted said nothing on the subject of a “no further claims” provision in enterprise agreements, although it may be noted that, in an attachment to the decision which laid out the areas in which the major parties had reached a degree of consensus, it was proposed that a “no extra claims commitment” might be one way that the IR Commission would be able to ensure that the integrity of a paid rates award was maintained: see 55 IR at 184.

51 In 1996, the 1988 Act (then re-named the *Workplace Relations Act 1996* (Cth), “the WR Act”) was amended in a number of ways, one of which was the introduction, for the first time since 1930, of a direct statutory prohibition upon the taking of industrial action. That became s 170MN of the WR Act, which provided that, from the time when a certified agreement came into operation until its nominal expiry date had passed, an employee whose employment was subject to the agreement, an organisation of employees that was bound by the agreement and an officer or employee of such an organisation acting in that capacity, “must not, for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award, engage in industrial action”. A like prohibition was applicable to an employer bound by a certified agreement. Relevantly, contravention of s 170MN attracted a civil penalty.

52 In February 2002, Kenny J decided *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588. It was held that s 170MN did not apply where the claim being supported by the action related to a matter not dealt with in the agreement. In the course of her reasons, her Honour observed (117 FCR at 602 [55]):

If the parties so desired, they could agree that a certified agreement made by them was intended to cover the whole field of relevant employment, thereby excluding the possibility of industrial action during the currency of the agreement.

Kenny J's conclusion was upheld on appeal: *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) 130 FCR 524. In dismissing the appeal, French and von Doussa JJ said (130 FCR at 535 [38]):

It is of course possible that parties to an agreement may seek to abuse s 170MN by confecting some issue not explicitly covered by a certified agreement and using that as a basis for constructing an entitlement to protected action. It may be that in such a case the court would construe the agreement as intended to cover the field of terms and conditions defining the employment relationship in question. Indeed the parties may, as Kenny J pointed out, make that intention explicit by the inclusion of a provision that the agreement is intended to be exhaustive of the terms and conditions of the relevant employment relationship.

53 In *United Firefighters' Union of Australia v Transfield Services Australia Pty Ltd* (2007) 167 IR 252, Vice-President Lawler of the IR Commission explained something of the consequences of *Emwest*. His Honour said (167 IR at 257 [15]):

Transfield seeks to rely upon the factual matrix existing at the time the 2005 Agreement was made including, in particular, the history of clause 1.6 and its alleged inclusion in the immediate predecessor to the 2005 Agreement in response to the decision of the Federal Court in *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588 In that case a collective agreement was concluded between a union and employer and certified under s 170 of the pre-reform Act. That agreement dealt with a broad range of employment conditions but did not address redundancy (in fact, the parties had agreed to postpone consideration of the union's claims in relation to redundancy). Kenny J held that the union was not prevented from taking protected industrial action in support of claims in relation to redundancy during the life of the agreement. The decision in *Emwest* took a number of industrial parties by surprise and was the subject of considerable interest in industrial circles because it had been generally assumed that s 170MN of the pre-reform Act prevented any lawful industrial action being taken during the nominal period of a certified agreement. After the decision in *Emwest*, so-called "no extra claims" clauses became ubiquitous in certified agreements.

54 With the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), s 170MN was repealed, but substantially re-enacted as s 110, and re-numbered as s 494. As re-enacted, the section was amended so as to apply the prohibition on taking industrial action before the nominal expiry date of a, now "collective", agreement "whether or not that action relates to a matter dealt with in the agreement". The outcome in *Emwest* was, therefore, legislatively reversed. Although grammatically re-arranged, the section was substantially re-enacted in 2009 as s 417 of the FW Act, and remained in that form at the time of the making, and approval, of the Agreement (and still remains in that form).

55 It is clear, therefore, that a prohibition on “further claims” (or “extra claims”) was not novel when the present parties made the Agreement in 2011: it had a long history in Australian industrial regulation. Originally, those words were the formula by which a union that was a party to an award which came up for a national wage adjustment was required to give an undertaking the object of which was to avoid a situation in which employees covered by the award would have the benefit of such an adjustment at the same time as being at liberty to pursue other claims for improvements in wages or conditions. The formula was then, for a time, used for a similar purpose at the point where agreements came to be certified under the 1988 Act. Within that context, to regard the assertion of a right or entitlement as a limiting criterion of what constituted a “claim” would not reflect the purpose for which the formula was employed. The purpose was to require the parties – usually the relevant union and its members – to foreswear any attempt to improve upon the wages, conditions and other benefits for which the relevant industrial instrument provided. At the time (ie until 1996), there was nothing in the legislation which prohibited the taking of industrial action by a party who sought to improve upon benefits obtained under a recently-made agreement or award, so the prohibition on further claims provided, quite probably, the only practical means of keeping such a party to his or her bargain (or, as appropriate, to the terms of the award which he or she had sought).

56 This industrial relations history is sufficient to reject the contention by Toyota that the word “claim” in cl 4 of the Agreement was to be understood in the limited sense of an assertion of a right or entitlement, whether legal or moral.

57 Toyota’s next argument assumed an understanding of the industrial relations history to which we have referred. It was stressed that, originally, the prohibition on the making of further claims to be found in industrial awards and agreements was based on apprehensions that, without it, the unions concerned would be free to organise industrial action in support of claims additional to those settled by those awards and agreements whenever it was to their members’ advantage to do so. Against a statutory environment in which the restraints on taking industrial action were indirect and not always effective, it was at the point of making the relevant claims that employers and others holding those apprehensions sought to head off, in effect, any such action as might be taken in support of the claims. Now that industrial action before the nominal expiry date of an enterprise agreement is rendered unlawful by the direct operation of s 417 of the FW Act, there is no point in regarding an otherwise benign proposal to vary such an agreement as a “further claim”.

58 Here we note what is common ground, namely, that the expression “the end of this agreement” in cl 4 of the Agreement is to be understood in the sense “the nominal expiry date of this agreement”. When the clause is so understood, it is correct, as Toyota stressed, that the operation of the prohibition in cl 4 is co-terminous with the period during which industrial action could not be taken in support of claims for the acceptance of the proposals for variation made by Toyota on 11 and 15 November 2013. By a combination of ss 19(1)(d) and (3) and 417(1) and (2) of the FW Act, Toyota could not, in November 2013, have prevented its employees from performing work under their contracts of employment without terminating those contracts. Further, any suggestion of dismissing or otherwise disadvantaging those employees on account of their refusal to accede to the proposals would seem to be ruled out by the provisions of Div 3 of Pt 3-1 of the FW Act. Neither were the proposals in fact put before the employees as something to which they ought to agree or suffer the consequences (save, of course, in the indirect sense that acceptance of the proposals was said to be conducive to the long-term commercial viability of the Altona plant, and thus to job security).

59 The legislative framework provides no basis to suppose that the drafters of cl 4 of the Agreement intended that the embargo on further claims should apply only to claims that could have been supported by industrial action. As mentioned above, since 1996 there has been a legislated prohibition against the taking of industrial action by someone covered by an enterprise agreement within term. Until 2005, that prohibition was incomplete, but since then it has been comprehensive. The need for employers to introduce no further claims clauses to close off the gap which was revealed in *Emwest* no longer exists. By 2011, when the Agreement was made, it could not be said that the purpose of a no further claims clause was to protect those covered by an enterprise agreement from the prospect that industrial action might be taken by some other party or parties in relation to matters not covered in the agreement, at least until the nominal expiry date of the agreement.

60 The makers of the Agreement must be taken to have been aware of the relevant provisions of the FW Act when they put their names to it. The embargo on industrial action before the arrival of the nominal expiry date of the Agreement applied as much to the employees, and their unions, as it did to Toyota. No proposal for changes in wages or other terms and conditions of employment could have been supported by industrial action until the arrival of that date. The reference to “claims” in cl 4 must, therefore, have been an intended reference

to demands, requests, proposals and the like that could not have been supported by industrial action.

61 That is not to say that we accept that, in the industrial context, it is a necessary element of a “claim” that it be supportable by industrial, or analogous direct, action. Even aside from claims which involve an assertion of a legal right or entitlement, it is not difficult to envisage circumstances in which a party to an employment relationship might advance to the other party the need to make some presumptively advantageous alteration to the existing state of affairs. A small group of employees may, for example, request an alteration of their roster without having any legal or industrial means at their disposal to force their employer to agree. But, if it were what they wanted, and they put it to their employer in the expectation of it being seriously considered, the request would not, in our view, be disqualified from being regarded as a “claim” by reason only that there were no such means.

62 For the above reasons, we take the view that the fact that Toyota’s proposals could not have been supported by industrial action or any analogous direct action to secure their acceptance is neither here nor there apropos the argument that the proposals did not constitute further claims within the meaning of cl 4 of the Agreement.

63 Toyota’s next submission was that cl 4 should not be so construed that it amounts to a contravention of the Agreement for Toyota and its employees to exchange proposals for changes in terms and conditions of employment within the three-month period which precedes the nominal expiry date of the Agreement, and in which cl 4 itself contemplates that there will be negotiations for a new agreement. By the terms of the second subparagraph in cl 4, Toyota and the Union agreed to start negotiations for a renewal of the Agreement three months prior to “its expiry”, that is, the nominal expiry date. It was most unlikely, it was submitted, that the makers of the Agreement would have provided for Toyota and the Union (being the presumed bargaining agents in the context of a new agreement) to contravene cl 4 itself by making further claims before the nominal expiry date, as such negotiations would inevitably involve.

64 There are, in our view, two answers to this submission. The first is that, as a matter of internal construction, cl 4 clearly contemplates the making of claims within the three months before the nominal expiry date of the Agreement, and it would make sense to understand the reference to further claims as not extending to claims made in that environment. Particularly

given the arrangement of these provisions within cl 4, a claim made in that negotiating environment should not be regarded as a “further” claim.

65 The other answer is that the conclusion, for which the submission made by Toyota implicitly presses, that a claim made by itself or the Union within the three-month negotiating period cannot have been intended to be prohibited by the no further claims aspect of cl 4, would provide no sustenance for the case which Toyota made before the primary Judge and which it makes on appeal. That case is that, whatever else it means, the relevant aspect of cl 4 cannot be read as an embargo on proposals to vary the Agreement itself. By definition, negotiations of the kind referred to in the second subparagraph of cl 4, and the claims made in those negotiations, would not involve proposals to vary the agreement before its nominal expiry date: they would involve proposals for the terms of a new agreement to commence operation at some point subsequent to the nominal expiry date of the Agreement.

66 Toyota then submitted that cl 4 should not be so construed that it amounts to a contravention of the Agreement for the parties to it to seek to adjust its terms to changed circumstances. In our view, this submission achieves little traction at the level of construction as such. As we understand the point, it is said that the FW Act places an emphasis upon flexibility as an objective in workplace regulation – to be seen, for example, in ss 3(a) and 171(a) – and that the Agreement should, where possible, be construed so as to permit Toyota and its workforce to make such variations as were called for, or rendered suitable, by the changing business environment in which the makers of the Agreement found themselves from time to time. This, it was said, would conduce to the achievement of flexibility more so than a construction of the Agreement that would have its terms locked in, without the makers being able to do anything about it, until the arrival of the nominal expiry date.

67 The difficulty with this submission is that it does not speak at the level of the problem with which the court is concerned. It does not engage with the construction of the terms of cl 4 as they appear in the Agreement. A desire for flexibility may well have provided the ideal setting for the making of an agreement which did not contain an embargo on further claims, but the fact is that the Agreement does contain such an embargo. There is no element of uncertainty, nor is there any scope for differing interpretations, in cl 4 such as would be resolved by recourse to some high-level perception that the makers of the Agreement probably intended to respect the statutory objective of achieving flexibility in workplace regulation. Particularly with respect to this aspect of Toyota’s case, there is no intelligible

sense in which a proposed variation which is based upon the need to respond to changed circumstances should, because of that need, be regarded as outside the concept of a “further claim” in cl 4.

68 Toyota’s final argument on the construction of cl 4 of the Agreement (ie aside from those that were interwoven with its case on the repugnancy point) was based on the provision of the Agreement that made it an objective to attain cost structures similar to those of other members of the Toyota group worldwide. It was contended that, pursuant to ss 46 and 15AA of the *Acts Interpretation Act 1901* (Cth) (“the AI Act”), an interpretation of the Agreement which would best achieve that objective is to be preferred to each other interpretation. We do not, however, accept the premise from which this argument proceeds. Section 46 of the AI Act applies where “a provision confers on an authority the power to make an instrument”. There is no provision of the FW Act which confers on the Commission the power to make an enterprise agreement. Such an agreement is made by the employer and the relevant employees under ss 172(2) and 182(1). We consider, therefore, that the constructional questions which arise for resolution in this appeal must be addressed without assistance from the AI Act.

69 Of itself, that conclusion is, perhaps, an inappropriately narrow basis upon which to dismiss this argument advanced on behalf of Toyota. Clause 10 of the Agreement provides as follows (in which “TMCA” is a reference to Toyota):

The Parties agree that the success of TMCA within the international vehicle manufacturing industry is crucial to the long term sustainability of TMCA’s ability to provide beneficial terms and conditions of employment to its Employees. This will be achieved through the following objectives:

- Achieve the highest international quality and service levels.
- Attain cost structures similar to those of other Toyota operations world-wide.
- Supply product to the market place on a timely and cost effective basis.
- Provide a rate of return on investment comparable with or greater than other Toyota operations.

It may be accepted that, if the meaning of a provision of the Agreement were unclear, the reader would be justified in preferring a reading which tended to promote these objectives.

70 That is, however, to deal with the problems of construction at a very high level. The Agreement is both comprehensive and prescriptive. The objects of the Agreement are not to be discerned only in provisions of the kind to be seen in cl 10, although the provisions in the first two subparagraphs of cl 6 may also be noted in this context:

The purpose of this Agreement is to express the commitment of The Parties to achieve TMCA's success as a Global Company.

The Parties are committed to the Implementation of all aspects of this Agreement both individually and collectively. It is agreed that subject to FWA approval, this Agreement defines the legal relationships between The Parties to this Agreement.

It is as clear as may be that it was an object of the Agreement to set down the specific terms and conditions that would govern the employment of employees covered by it until the nominal expiry date. If there is any object that should be regarded as relevant to the construction of cl 4, it is that one.

71 It was submitted on behalf of the respondents that a provision such as the no further claims aspect of cl 4 is to be regarded as an important element of the supporting mechanisms implicit in the scheme of collective bargaining for which the FW Act provides. Such a provision delivers stability and predictability in the matter of terms and conditions of employment, generally regarded as essential characteristics of a successful business in a market economy. It was submitted, in effect, that Toyota, as the employer and the paymaster, would have regarded this provision, in itself, as fundamental to the bargain which it reached with its employees and their representatives. We accept those submissions. The objective sought to be achieved by the no further claims provision speaks so loudly through the terms of the provision itself, and the words of the provision are so free of ambiguity, as to make it quite inappropriate to attempt to modify the meaning otherwise conveyed by those words whenever it should be convenient to do so for the more effective achievement of the objects referred to in cl 10 of the Agreement.

72 If the repugnancy point did not arise in this appeal, we would, for the above reasons, hold that the proposals put by Toyota to its employees on 11 and 15 November 2013 were further claims within the meaning of cl 4 of the Agreement, and that Toyota contravened that clause when it made those proposals.

73 Before leaving the issue of construction, we note that the determination of the repugnancy point, to which we turn next, has the very real potential to influence the way cl 4 of the Agreement should be construed. We shall return to this dimension of the problem at the conclusion of the next section of our reasons.

THE REPUGNANCY POINT

74 Under this heading, we propose to consider the issue which we have numbered 2(a) in para 10 above, and to do so in the order there implied. It is necessary to commence with the proposition that, ignoring for the moment the prospect that the no further claims provision of cl 4 of the Agreement could itself be removed by variation, that provision would be invalid or void on account of inconsistency with, or repugnancy to, the Act under which the agreement was approved, and which gives it its legal efficacy. In this case, the primary Judge said:

That the hands of the parties to an agreement could be completely tied by their prior agreement so that no later capacity to effectuate an agreed change is available, no matter how beneficial to all that change may be, is not a common feature of any type of agreement making. It is an unattractive notion and a consequence that is not likely to have been intended by the framers of the FW Act. I do not consider that the scheme of the FW Act intends that parties to an enterprise agreement may exclude themselves entirely from the Subdiv A variation process. A provision in an enterprise agreement to that effect would be inconsistent with the FW Act and invalid.

This conclusion by his Honour is challenged by the respondents.

75 As developed on the hearing before the Full Court, there were two main lines of argument deployed by the respondents in support of that challenge. The first was that the FW Act had so comprehensively addressed the question of inconsistency between its own terms and those of an enterprise agreement, and laid down in such detail the circumstances under which the Commission should reject an application for approval of an enterprise agreement, as to leave no scope for the conclusion that inconsistency or repugnancy should be perceived in a provision of an agreement under which the employer agreed not to exercise its right to initiate a variation under Subdiv A of Div 7. The second emphasised the consequences of upholding an interpretation that would allow the provisions of that subdivision to be used as the means of striking down a term of an enterprise agreement that had been made under the more tightly regulated provisions of Divs 2, 3 and 8 of Pt 2-4. We shall give more detail to this second line of argument in due course.

76 Much of the jurisprudence which engaged the attentions of the parties before the primary Judge and again on appeal in connection with the respondents' first line of argument has been developed under regulation-making powers which were expressed in terms of which s 846(1) of the WR Act was a modern example:

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Under such a provision, even where a matter was required or permitted to be prescribed, a regulation had to be “not inconsistent with” the empowering Act. The power given to employers and employees to make enterprise agreements under the FW Act is not subject to any such explicit condition. This provides the base line for the respondents’ submission that, in respects not specifically dealt with in the FW Act itself, it must be concluded that the legislature intended that the makers of an enterprise agreement should be able to include in it terms which qualified the operation of that Act.

77 There are two levels at which the FW Act places explicit limits upon the ability of the employer and the majority of relevant employees to make an enterprise agreement: first, by the specification of requirements which must be met by the agreement at the point of approval by the Commission; and secondly, by identifying terms which, if contained in an enterprise agreement, are of no effect.

78 As mentioned previously, it is in ss 186 and 187 of the FW Act that the requirements for approval are set out. Dealing only with single-enterprise agreements in established businesses, and ignoring the special provisions of Subdiv E of Div 4 of Pt 2-4, the requirements are that –

- the agreement has been genuinely agreed to by the employees covered by the agreement (s 186(2)(a));
- the terms of the agreement do not contravene s 55 of the FW Act (to be found in Subdiv A of Div 3 of Pt 2-1 of the FW Act, entitled, “Interaction between the National Employment Standards and a modern award or an enterprise agreement”) (s 186(2)(c));
- the agreement passes the “better off overall test” (s 186(2)(d));
- the group of employees covered by the agreement was “fairly chosen” (s 186(3));
- the agreement does not include any unlawful terms (s 186(4));
- the agreement does not include any “designated outworker terms” (s 186(4A));
- the agreement specifies a “nominal expiry date” no more than four years after the date of approval by the Commission (s 186(5));

- the agreement includes a term which allows for the settlement of disputes of certain kinds (s 186(6));
- approval of the agreement “would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation” (s 187(2)); and
- if a bargaining representative is required to vary the agreement as referred to in s 184(2), he or she has complied with that subsection and with subsection (3) of s 184 (s 187(3)).

79 In many instances, these provisions refer to other provisions of the FW Act, the detailed terms of which do not require consideration in the present context. As a generalisation, however, it may be said that the provisions bespeak the giving of detailed legislative attention to the circumstances in which an enterprise agreement should not be approved by the Commission because of its tendency to undermine the policy and scheme of the FW Act itself. Section 187(2) in particular should be noted in this respect.

80 Terms of an enterprise agreement which, even if the agreement has been approved by the Commission, are of no effect are the concern of ss 56, 253 and 326 of the FW Act. Section 56 provides that a term of an enterprise agreement has no effect “to the extent that it contravenes section 55”, a section which addresses in detail the relationship between the “national employment standards” for which Pt 2-2 of the FW Act provides and, amongst other things, an enterprise agreement.

81 Section 253(1) provides as follows:

A term of an enterprise agreement has no effect to the extent that:

- (a) it is not a term about a permitted matter;
- (b) it is an unlawful term; or
- (c) it is a designated outworker term.

It is not necessary to enter upon the content of para (c) of this subsection, save to note the operation of the provision itself. Section 326 is a division of Pt 2-9 of the FW Act which is concerned with the payment of wages to employees, the scope of permitted deductions, and like matters.

82 With respect to s 253(1)(a), “permitted matters” are the concern of s 172(1) of the FW Act, which provides as follows:

An agreement (an *enterprise agreement*) that is about one or more of the following matters (the *permitted matters*) may be made in accordance with this Part:

- (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement;
- (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
- (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
- (d) how the agreement will operate.

Note 1: For when an enterprise agreement covers an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement will be covered by the agreement if the organisation notifies FWA under section 183 that it wants to be covered.

The intent of this provision, and of s 253(1)(a), is to confine an enterprise agreement to what might broadly be described as the employment, or industrial relations, setting. The terms of paras (a) and (b) have a deal in common with like provisions in earlier legislation. The terms of para (c) identify a subject as to which there might, by a line of High Court jurisprudence developed under the 1904 Act and the 1988 Act, be some doubt as to whether it was comprehended by the terms of para (a). Because s 253(1)(a) is concerned with the outer perimeter, as it were, of the subject area in which an enterprise agreement might be made, we do not consider that it makes any useful contribution to the resolution of the repugnancy point.

83 Paragraph (b) of s 253(1) is, however, directly relevant to that point. An “unlawful term” is defined in s 194 of the FW Act as follows:

A term of an enterprise agreement is an *unlawful term* if it is:

- (a) a discriminatory term; or
- (b) an objectionable term; or
- (ba) a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement; or
- (c) if a particular employee would be protected from unfair dismissal under Part 3-2 after completing a period of employment of at least the minimum employment period — a term that confers an entitlement or remedy in relation to a termination of the employee’s employment that is unfair (however described) before the employee has completed that period; or
- (d) a term that excludes the application to, or in relation to, a person of a provision of Part 3-2 (which deals with unfair dismissal), or modifies the

- application of such a provision in a way that is detrimental to, or in relation to, a person; or
- (e) a term that is inconsistent with a provision of Part 3-3 (which deals with industrial action); or
 - (f) a term that provides for an entitlement:
 - (i) to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or
 - (ii) to enter premises to hold discussions of a kind referred to in section 484;other than in accordance with Part 3-4 (which deals with right of entry); or
 - (g) a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3-4 (which deals with right of entry).
 - (h) a term that has the effect of requiring or permitting contributions, for the benefit of an employee (the *relevant employee*) covered by the agreement who is a default fund employee, to be made to a superannuation fund or scheme that is specified in the agreement but does not satisfy one of the following:
 - (i) it is a fund that offers a MySuper product;
 - (ii) it is a fund or scheme of which the relevant employee, and each other default fund employee in relation to whom contributions are made to the fund or scheme by the same employer as the relevant employee, is a defined benefit member;
 - (iii) it is an exempt public sector superannuation scheme.

By s 195, a term of an enterprise agreement is a discriminatory term “to the extent that it discriminates against an employee” because of any one of a number of listed personal characteristics or circumstances. By s 12, a term is an “objectionable term” if it requires, or has the effect of requiring, permits, or has the effect of permitting (or purports to do so in either case), a contravention of Pt 3-1 of the FW Act or the payment of a “bargaining services fee”. At this stage, it is not necessary to enter upon the detail of these matters, but the former of them will be relevant in a later section of these reasons.

84 As with ss 186 and 187, s 194 in part bespeaks the giving of detailed legislative attention to the circumstances in which an enterprise agreement should be of no effect because of its tendency to undermine the policy and scheme of the FW Act itself; in its other dimensions the section does, of course, address the issue of contrariety of an enterprise agreement with other policy objectives, not directly the concern of the FW Act.

85 The respondents pointed out that the FW Act is silent on the question whether a provision of an enterprise agreement may be inconsistent with the ability of an employer and its employees to make a variation to the agreement under Subdiv A of Div 7 of Pt 2-4 of the FW Act, or, specifically, with the ability of the employer to request its employees to approve a

proposed variation under s 208. Taking the no further claims term in cl 4 of the Agreement as including a prohibition upon making such a request, the existence of the prohibition would not have stood in the way of the Commission approving the Agreement: indeed, given the terms of s 186(1), the Commission would have had no option but to approve the Agreement notwithstanding the prohibition. Neither, it was pointed out, does s 253 render this part of cl 4 of no effect. In a statutory setting in which so little is left to implication, the legislature must be taken to have intended, or at least assumed, that an agreement containing a prohibition of this kind could and should be approved, and that the prohibition could and should be effective according to its terms.

86 We accept the broad thrust of the respondents' submission that the FW Act has addressed, in great detail, the matter of the terms that are permitted in an enterprise agreement, and has also given attention to the consequences of a term which is not so permitted finding its way into such an agreement. For the most part, however, the legislative indications on which the respondents rely are indirect ones. As it happens, the clearest, and most relevant, indication of legislative intent is to be found on the terms of Subdiv A itself, specifically those of ss 207 and 208. It is there provided that an employer and its relevant employees *may jointly make* a variation of an enterprise agreement, and that the employer *may request* the relevant employees to approve such a proposed variation. That a provision of an agreement which prohibited – either in terms or within the scope of a more generally-expressed prohibition – the making of such an agreement or request should be regarded as inconsistent with the statute is a proposition to which, in our view, there could be no answer.

87 The respondents sought to extract themselves from the inevitability of that conclusion by proposing that s 208 of the FW Act was merely “facilitative”, in that it gave the employer a facility which it was at liberty to take up or not as it chose. If the employer does not take it up, that could not be regarded as inconsistent with the section, or with the statutory scheme of which the section forms a part. From there, it is but a short step to propose, as the respondents did, that the situation arising under cl 4 of the Agreement is no different from one in which a party to a contract agrees, for consideration, not to exercise a right which he or she has under the general law.

88 We do not accept that premise, or the appropriateness of the contractual analogy. Under the FW Act, an enterprise agreement is an agreement in name only. Those who, by s 172(2), are empowered to “make” an enterprise agreement are the employer and “the employees who are

employed at the time the agreement is made and who will be covered by the agreement”. A contract lawyer would assume that those persons would be parties to the agreement, and that the assent of all of them would be necessary for the agreement to be “made”. But the lawyer would be wrong on both counts. The FW Act does not identify the employer, or any employee, as a “party” to an enterprise agreement. Further, notwithstanding the specific empowering terms of s 172, it is not necessary for all the employees who are employed at the time an agreement is made and who will be covered by the agreement to assent to the terms of the agreement. Once a majority of those employees have agreed by voting, the agreement must be sent to the Commission for approval and, if approved, thenceforth applies to all the employees in the relevant group, even those who did not agree, and even those, subsequently taken into employment, who were not part of the relevant group at the time the vote was taken under s 182.

89 In his reasons, the primary Judge said that “Toyota contended and it was not disputed, that an enterprise agreement made under the FW Act is a form of delegated legislation”. It appears that that contention was made in the context of Toyota’s submission based on s 46 of the AI Act to which we have referred. However, although the FW Act provides that an enterprise agreement is “made” otherwise than by the Commission, the Act does more than merely impose conditions upon, and give additional legal effect to, an agreement made between private parties. The effect of the legislation is to empower the employer and the relevant majority of its employees to specify terms which will apply to the employment of all employees in the area of work concerned. The legal efficacy of those terms will arise under statute, not contract, and, as mentioned above, will be felt also by those who did not agree to them. Someone, such as an employee subsequently taken on, who had nothing to do with the choice of the terms or the making of the agreement, will be exposed to penal consequences under s 50 if he or she should happen to contravene one of the terms. When viewed in this way, it is not difficult to share in the perception that an enterprise agreement approved under the FW Act has a legislative character.

90 An enterprise agreement is a statutory artefact made by persons specifically empowered in that regard, and under conditions specifically set down, by the FW Act. It is enforceable under that Act, and not otherwise. There is, in the circumstances, no reason to approach the question of legislative intent with a predisposition informed by notions of freedom of contract.

91 We add two further observations on this subject. The first relates to a section in the reasons of the primary Judge where his Honour noted that it was not uncommon for delegated legislation which purported to restrict the ordinary right of a person to have a matter reviewed by a court to be struck down unless such a restriction were clearly authorised by the relevant enabling Act. His Honour considered, however, that the “access provided by the Subdiv A variation process” was manifestly distinguishable from the exclusion of a person’s rights of access to the courts. His Honour then gave attention to the question whether Subdiv A did involve a “right” the exercise of which was compromised by cl 4 of the enterprise agreement. He said:

There is no right given by the Subdiv A variation process to any person to have a variation of an enterprise agreement made just as no one is given a right by the FW Act to have an enterprise agreement made. Access to the variation process depends upon consent. As s 207(1) provides, the parties to an enterprise agreement “may jointly make a variation of an enterprise agreement”. Employees have no right to insist upon the consent of the employer. There is no right conferred upon employees to require the employer to even consider whether the employer is prepared to consent. Nor is any equivalent right conferred upon an employer. The capacity given by s 208(1) for an employer to request affected employees to vote on a proposed variation is procedural and not, in my view, intended to confer upon the employer a right not correspondingly provided to the affected employees.

92 While we agree with his Honour that the ability of an employer to request the affected employees to approve, by voting, a variation to an enterprise agreement is not analogous to the right of a person to make an application to a court, it is a right given by statute nonetheless. There is a sense in which the right arising under s 208(1) of the FW Act may be seen as “procedural”, but so to describe that right is, in our view, to take an unduly limited view of its significance in the scheme of Div 7. Further, we consider that his Honour was in error in stating that s 208 is not “intended to confer upon the employer a right not correspondingly provided to the affected employees”. There is no doubt but that s 208 has precisely that effect. So do ss 181(1) and 220(1). Absent a provision having the effect which his Honour attributed to cl 4 of the Agreement in the present case, it would be both incontrovertible and uncontroversial that the employer bound by an enterprise agreement has a right to make a request of its employees under s 208(1) of the FW Act. There may be a view that it is somehow inappropriate for Div 7 to operate in this way, but to propose that s 208 was intended to give this right to the employer alone is to recognize a fundamental, and undeniable, feature of the provisions in question.

93 The second observation relates to the scope of the legislative policy, as discerned by the primary Judge accepting submissions made on behalf of the respondents, that an employer and its employees, having bargained with a view to reaching agreement, and having finally reached agreement in the form of an enterprise agreement, should be held to their bargain, at least until the arrival of the nominal expiry date. It was, his Honour considered, in harmony with such a policy that the makers of the agreement should be allowed, consensually, to make their bargain a more enduring one by mutual promises to make no further claims. While there is a superficial attractiveness to considerations of this kind, in the setting of the dispute presented by the facts of the present case, they do, in our respectful view, beg the question. Subdivision A of Div 7 expressly permits the employer and the “affected employees” to vary the original bargain. That they should be held to that bargain, or bound by the existing terms of the agreement which they seek to vary to hold to that bargain, cannot be viewed as harmonious with the apparent policy of the subdivision: to the contrary.

94 There does not appear to be any real doubt about the proposition that a subordinate instrument made pursuant to statutory power which is inconsistent with the Act under which it is made will be invalid and void to the extent of the inconsistency. In his reasons in the present case, the primary Judge referred to the dictum of French CJ in *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243, 262 [54]:

Regulations made under s 504 [of the *Migration Act* 1958 (Cth)] must be “not inconsistent with” the Migration Act. Even without that expressed constraint delegated legislation cannot be repugnant to the Act which confers the power to make it.

The Chief Justice’s authority for that proposition was *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582. That case concerned the validity of an ordinance made for the government of the Australian Capital Territory under a provision which originally read “until the Parliament makes other provision for the government of the Territory, the Governor-General may make ordinances having the force of law in the Territory.” The passage which we have underlined had since been repealed. Sitting as a single Justice of the High Court, Dixon J said (42 CLR at 588):

It is almost impossible to treat the repeal of the limitation with which it began, as anything less than an express declaration that the making of other provision for the government of the Territory shall not impair the power to make ordinances. But even with such an express declaration the power to make ordinances could not, in my opinion, be read as authorizing the Governor-General to make ordinances repugnant to a Commonwealth statute. It is one thing to say that the legislative power of the

Governor-General shall continue although Parliament shall establish a means of governing the Territory, and another thing to say that that legislative power may be exercised in a manner incompatible with a law made by Parliament itself.

95 *Laristan Building* is the only High Court case which the conduct of the present appeal has brought to attention where the power to make a subordinate instrument of regulatory effect was not conditioned by a formula along the lines of that set out in para 76 above. Whether by reference to the need for a regulation to be “necessary”, “convenient”, “expedient” or the like – as in *Grech v Bird* (1936) 56 CLR 228 and *Shanahan v Scott* (1957) 96 CLR 245 – or by reference to that need, coupled with a requirement that the regulation be not inconsistent with its empowering Act – as in *Carbines v Powell* (1925) 36 CLR 88; *Gibson v Mitchell* (1928) 41 CLR 275; *Broadcasting Company of Australia Pty Ltd v The Commonwealth* (1935) 52 CLR 52 and *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 – the other cases do not deal directly and squarely with a situation where there is no such formula of any kind. In the present case, we were assured by counsel for Toyota that it was uncontroversial as between the parties that the test for the invalidity of the further claims aspect of cl 4 of the Agreement was that articulated by Hayne J in *Plaintiff M47*, namely, “whether the regulation in question varies or departs from (in other words alters, impairs or detracts from) the provisions of the Act” (292 ALR at 290 [174]), but the fact is that the regulation-making power under consideration in that case was expressly conditioned by the “not inconsistent with” formula, and his Honour’s remark was made in that context.

96 Notwithstanding those qualifications, *Laristan Building* is authority for the proposition that the power to make a federal ordinance cannot be exercised in a manner incompatible with a law made by the Parliament itself (and, one might add, especially not the law under which such an ordinance would have been made). In *Plaintiff M47*, French CJ took the view that *Laristan Building* stood for the general proposition that “delegated legislation cannot be repugnant to the Act which confers the power to make it”. And we may see the same general proposition in the reasons of Jordan CJ in *Ex parte Reid* (1943) 43 SR (NSW) 207, 215.

97 An enterprise agreement made under Pt 2-4 of the FW Act is not, of course, a regulation. But, as stated above, it is something more than a mere agreement in the way of a contract. It is a specific instrument made only under the detailed regime for which Pt 2-4 provides and enforceable only as provided by the FW Act. To this extent, we consider that the general principle applicable to the invalidity of regulations on account of repugnancy with their

authorising statute is relevant to the issue presently for resolution. At base, the question which arises under that issue is essentially one of the rule of law. Parliament having said that an enterprise agreement may be varied, and that the employer may put a request to its employees in that regard, a term of the agreement which states, or has the effect, that the employer may not so proceed must necessarily be inconsistent with or repugnant to the FW Act to that extent. Subject to his view as to the significance of Toyota's ability to initiate, and to carry through, a variation of the Agreement by removing the no further claims provision itself, the primary Judge took that view of the matter, and we agree with him.

98 Turning then to the second main line of argument deployed on behalf of the respondents against Toyota's case on the repugnancy point, the emphasis here was on the different treatments given by the FW Act to the processes of making and varying an enterprise agreement. In the case of the making of an agreement under Divs 2, 3, 4 and 8 of Pt 2-4, the broad principle of majoritarian outcomes had been qualified to ensure that the legitimate industrial interests of minority groups were not suffocated. By contrast, under Div 7 an existing agreement might be varied on the vote of a majority of the affected employees without any such protection. In an extreme case, it might be apprehended that, in order to attract the support of minority groups, an employer and the bargaining agent representing the majority of its employees might make an agreement which is beneficial to those groups, and then, a few weeks after approval by the Commission under s 186, put through a variation which was detrimental to them. As we understand the argument, it is said that the legislature cannot have intended that this would be possible, and cannot have intended, therefore, that, at the point of the making of an enterprise agreement, the makers would be incapable of binding themselves not to have recourse to Div 7 before the nominal expiry date.

99 In a scenario such as that posited in the previous paragraph, there are only two points at which the interests of the minority group might be brought forward for consideration during the process of the approval of a new enterprise agreement which has been recently made. The first is the requirement in s 186(3) that the Commission be satisfied that the group of employees covered by the agreement had been "fairly chosen". That expression is not defined in the FW Act. It seems to have been assumed that there must have been a "choice" by someone as to the range of employees that would be covered, and it may be that this necessarily follows from the highly discretionary definition in the FW Act of what amounts to being "covered" by an enterprise agreement: see s 53(1). Subdivision A of Div 4 seems to be based on an assumption that the initiative for the making of an enterprise agreement will

come from the employer, and it may be that s 186(3) should be read against such an understanding. Nonetheless, there are no indications in the FW Act that the Commission should, or even might, regard a group constituted by all of the employer's employees as not having been fairly chosen. Indeed, the terms of s 186(3A) seem to imply that such a group constitution is to be regarded as the norm.

100 Stronger support for the respondents' present argument may be seen in the terms, and significance, of s 238 of the FW Act. Under that section, the Commission is empowered to make a "scope order" specifying the employer that, and the employees who, will be covered by a proposed enterprise agreement. A bargaining representative may apply for such an order if he or she "has concerns that bargaining for the agreement is not proceeding efficiently or fairly" because "the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover". There are several criteria for the making of a scope order specified in s 238, but it may be accepted that it would provide, at least in some circumstances, an avenue for a bargaining representative who has been appointed by a minority group of employees to have the coverage of a proposed enterprise agreement adjusted by the Commission so as to exclude that group. It may also be accepted that, as a practical matter, the employer and the bargaining representative for the majority of employees might, in order to avoid Commission proceedings for a scope order, ensure that the terms of the proposed enterprise agreement were not disadvantageous to the minority group. On the submission of the respondents, the FW Act should not be understood to have excluded the capacity of all – the majority, the minority and the employer – to put their names to a covenant not to use the purely majoritarian provisions of Div 7 to vary the terms of an agreement made in such circumstances.

101 The difficulty with the respondents' argument, in our view, is that it does not speak the language of legitimate statutory interpretation. It goes no further than to identify what might, on one view, be regarded as an anomaly in the way the legislature has treated different processes under Pt 2-4. As a matter of legal analysis, the argument encounters difficulties of the same kind as did the unsuccessful argument of the applicants in *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297. However the matter is looked at, there can be no question but that Subdiv A of Div 7 provides for a simpler process, and one which is less set about with qualifications demonstrating a concern for the interests of minority groups, than do the main agreement-making provisions of Pt 2-4. The legislature must be taken to have meant what it said in this respect. However sympathetic one might be to the situation in

which a minority group of employees might find itself in the circumstances postulated by the respondents (and we note that there was no suggestion that this represented the facts of the present case), there is not the slightest support in the FW Act for the submission that the legislature not only anticipated a situation of this kind but intended that it might be avoided by permitting the makers of the enterprise agreement in question to insert a term that was directly inconsistent with a provision of the Act itself – a provision which the legislature is known to have adopted and, it must be assumed, intended to be observed.

102 We turn next to the critical consideration by reference to which the primary Judge decided the case in favour of the respondents. Although his Honour accepted that a term of an enterprise agreement which purported to exclude the employer and its employees completely from having access to the process of variation under Subdiv A would be repugnant and invalid, he said:

121 That is not to say however that the scheme of the FW Act has set its face against the prospect that by their agreement, parties to an enterprise agreement may impose restrictions on their capacity to agree to a variation without ousting their capacity to do so. Those restrictions may take the form of a range of required steps. A requisite period of consultation prior to a proposal for variation being pursued provides one possible example. A facility for employees to meet and consult with their union as a prerequisite step may provide another example. So long as, practically speaking, the capacity for parties to access the Subdiv A variation process is not ousted, a term imposing restrictions is not necessarily inconsistent with the FW Act.

122 It is then necessary to consider whether the terms of the no extra claims component of cl 4 foreclose the capacity of the parties to the Agreement to consensually access the Subdiv A variation process. The terms of cl 4 preclude any further claims “in relation to wages or any other terms and conditions of employment”. Those terms do not exclude the capacity of the parties to effectuate a variation to cl 4 itself including by removing it. That can be done without breaching the enterprise agreement and if it is done, the parties will have unfettered access to the Subdiv A variation process in relation to desired variations to wages or any other terms or conditions of employment.

Thus the primary Judge took the view that cl 4 had not “ousted the capacity of Toyota or its employees to access the Subdiv A variation process in order to vary wages and other terms and conditions of employment specified by the Agreement”. The clause imposed “an extra step in the process of achieving a desired variation, but [did] not foreclose access in either a technical or practical sense to the Subdiv A variation process.” His Honour held that there was, therefore, no inconsistency between the no further claims component of cl 4 and the FW Act.

103 For the purposes of considering this point, we are prepared to accept, contrary to the premise upon which the cross-appeal is based, that a claim to remove cl 4 would not be a claim “in relation to wages or any other terms and conditions of employment”, and that cl 4 would not, therefore, set up an embargo on a claim for its own removal. Nonetheless, we do not, with respect, consider that this compartment of his Honour’s reasons withstands examination.

104 At all relevant times, the no further claims element of cl 4 has been, and remains, part of the Agreement. The question which arose had to be confronted against the facts as they existed. With respect to his Honour, we do not consider that the answer to the question was to be found in an analysis of the law that would be applicable to a different set of facts. There was no proposal to remove the no further claims provision from the Agreement. Had it previously been removed, of course, the question which has occupied the court, both at first instance and on appeal, would never have arisen. However, the provision was there, and the respondents sued on it. If, as the respondents submitted and still submit, the operation of the clause was both absolute and categorical, it is no answer to Toyota’s challenge to its validity to propose that Toyota might have, in effect, arrived at the desired destination by a different route, one which involved first requesting its employees to agree to the removal of the provision itself.

105 We also consider that the primary Judge’s conclusion that the no further claims term in cl 4 of the Agreement is valid to the extent that it imposes restrictions on (but does not wholly exclude) Toyota and its employees having access to the provisions of Subdiv A of Div 7 cannot stand alongside a line of cases which have struck down regulations which placed pre-conditions to, or qualifications upon, the exercise of rights granted or assumed by the relevant empowering statutes. The principle here, on a reading of the cases, is that the setting up of such a pre-condition or qualification gives rise to repugnancy no less than the imposition of a complete prohibition. This principle has to do with the quality of the inconsistency and is not, in our view, applicable only to statutes which use the “not inconsistent with” formula, the “necessary or convenient” formula, or both.

106 In *Wells v Finnerty* (1910) 12 WALR 41, it was held that a regulation imposing a requirement to register, within a stated period, a charge or lien which arose under a provision of the relevant empowering statute, and for the charge or lien to lapse if not registered within that period, was beyond power. The case of *In re The Metropolitan Abattoirs Acts 1908-1930* [1932] SASR 184 concerned a regulation which required any person who brought meat of a certain description into a particular area to obtain a permit. The empowering statute had

dealt with the subject of the sale of meat within the area, but had not required a permit for merely bringing meat into the area. It was held in the Full Court that the regulation was beyond power, Piper J (with the concurrence of Murray CJ) stating ([1932] SASR at 193-194):

It cannot be said that any of the sections now referred to shews any object or purpose justifying interference by regulation with conduct which the Act leaves perfectly lawful – the mere transport of meat into the area, it not being carried “for delivery on sale” and not being exposed for sale, or in possession of a person apparently for the purpose of sale for human consumption.

107 We have mentioned these cases specifically because they were not complicated by the presence of either of the now conventional formulae to which we have referred. However, as mentioned above, we do not think that the presence of any such formula affects the principle involved in this aspect of the present case. For cases which did involve a formula of the now conventional kind, we refer to *Ex parte Lawes* [1908] SALR 130, to *IRA, L & AC Berk, Ltd v The Commonwealth* (1930) 30 SR (NSW) 119 and to *R v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381.

108 Under a slightly different, but harmonious, line of authority, the no further claims term in cl 4 of the Agreement is to be regarded as repugnant to the FW Act because the Act itself has given detailed, and specific, attention to the matter of the conditions under which a variation to an enterprise agreement may be approved by the Commission. It is true, as the respondents stressed, that the making of such a variation is a much simpler undertaking than the making of an enterprise agreement in the first place. But there are many conditions specified nonetheless: see s 211. On any view, the legislature has given specific attention to the question of the conditions which should be so imposed, and to the discriminations appropriate to be made as between Divs 2, 3, 4 and 8, on the one hand, and Div 7, on the other hand. The situation is, in our view, one in which the approach articulated in *Morton v Union Steamship* (83 CLR at 813) and *Ex p Martin* (89 CLR at 406-407) should be taken.

109 In the light of the authorities to which we have referred, we do not, with respect, agree with the primary Judge that “[a] requisite period of consultation prior to a proposal for variation being pursued” is a restriction that could lawfully become part of an enterprise agreement made under Pt 2-4. Such a restriction would too closely intrude into the area governed by s 180 in its application to a proposed amendment under s 211(3) to be regarded as anything other than repugnant to the scheme of the FW Act. The no further claims term in cl 4 of the

Agreement is, of course, *a fortiori*: as construed by his Honour, it goes further than merely to defer the taking of steps otherwise available under Div 7. Subject only to it not having been removed by a separate, anterior, process of variation, it prohibits the taking of those steps.

110 For the above reasons, we take the view that the operation of the no further claims provision in cl 4 in a context in which Toyota proposed no more than that the Agreement be varied under Subdiv A of Div 7 of Pt 2-4 of the FW Act was and is in conflict with the provisions of that subdivision, and *pro tanto* invalid. The proceeding below should have been dismissed.

111 This conclusion is based on the construction of cl 4 of the Agreement which we have favoured in the previous section of these reasons. Further, it is a conclusion which relates only to so much of the no further claims term as would stand in the way of Toyota and its employees taking advantage of the provisions of the FW Act that deal with the subject of the variation of an enterprise agreement. In other respects, there has been no challenge to the validity of that term, and nothing we have said should be understood as going beyond that context.

112 There is a question whether a consequence of the conclusion we have reached is that the no further claims term in cl 4 should be construed in a way that confined its operation to the area where that operation would be a valid one. That would be consistent with the general principle of construction that it may be assumed that the makers of a statutory instrument intended to exercise their power validly, not invalidly. Imputing to the makers of the Agreement an understanding of the law as we have attempted to explain it in this part of our reasons, could they be taken, objectively, to have intended that the no further claims term would act as a prohibition upon the employer embarking upon a process which went no further than to make a request under s 208 or to distribute to the affected employees an explanatory statement in anticipation of such a request? In our view, construed in the light of what we take to be the correct resolution of the repugnancy point, the no further claims term in cl 4 should not be construed as involving such a prohibition.

113 So far as the disposition of the present appeal is concerned, it does, of course, matter not whether the no further claims term is to be construed as we have proposed above or whether the term, construed otherwise, is invalid on account of its inconsistency with or repugnancy to the relevant provisions of the FW Act. On either approach, the appeal should be allowed and the cross-appeal dismissed.

PERMITTED MATTER

114 The primary Judge held that the no further claims term in cl 4 of the Agreement was a permitted matter under para (a) of s 172(1) of the FW Act in the sense that it pertained to the relationship between Toyota and its employees. His Honour accepted the submission of the respondents that “the Agreement contains terms about wages and other conditions of employment which clearly pertain to the relationship between Toyota and its employees ... [and that the] no extra claims component of cl 4 is ‘about’ those matters because it provides protection for them from the effects of any further claims.” At the general level, we do not understand Toyota to have any complaint about his Honour’s conclusion, or the reasoning that sustained it.

115 Toyota’s point, rather, is the specific one that, as construed by the primary Judge, the term in cl 4 restricts the exercise of rights which would otherwise be conferred on Toyota and its employees under Div 7 of Pt 2-4 of the FW Act, and impairs the exercise of the Commission’s powers to approve a variation of the Agreement. Although the term, on any view, has a much wider operation than this, to the extent that it does so operate, it is, according to Toyota, of no effect pursuant to s 253(1)(a) of the FW Act.

116 When a like submission was made before the primary Judge, his Honour rejected it in the following terms:

The exercise of those powers and functions of the Commission conferred by ss 210-216 is dependent upon the parties having made a variation through the consensual process contemplated by ss 207-209. The exercise of the Commission’s jurisdiction is thus limited by a requisite precondition. For the reasons already explained, the no extra claims component of cl 4 is not inconsistent with or repugnant to the process which preconditions or limits the exercise of the Commission’s functions. The no extra claims component of cl 4 does not therefore limit the extent to which the Commission’s functions may be exercised beyond the limitations already provided for by the Act. The clause does not limit or preclude the exercise of the Commission’s functions, just as the refusal of an employer to agree to a proposed variation could not be said to do so.

117 Even if construed as his Honour did, the subject of the no further claims term would not, in our view, be the powers and functions of the Commission under Div 7 of Pt 2-4 of the FW Act. The term precludes those whom it describes as the “parties” from making further claims on each other, and, assuming for the moment that this stood in the way of Toyota and its employees agreeing to vary the Agreement, the proscription would be quite unconcerned with stages in the approval of a proposed enterprise agreement subsequent to the “making” of a

variation to the agreement under s 209. Assuming the efficacy of the proscription in cl 4, the occasion would never arise for the Commission to exercise its functions under s 210 and later provisions of Subdiv A. It is along this axis of analysis that *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312 and *Re Media, Entertainment and Arts Alliance* (1993) 178 CLR 379, relied upon by Toyota, should be distinguished.

118 Toyota's point under s 253(1)(a) of the FW Act is less easily dismissed insofar as it proposes that the subject with which the no further claims term in cl 4 of the Agreement deals is the making of a variation to an enterprise agreement under ss 207-209. The clause says nothing about that subject in terms, of course, but, as construed by the primary Judge, it does operate in that way.

119 In this area of its case, Toyota relied upon the judgment of the Full Court in *Construction, Forestry, Mining and Energy Union v Newlands Coal Pty Ltd* [2006] FCAFC 71. The dispute in that case arose under provisions of the WR Act which permitted the making of an "Australian Workplace Agreement" ("AWA") by an employer and one of its employees. Certified agreements to which the union was a party contained a clause to the effect that they contained all conditions of employment and entitlements of employees employed under their terms and conditions by the relevant employer, to the exclusion of all other awards, agreements and industrial instruments. The union contended that these clauses precluded the employer from offering AWAs to its employees. At first instance, Dowsett J had held that the clauses spoke only as at the time when the certified agreements had been made, the reference to conditions of employment and entitlements of employees being a reference to such conditions and entitlements as then existed. There was nothing to prevent the employer and any one or more of its employees from agreeing to other conditions and entitlements by way of an AWA made at some later time.

120 The Full Court upheld Dowsett J's construction of the clauses. A significant aspect was that, if the clauses were given an ambulatory operation as proposed by the union, there would be an "apparent conflict" with s 170VF of the WR Act, which relevantly provided that an employer and an employee "may make [an AWA]". Referring to the reasons of Dowsett J, their Honours in the Full Court continued:

As his Honour had said (at [19]):

Implicit in the respondent's submission is the proposition that a certified agreement may exclude the statutory right to enter into AWAs by using a device such as cl 4. In principle it may be possible for a person to bargain

away his or her statutory rights, at least in the absence of a statutory prohibition. However one would not readily construe the unqualified language of s 170VF as permitting such a course. This is particularly so given the presence in the Act of subs 170VQ(6). That subsection contemplates an AWA being partially inoperative because of inconsistency with a certified agreement. This suggests that it will continue to operate in areas where there is no such conflict. It is unlikely that such areas are to be limited to those in which the AWA is in identical terms to the certified agreement. Such an arrangement would be pointless. Clearly, Parliament contemplated AWAs dealing with issues not dealt with in a relevant certified agreement.

We find that reasoning compelling. Indeed, if construed as contended for by the CFMEU, there would be a real question as to whether cl 4 in each certified agreement would be “about matters pertaining to the relationship between an employer and employees” as required by s 170LI of the Act.

It was this concluding passage that was relied on by Toyota in the present appeal.

121 The precise content of what the Full Court in *Newlands Coal* considered to be a “real question” was not developed by their Honours. It seems that the concern to which their Honours were implicitly referring was that a clause of a certified agreement that bound one of the parties not to exercise a statutory right to enter an AWA with an individual employee, not a party to the agreement, would not be about matters which pertained to the relationship referred to. If this was the view taken, we would, for our own part, prefer to leave any expression of concurrence or otherwise with it to an occasion when the issue directly arises. For present purposes, it is sufficient to say that their Honours’ observation was clearly not part of the *ratio decidendi* in *Newlands Coal*, and that the case was concerned with a fact situation rather different from that now before the Full Court.

122 An agreement between an employer and its employees – otherwise uncontroversially within s 172(1)(a) of the FW Act – that the provisions of the agreement would remain in place for a stated time, and that neither would seek the making of a variation to those provisions within that time, would clearly be about matters pertaining to the relationship between those parties. If the agreement were an enterprise agreement under the FW Act, it would apply also to employees who had not agreed, but that statutory extension would not affect the subject matter of the agreement as made. Likewise, if a consequence of the self-imposed embargo on variations was that the employer could not request its employees on a later occasion to agree to a variation for which the FW Act provided, that may – and, for reasons stated earlier, in our view would – create issues as to the validity of the embargo, but it would not alter the subject matter thereof.

123 For the above reasons, we take the view that the no further claims provision in cl 4 of the Agreement was, and remains, about a matter of the kind referred to in s 172(1)(a) of the FW Act. It is not ineffective under s 253(1)(a).

OBJECTIONABLE TERM

124 Toyota submits that the no further claims term in cl 4 of the Agreement is an objectionable term within the meaning of the FW Act because it permits Toyota to contravene Pt 3-1 of the FW Act. The contravention would be the taking of “adverse action” contrary to s 340(1)(b) constituted by the injury of an employee in his or her employment or the prejudicial alteration of the position of an employee as prescribed in paras (b) and (c) of item 1 in the table to s 342(1). The injury or alteration would be the diminution of the employee’s job security which, on Toyota’s case, would be the inevitable, or at least a likely, outcome of Toyota being unable to procure the variations to the Agreement which it foreshadowed on 11 and 15 November 2013. The relevant “workplace right” would be the ability to participate in a process for the variation of an enterprise agreement: s 341(1) and (2)(e).

125 The scenario which Toyota’s case envisages is that it would, by the operation of the no further claims term, be prohibited from initiating a process to vary the Agreement, that the agreement would remain in its existing form, that every employee would, to some extent at least, come closer to being retrenched because of Toyota’s inability to achieve the cost savings which its proposed variations would have delivered, and that every such employee would thereby be injured in his or her employment or have his or her position altered to his or her prejudice.

126 This very strained contention as to how the definition of “objectionable term” in s 12, and the provisions of Pt 3-1, of the FW Act would, or even might, operate in the circumstances facing Toyota if it were unable to initiate a process for the variation of the Agreement cannot be supported. First, counsel for Toyota accepted that para (b) of s 340(1) required a subjective inquiry, no less than para (a). That is to say, the expression “to prevent the exercise” must be read in the sense “in order to prevent the exercise” or “with a view to preventing the exercise”. It was not sufficient if action taken by the person referred to in the subsection had the incidental effect of preventing the exercise. That was, in our view, an appropriate concession. For Toyota to withhold from making any proposal for the variation of the Agreement because of the prohibition in cl 4 would not be to act, or to refrain from acting, in order to prevent the exercise by its employees of their rights to participate in the process that

would have been initiated by any such proposal. Rather, it would be to act, or to refrain from acting, out of a desire to comply with the law.

127 Secondly, it was made clear by counsel for Toyota that the workplace right on which their client relied was the ability of an employee to participate in a process for the variation of the Agreement. However, unless and until Toyota made a request under s 208, there would be no such ability. On the construction of cl 4 by reference to which this department of Toyota's appeal proceeded, the effect of compliance with the no further claims term would be that no such request could be made. By the very operation of the provision which is assailed, therefore, the threshold erected by s 341(1)(b) would never be crossed: the employee would not have the workplace right in question.

128 Thirdly, even assuming the existence of a workplace right, the no further claims term in cl 4 does not "permit" the putative action which Toyota contends would amount to a contravention of s 340(1)(b). It is, in our view, not sufficient if a term of an enterprise agreement has an omnibus operation which, while being silent with respect to acts which would constitute adverse action, could theoretically comprehend conduct which, in particular circumstances, might be so characterised. If a term of such an agreement provided no more than that an employee could be dismissed on four weeks' notice, it could not be said that this "permitted" him or her to be dismissed, for example, for having participated in a conference conducted by the Commission (s 341(2)(a)). Likewise, on the facts of the present case, where the relevant term in cl 4 of the Agreement provides no more than that further claims not be made, it could not be said that this "permitted" Toyota to place the job security of every employee in greater peril by withholding from making such claims. The connection between the operation of the no further claims term and the proscription in Pt 3-1 relied on by Toyota is just too tenuous to fall within the definition of "objectionable term" in s 12 of the FW Act.

129 There may be other bases upon which this ground of appeal ought to be rejected, but what we have said above will suffice.

DISPOSITION OF THE APPEAL AND CROSS-APPEAL

130 For the reasons which we have given above, we shall allow the appeal, dismiss the cross-appeal, set aside the declaration and order made by the primary Judge on 12 December 2013 and order that the respondents' application dated 20 November 2013 be dismissed.

I certify that the preceding one hundred and thirty (130) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Jessup, Tracey and Perram.

Associate:

Dated: 18 July 2014