FEDERAL COURT OF AUSTRALIA

Australian Mines and Metals Association Inc v The Maritime Union of Australia

[2015] FCA 677

Citation:	Australian Mines and Metals Association Inc v The Maritime Union of Australia [2015] FCA 677
Parties:	**AUSTRALIAN MINES AND METALS ASSOCIATION INC (ACN 004 078 237), SWIRE PACIFIC SHIP MANAGEMENT (AUSTRALIA) PTY LTD (ACN 059 646 981), TIDEWATER MARINE AUSTRALIA PTY LTD (ACN 000 567 395), SKILLED OFFSHORE (AUSTRALIA) PTY LTD (ACN 109 339 433) and MERMAID MARINE VESSEL OPERATIONS PTY LTD (ACN 009 200 686) v THE MARITIME UNION OF AUSTRALIA**
File number:	WAD 257 of 2014
Judge:	**BARKER J**
Date of judgment:	3 July 2015
Catchwords:	**INDUSTRIAL LAW** – proposed enterprise agreements – common requirements that apply for industrial action to be protected industrial action under s 413 of *the Fair Work Act 2009* (Cth) – construction of s 413(5) of the *Fair Work Act 2009* (Cth) – whether any contravention of bargaining orders made under s 230 of the *Fair Work Act 2009* (Cth) disqualified industrial action from being protected industrial action **INDUSTRIAL LAW** – whether bargaining orders made under s 230 of the *Fair Work Act 2009* (Cth) capable of substantial compliance
Legislation:	*Acts Interpretation Act 1901* (Cth) s 15AA, s 25C *Corporations Act 2001* (Cth) s 445G(3) *Evidence Act 1995* (Cth) s 191 *Fair Work Act 2009* (Cth) s 19(1), s 172, s 172(2), s 172(2)(a), s 173, s 174(3), s 176, s 228, s 228(1), s 228(2), s 229, s 230, s 230(3), s 231, s 232, s 233, s 234, s 235, s 408, s 409, s 409(1)(c), s 410, s 411, s 413, s 413(3), s 413(4), s 413(5), s 414, s 414(2), s 418, s 420, s 421(1), s 443(1), s 539(2), s 545, s 546, Ch 2 Pt 2-4 Div 2, Div 3, Div 8, Pt 3-3 Div 2 Subdiv B, Div 8, Pt 4-1 Div 2 *Fair Work (Registered Organisations) Act 2009* (Cth)

	Federal Court Rules 2011 (Cth) R 41.06
Cases cited:	*Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135 *IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed)* (2004) 211 ALR 231; [2004] FCA 1390 *Australian Competition and Consumer Commission v Abel Rent-A-Car Pty Ltd* [2000] FCA 479 *Bernard Putnin as liquidator of MAFF Investments Pty Ltd (in liq) v Fuller* (1991) 3 WAR 546 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 *Commonwealth of Australia v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297; [1972] HCA 19 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242; [1979] HCA 27 *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288; [2014] VSC 134 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427; [2005] FCAFC 84 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309; [1985] HCA 48 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493; [2013] HCA 35 *Minister for Immigration and Border Protection v Han* [2015] FCAFC 79 *Parramore v Duggan* (1995) 183 CLR 633; [1995] HCA 21 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 *Saraswati v The Queen* (1991) 172 CLR 1; [1991] HCA 21 *Tay v Migration Review Tribunal* (2009) 178 FCR 1; [2009] FCA 515
Date of hearing:	20 November 2014
Place:	Perth
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	193

Counsel for the Applicants:	Mr SJ Wood QC with Mr M Follett
Solicitor for the Applicants:	Herbert Smith Freehills
Counsel for the Respondent:	Mr H Borenstein QC
Solicitor for the Respondent:	Maritime Union of Australia

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 257 of 2014**

BETWEEN:	**AUSTRALIAN MINES AND METALS ASSOCIATION INC (ACN 004 078 237)** **First Applicant**
	SWIRE PACIFIC SHIP MANAGEMENT (AUSTRALIA) PTY LTD (ACN 059 646 981) **Second Applicant**
	TIDEWATER MARINE AUSTRALIA PTY LTD (ACN 000 567 395) **Third Applicant**
	SKILLED OFFSHORE (AUSTRALIA) PTY LTD (ACN 109 339 433) **Fourth Applicant**
	MERMAID MARINE VESSEL OPERATIONS PTY LTD (ACN 009 200 686) **Fifth Applicant**
AND:	**THE MARITIME UNION OF AUSTRALIA** **Respondent**

JUDGE: **BARKER J**
DATE OF ORDER: **3 JULY 2015**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The originating application of the applicants filed 14 August 2014 be dismissed.

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

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 257 of 2014**

BETWEEN:	**AUSTRALIAN MINES AND METALS ASSOCIATION INC (ACN 004 078 237)** **First Applicant**
	SWIRE PACIFIC SHIP MANAGEMENT (AUSTRALIA) PTY LTD (ACN 059 646 981) **Second Applicant**
	TIDEWATER MARINE AUSTRALIA PTY LTD (ACN 000 567 395) **Third Applicant**
	SKILLED OFFSHORE (AUSTRALIA) PTY LTD (ACN 109 339 433) **Fourth Applicant**
	MERMAID MARINE VESSEL OPERATIONS PTY LTD (ACN 009 200 686) **Fifth Applicant**
AND:	**THE MARITIME UNION OF AUSTRALIA** **Respondent**

JUDGE:	**BARKER J**
DATE:	**3 JULY 2015**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

1 On 9 July 2014, the Fair Work Commission (***FWC***), on the application of the first applicant, Australian Mines and Metals Association Inc (***AMMA***) as bargaining representative for the second to fifth applicants, made four ***interim orders*** (in identical terms) under the *Fair Work Act 2009* (Cth) (***FW Act***) against the Maritime Union of Australia (***MUA***), namely, the ***Swire order***, the ***Tidewater order***, the ***Skilled order*** and the ***Mermaid order***. All interim orders, save for the Tidewater order, were corrected on 10 July 2014.

2 The ***applicants*** (AMMA, ***Swire*** Pacific Ship Management (Australia) Pty Ltd, ***Tidewater*** Marine Australia Pty Ltd, ***Skilled*** Offshore (Australia) Pty Ltd and ***Mermaid***

Marine Vessel Operations Pty Ltd) now allege that orders 1 and 8 of each of the interim orders were contravened and that, as a result, they are entitled to the following declarations:

1. By failing to provide by close of business on 21 July 2014, any document or other thing to either the first applicant, the second applicant or the Fair Work Commission in compliance with paragraphs [1] and [8] of the Interim order made by the Fair Work Commission on 9 July 2014 (PR552938) (as corrected on 10 July 2014 (PR553013)) (**Swire order**), the respondent contravened the Swire order.

2. By failing to provide by close of business on 21 July 2014, any document or other thing to either the first applicant, the third applicant or the Fair Work Commission in compliance with paragraphs [1] and [8] of the Interim order made by the Fair Work Commission on 9 July 2014 (PR552946) (**Tidewater order**), the respondent contravened the Tidewater order.

3. By failing to provide by close of business on 21 July 2014, any document or other thing to either the first applicant, the fourth applicant or the Fair Work Commission in compliance with paragraphs [1] and [8] of the Interim order made by the Fair Work Commission on 9 July 2014 (PR552944) (as corrected on 10 July 2014 (PR553016)) (**Skilled order**), the respondent contravened the Skilled order.

4. By failing to provide by close of business on 21 July 2014, any document or other thing to either the first applicant, the fifth applicant or the Fair Work Commission in compliance with paragraphs [1] and [8] of the Interim order made by the Fair Work Commission on 9 July 2014 (PR552801) (as corrected on 10 July 2014 (PR553011)) (**Mermaid order**), the respondent contravened the Mermaid order.

5. Any industrial action (within the meaning of section 19(1) of the *Fair Work Act 2009* (Cth)) organised by the Maritime Union of Australia for a proposed enterprise agreement to replace the *Swire Pacific [Ship] Management (Australia) Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010*, will not be 'protected industrial action' within the meaning of section 408 of the *Fair Work Act 2009* (Cth).

6. Any industrial action (within the meaning of section 19(1) of the *Fair Work Act 2009* (Cth)) organised by the Maritime Union of Australia for a proposed enterprise agreement to replace the *Tidewater Marine Australia Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010*, will not be 'protected industrial action' within the meaning of section 408 of the *Fair Work Act 2009* (Cth).

7. Any industrial action (within the meaning of section 19(1) of the *Fair Work Act 2009* (Cth)) organised by the Maritime Union of Australia for a proposed enterprise agreement to replace the *Offshore Marine Services Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010*, will not be 'protected industrial action' within the meaning of section 408 of the *Fair Work Act 2009* (Cth).

8. Any industrial action (within the meaning of section 19(1) of the *Fair Work Act 2009* (Cth)) organised by the Maritime Union of Australia for a proposed enterprise agreement to replace the *Mermaid Marine Vessel Operations Pty Ltd*

> *Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010*, will not be 'protected industrial action' within the meaning of section 408 of the *Fair Work Act 2009* (Cth).

3 No other order is sought in the proceeding by the applicants.

4 It is not in dispute in the proceeding that the Court has the power to make declarations alone in the circumstances of this case. The Court accepts the applicants' submission below that the circumstances of this case enliven a discretion of the Court to grant such relief, if the applicants make out their case.

5 In seeking these declarations, the applicants rely on s 413 of the FW Act, which provides ***common requirements*** that apply for ***industrial action*** to be ***protected industrial action*** for a proposed enterprise agreement. The applicants submit the MUA has contravened the interim orders and as such the s 413(5) requirement – the bargaining representative must not have contravened any orders that apply to them and that relate to the proposed enterprise agreement or a matter that arose during bargaining for the agreement – is not satisfied.

6 The MUA denies that it has contravened the interim orders as alleged.

7 The key issues arising in the proceeding may be stated as follows:

(1) whether s 413(5) applies without qualification to any contravention no matter when it occurred, whether the contravening conduct is continuing, whether it has been rectified or whether it has been punished or enjoined under other provisions of the FW Act;

(2) whether the orders which it is alleged that the MUA has contravened were capable of being substantially complied with; and

(3) if so, whether the MUA did substantially comply with the orders.

THE INTERIM ORDERS

8 The terms of each of the interim orders were identical save for the naming of the affected company. For present purposes it is therefore sufficient to refer to the terms of the Swire order:

> A. On 16 May 2014, the Australian Mines and Metals Association (**AMMA**) as bargaining representative for Swire Pacific Ship Management (Australia) Pty Ltd made application to the Fair Work Commission (**Commission**) seeking bargaining orders against the Maritime Union of Australia (**MUA**).
>
> B. The parties agree and consent, pending final determination of application

B2014/787, that with respect to bargaining subject to this application and pursuant to s.589(2) of the *Fair Work Act 2009* (**FW Act**), the Commission orders that:

[1] The MUA must, by no later than close of business on 21 July 2014, clarify, identify and prioritise its claims by providing confirmation in writing to the AMMA, as bargaining representative of Swire Pacific Ship Management (Australia) Pty Ltd (**Company**), of the MUA's binding commitment to a consolidated and exhaustive list setting out:

(a) the claims the MUA wishes to pursue against the Company in relation to the proposed agreement to replace the Swire Pacific Management (Australia) Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010 and Swire Pacific Ship Management (Australia) Pty Ltd and MUA Gorgon Jetty and Marine Structures Contract Enterprise Agreement 2011 (**Proposed Agreement**);

(b) which claim(s) or parts thereof are pursued only in relation to the Company and not in relation to any other employer in the offshore maritime industry. In doing so, the MUA must highlight the precise part(s) of the claim(s) which are unique to the Company;

(c) matters that are, at the time of providing that list:

(i) to the best of the MUA's knowledge and belief, agreed in principle by the MUA and the Company;

(ii) to the best of the MUA's knowledge and belief, not agreed in principle by the MUA and the Company; and

(d) a ranking of each of the MUA's claims as of high, medium or low importance to the MUA.

In providing the list referred to in this Order 1, the MUA will provide an undertaking to the Company that it will not pursue any claims in bargaining for the Proposed Agreement other than those identified pursuant to Order 1(a).

[2] The MUA must, by no later than close of business on 25 July 2014, provide confirmation in writing to AMMA of the MUA's justification for each matter listed pursuant to sub-order 1(c)(ii) with reference to any evidence on which the MUA relies in support and having regard to the objects of the FW Act.

[3] With reference to the clarification provided at Orders 1 and 2, the MUA, for the term of this Order, shall commit to honour all positions that are agreed in principle as at the date of this Order and the undertaking provided pursuant to Order 1 other than to the extent that the MUA provides written justification as to any proposed variation to a position that has been agreed in principle or the undertaking provided pursuant to Order 1, including with specific detail as to how such variation would enable the parties to move closer towards reaching an agreement on the terms of the Proposed Agreement.

[4] With reference to the clarification provided by the MUA pursuant to Orders 1 and 2, the Company shall respond by no later than close of business on 8 August 2014, subject to receipt of the MUA's respective lists and other information in compliance with Orders 1 and 2, by confirming in writing:

(a) whether the Company agrees with or disputes the matters contained therein;

(b) whether the Company requires any further clarification or information from the MUA to understand or interpret the matters contained therein; and

(c) in respect of the matters identified by the MUA pursuant to order 1(c)(ii), if the Company disputes the matters identified, the justification for the Company disputing those matters, having regard to the objects of the FW Act.

[5] The MUA shall, by close of business on 25 July 2014, provide confirmation in writing to AMMA of:

(a) the MUA's detailed reasons for the precise scope of the proposed agreement that the MUA is now seeking with the Company;

(b) any purported justification for the MUA's current scope claim including with reference to how the negotiations would proceed more fairly or efficiently if such scope was agreed and any evidence in support;

(c) if applicable, the specific detail of any Gorgon RCA Allowances or Gorgon downstream specific claims the MUA is now seeking to include in or have resolved in order to reach an agreement with the Company; and

(d) the precise wording and placement in the proposed agreement with the Company of the clause on job security to which it is willing to agree.

[6] The MUA and AMMA on behalf of the Company must also commit to and attend a schedule of Commission negotiating conferences and report-back conferences before Commissioner Cloghan on no less than 5 separate occasions over a period of no more than two weeks commencing 12 August 2014, on dates as follows between the MUA and AMMA, which shall be industry-wide rather than Company-specific conferences.

- 12 August 2014 - 8:30 am to 4:30 pm
- 13 August 2014 - 8:30 am to 11:30 am
- 18 August 2014 - 8:30 am to 11:30 am
- 20 August 2014 - 8:30 am to 4:30 pm
- 21 August 2014 - 8:30 am to 4:30 pm

[7] The MUA and the Company shall at each such meeting and conference referred to in Order 6 be represented by a person or persons with sufficient delegated decision making authority to meaningfully negotiate with the other bargaining representatives.

[8] The MUA shall, by close of business on 21 July 2014, provide a written undertaking to the Commission that it will not seek to include in the proposed agreement with the Company:

(a) any term that would have the effect of requiring the Company to directly or indirectly discriminate against a person on the basis of their

sex, age, race or nationality in breach of any anti-discrimination law;

(b) any term that pertains only to the relationship between the MUA, its members and/or potential members and that the MUA does not reasonably believe is a permitted matter;

(c) any term that would have the effect of placing a restriction or prohibition on the Company's use of contractors; and

(d) any term that would have the effect of rendering lawful what would otherwise be unprotected industrial action.

[9] The MUA shall not during the term of this Order pursue any claim that is substantially to the same effect as any claim which has, at some stage prior to this Order, been withdrawn in response to a concern raised by or on behalf of the Company that the claim is, or may be, a matter that is not permitted or is an unlawful term within the meaning of the FW Act.

[10] This matter will be listed for a report-back hearing on 12 August 2014 or parties at liberty to apply.

[11] This order is operative from 9 July 2014.

9 At the hearing of this proceeding, the applicants said that order 4 of each order was complied with and that there was also no dispute that the conferences to which order 6 refer took place.

10 The Court proceeds to consider the issues in reliance on the facts agreed by the parties, as set out below, and on the basis that there was compliance with orders 4 and 6 of the interim orders.

STATEMENT OF AGREED FACTS

11 The parties have agreed the following facts for the purpose of this proceeding in accordance with s 191 of the *Evidence Act 1995* (Cth).

The parties and relevant persons

12 AMMA is and was, at all material times relevant to the matters referred to herein, a corporation duly registered under the ***Corporations Act*** *2001* (Cth).

13 Swire is and was, at all material times relevant to the matters referred to herein, a corporation duly registered under the *Corporations Act.*

14 Tidewater is and was, at all material times relevant to the matters referred to herein, a corporation duly registered under the *Corporations Act*.

15 Skilled is and was, at all material times relevant to the matters referred to herein, a corporation duly registered under the *Corporations Act*.

16 Mermaid is and was, at all material times relevant to the matters referred to herein, a corporation duly registered under the *Corporations Act*.

17 At all material times relevant to the matters referred to herein, Swire employed employees in classifications set out in the Swire Pacific Ship Management (Australia) Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010 (***Swire general agreement***), whose employment was covered and regulated by the Swire general agreement (***Swire employees***).

18 At all material times relevant to the matters referred to herein, Tidewater employed employees in classifications set out in the Tidewater Marine Australia Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010 (***Tidewater general agreement***), whose employment was covered and regulated by the Tidewater general agreement (***Tidewater employees***).

19 At all material times relevant to the matters referred to herein, Skilled employed employees in classifications set out in the Offshore Marine Services Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010 (***Skilled general agreement***), whose employment was covered and regulated by the Skilled general agreement (***Skilled employees***).

20 At all material times relevant to the matters referred to herein, Mermaid employed employees in classifications set out in the Mermaid Marine Vessel Operations Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010 (***Mermaid general agreement***), whose employment was covered and regulated by the Mermaid general agreement (***Mermaid employees***).

21 MUA is and was at all material times:

(1) an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth); and

(2) entitled to represent the industrial interests of each of the Swire employees, the Tidewater employees, the Skilled employees and the Mermaid employees.

Expiry of the general agreements and bargaining for replacement agreements

22 Each of the general agreements referred to above reached their nominal expiry dates by 31 July 2013.

23 Since in or about approximately December 2012 until the present time, Swire and the Swire employees have been engaged in bargaining for the purposes of making, or seeking to make, a proposed enterprise agreement under the FW Act to replace the existing Swire general agreement (***Swire proposed agreement***).

24 Since in or about approximately December 2012 until the present time, Tidewater and the Tidewater employees have been engaged in bargaining for the purposes of making, or seeking to make, a proposed enterprise agreement under the FW Act to replace the existing Tidewater general agreement (***Tidewater proposed agreement***).

25 Since in or about approximately December 2012 until the present time, Skilled and the Skilled employees have been engaged in bargaining for the purposes of making, or seeking to make, a proposed enterprise agreement under the FW Act to replace the existing Skilled general agreement (***Skilled proposed agreement***).

26 Since in or about approximately December 2012 until the present time, Mermaid and the Mermaid employees have been engaged in bargaining for the purposes of making, or seeking to make, a proposed enterprise agreement under the FW Act to replace the existing Mermaid general agreement (***Mermaid proposed agreement***).

27 In relation to the bargaining for the Swire proposed agreement, AMMA is, and has been since 5 March 2012, Swire's bargaining representative within the meaning of s 176 of the FW Act.

28 In relation to the bargaining for the Tidewater proposed agreement, AMMA is, and has been since 14 June 2013, Tidewater's bargaining representative within the meaning of s 176 of the FW Act.

29 In relation to the bargaining for the Skilled proposed agreement, AMMA is, and has been since 5 February 2013, Skilled's bargaining representative within the meaning of s 176 of the FW Act.

30 In relation to the bargaining for the Mermaid proposed agreement, AMMA is, and has been since 28 October 2013, Mermaid's bargaining representative within the meaning of s 176 of the FW Act.

31 The MUA is and was at all material times in relation to the bargaining:

(1) for the Swire proposed agreement, the bargaining representative for one or more of the Swire employees within the meaning of s 176 of the FW Act;

(2) for the Tidewater proposed agreement, the bargaining representative for one or more of the Tidewater employees within the meaning of s 176 of the FW Act;

(3) for the Skilled proposed agreement, the bargaining representative for one or more of the Skilled employees within the meaning of s 176 of the FW Act; and

(4) for the Mermaid proposed agreement, the bargaining representative for one or more of the Mermaid employees within the meaning of s 176 of the FW Act.

Interim bargaining orders

32 On 16 May 2014, AMMA (as bargaining representative for Swire) applied to the FWC under s 229 of the FW Act, for a bargaining order under s 230 of the FW Act, in relation to the bargaining with the Swire employees and the MUA (***Swire application***).

33 On 16 May 2014, AMMA (as bargaining representative for Skilled) applied to the FWC under s 229 of the FW Act, for a bargaining order under s 230 of the FW Act, in relation to the bargaining with the Skilled employees and the MUA (***Skilled application***).

34 On 16 May 2014, AMMA (as bargaining representative for Mermaid) applied to the FWC under s 229 of the FW Act, for a bargaining order under s 230 of the FW Act, in relation to the bargaining with the Mermaid employees and the MUA (***Mermaid application***).

35 On 20 May 2014, AMMA (as bargaining representative for Tidewater) applied to the FWC under s 229 of the FW Act, for a bargaining order under s 230 of the FW Act, in relation to the bargaining with the Tidewater employees and the MUA (***Tidewater application***).

36 On 9 July 2014, the FWC made an interim order in:

(1) the Swire application (PR552938), which was later corrected by a correction order dated 10 July 2014 (PR553013) (Swire order);

(2) the Tidewater application (PR552946) (Tidewater order);

(3) the Skilled application (PR552944), which was later corrected by a correction order dated 10 July 2014 (PR553016) (Skilled order); and

(4) the Mermaid application (PR552801), which was later corrected by a correction order dated 10 July 2014 (PR553011) (Mermaid order).

37 AMMA (as bargaining representative for each of Swire, Tidewater, Skilled and Mermaid) and the MUA agreed and consented to each of the orders referred to above (including orders 1 and 8 thereof), before those orders were made by the FWC.

38 On 10 July 2014, Mr Edmonds from the MUA sent an email (including associated chain) to the Chambers of Commissioner Cloghan at the FWC, copied to Ashurst (as solicitors for AMMA), requesting corrections to the Swire, Skilled and Mermaid orders.

39 On 10 July 2014, the FWC issued a correction order in relation to each of the Swire order (PR553013), the Skilled order (PR553016) and the Mermaid order (PR553011).

40 The Swire order (as corrected):

(1) applied to the MUA; and

(2) related to the Swire proposed agreement; and

(3) related to a matter that arose during bargaining for the Swire proposed agreement.

41 The Tidewater order:

(1) applied to the MUA; and

(2) related to the Tidewater proposed agreement; and

(3) related to a matter that arose during bargaining for the Tidewater proposed agreement.

42 The Skilled order (as corrected) :

(1) applied to the MUA; and

(2) related to the Skilled proposed agreement; and

(3) related to a matter that arose during bargaining for the Skilled proposed agreement.

43 The Mermaid order (as corrected):

(1) applied to the MUA; and

(2) related to the Mermaid proposed agreement; and

(3) related to a matter that arose during bargaining for the Mermaid proposed agreement.

Alleged contraventions of the interim orders

44 The MUA did not by close of business on 21 July 2014 provide any document or other thing:

(1) to AMMA, as bargaining representative for Swire, in purported compliance with subparagraphs (a)-(d) of order 1 of the Swire order;

(2) to AMMA or Swire, in purported compliance with the final paragraph (undertaking) of order 1 of the Swire order; and

(3) to the FWC, in purported compliance with order 8 of the Swire order.

45 The MUA did not by close of business on 21 July 2014 provide any document or other thing:

(1) to AMMA, as bargaining representative for Tidewater, in purported compliance with subparagraphs (a)-(d) of order 1 of the Tidewater order;

(2) to AMMA or Tidewater, in purported compliance with the final paragraph (undertaking) of order 1 of the Tidewater order; and

(3) to the FWC, in purported compliance with order 8 of the Tidewater order.

46 The MUA did not by close of business on 21 July 2014 provide any document or other thing:

(1) to AMMA, as bargaining representative for Skilled, in purported compliance with subparagraphs (a)-(d) of order 1 of the Skilled order;

(2) to AMMA or Skilled, in purported compliance with the final paragraph (undertaking) of order 1 of the Skilled order; and

(3) to the FWC, in purported compliance with order 8 of the Skilled order.

47 The MUA did not by close of business on 21 July 2014 provide any document or other thing:

(1) to AMMA, as bargaining representative for Mermaid, in purported compliance with subparagraphs (a)-(d) of order 1 of the Mermaid order;

(2) to AMMA or Mermaid, in purported compliance with the final paragraph

(undertaking) of order 1 of the Mermaid order; and

(3) to the FWC, in purported compliance with order 8 of the Mermaid order.

Subsequent and other matters

48 On 18 July 2014, the MUA provided to Swire (by way of letter from Mr Tracey) a "Formal Notice of Intention to take Employee Claim Action", in the form of two consecutive 24 hour stoppages of all work (subject to particular exemptions), commencing at 12.01am on 25 and 26 July 2014 respectively, in purported compliance with s 414(2) of the FW Act.

49 At approximately 12.57pm on 22 July 2014, AMMA (as bargaining representative for each of Swire, Tidewater, Skilled and Mermaid) raised with the MUA (by way of letter from AMMA's solicitors (Ashurst)) the MUA's alleged non-compliance with orders 1 and 8 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order.

50 At approximately 3.36pm on 22 July 2014, the MUA provided a document to the FWC (by way of letter from Mr Tracey of the MUA to the Chambers of Commissioner Cloghan at the FWC) in purported compliance with order 8 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order.

51 At approximately 4.30pm on 22 July 2014, the MUA by way of letter from Mr Tracey to Mr White from AMMA, provided a document to AMMA, in its capacity as bargaining representative for each of Swire, Tidewater, Skilled and Mermaid, in purported compliance with subparagraphs (a)-(d) of order 1 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order.

52 On 22 July 2014, Swire made an application to the FWC for an order under s 418 of the FW Act, stopping or preventing the proposed industrial action in the notice provided by the MUA on 18 July 2014, on the basis that the industrial action would not be protected industrial action.

53 On 23 July 2014, AMMA (as bargaining representative for each of Swire, Tidewater, Skilled and Mermaid) raised with the MUA (by way of letter from AMMA's solicitors (Ashurst)) the MUA's alleged non-compliance with order 8 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order.

54 The application was heard by Commissioner Bull of the FWC on 23 and 24 July 2014.

55 During the hearing of the application:

(1) Swire made submissions to the FWC consistent with the matters referred to in support of its contention that the MUA had contravened the Swire order, such that the industrial action the subject of the notice would not be protected industrial action because of the operation of s 413(5) of the FW Act; and

(2) the MUA made submissions to the FWC challenging and/or rejecting those submissions, and to the effect that the MUA had substantially complied with the Swire order by reason of the matters referred to above; and

(3) Swire made submissions to the FWC in response, including submissions to the effect that the MUA had not substantially complied with the second paragraph (undertaking) of order 1 of the Swire order, nor with order 8 of the Swire order.

56 At about 2.00pm on 24 July 2014, after a short adjournment of the hearing, the MUA withdrew the notice, after which the FWC dismissed the application. The FWC later reduced this decision to dismiss the application to writing ([2014] FWC 4961), dated 28 July 2014.

57 On 25 July 2014, the MUA (by way of letter from Mr Tracey to the Chambers of Commissioner Cloghan at the FWC and Mr White from AMMA) provided a document to the FWC and to AMMA (in its capacity as bargaining representative for each of Swire, Tidewater, Skilled and Mermaid):

(1) in purported compliance with the second paragraph (undertaking) of order 1 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order; and

(2) in further purported compliance with order 8 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order.

58 On 27 July 2014, the MUA made a request of the FWC in writing (by way of email from Mr Edmonds from the MUA to the Chambers of Commissioner Cloghan at the FWC, copied to Ashurst (as AMMA's solicitors)) to retrospectively vary the time for compliance with orders 1 and 8 of each of the Swire order, the Tidewater order, the Skilled order and the Mermaid order.

APPLICANTS' SUBMISSIONS

Introduction and background

59 The applicants note that the FW Act provides for the making of enterprise agreements between employers and employees, to specify and regulate terms and conditions of employment. It establishes various processes for the bargaining leading to the making of those agreements, and provides roles for, and imposes responsibilities on, bargaining representatives within them.

60 Division 2 of Pt 3-3 of the FW Act provides for "protected industrial action", a limited and tightly regulated immunity from civil suit for the effects of industrial action taken by employers and employees and their bargaining representatives (including unions), for the purposes of supporting or advancing claims for a proposed enterprise agreement.

61 Section 413 of the FW Act provides for what are termed "common requirements", which must exist in order for particular industrial action to be regarded as "protected industrial action" for a proposed enterprise agreement.

62 One such "common requirement' is s 413(5), which relevantly provides that for a union seeking to organise protected industrial action by its members whom it represents (as a bargaining representative), that union must not have contravened any orders which apply to it and which relate to the proposed enterprise agreement, or bargaining for it.

63 Four orders of the kind to which s 413(5) speaks were made by the FWC under the FW Act in relation to bargaining for a proposed enterprise agreement with four separate offshore oil and gas vessel operators: the Swire, Tidewater, Skilled and Mermaid orders. The interim orders applied to the MUA.

64 The interim orders required the MUA to do various things in various ways and within various times, as part of the statutory framework providing for "good faith bargaining" obligations (see for example, ss 228(1) and 231 of the FW Act).

65 The applicants contend that the MUA did not do what the interim orders required, and hence contravened those interim orders. The applicants seek declarations to this effect.

66 Section 413(5) of the FW Act provides (and the applicants say) that the effect of this is that any industrial action organised by the MUA for the proposed enterprise

agreements with Swire, Tidewater, Skilled and Mermaid cannot be "protected industrial action". Thus, they seek declarations to this effect.

The contravention of the interim orders

67 The applicants note the interim orders are agreed. Further, they note it is agreed that the interim orders apply to the MUA, relate to the proposed enterprise agreements in each case, and relate to a matter that arose during bargaining for those proposed enterprise agreements in each case, referring to [29]-[32] of the statement of agreed facts ([40]-[43] above).

68 The interim orders required the MUA to provide certain documentation and related materials to the applicants and the FWC by close of business on 21 July 2014. The applicants point out the MUA admits that in each case, it did not do so. The applicants refer to [27]-[30] of the statement of agreed facts ([38]-[41] above), although the submission may be made by reference to [33]-[36] of the agreed facts ([44]-[47] above.

69 The interim orders are orders of the FWC. The applicants submit those orders impose binding obligations on those to whom they apply, like any other orders made by a judicial or quasi-judicial body, unless and until set aside. They say the "retrospective nullification" of those obligations in the event of jurisdictional error does not alter this proposition: *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at [38]; [2005] FCAFC 84; *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 277; [1979] HCA 27. There is (and has been) no suggestion that the interim orders are invalid or are otherwise liable to be set aside. Contravening orders of this type can lead to the imposition of civil penalties: see s 233 and Div 2 of Pt 4-1 of the FW Act. Therefore, in the applicants' submission, there is no reason why they would be treated any differently to orders of a court for the purposes of assessing whether or not they have been contravened.

70 The applicants note orders of a court which require a person to do an act or thing within a particular time are contravened where the person neglects or refuses to do the act or thing within the time specified in the order (see for example, the endorsement contained in R 41.06 of the *Federal Court Rules 2011* (Cth)).

71 Insofar as court orders are concerned, it is submitted the question of compliance (or contravention) is a binary proposition: the person to whom the order applies either contravenes it, or they do not. Casual, accidental or unintentional disobedience of a court

order (so-called technical contempt) is still a contravention: see *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 at [36]-[51]; *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288 at [100]; [2014] VSC 134; *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 at [138]-[142]; *Bernard Putnin as liquidator of MAFF Investments Pty Ltd (in liq) v Fuller* (1991) 3 WAR 546 at 550; *Australian Competition and Consumer Commission v Abel Rent-A-Car Pty Ltd* [2000] FCA 479 at [14]-[15]. The applicants say the same follows with respect to orders made by an authority or tribunal pursuant to statute, unless of course the relevant statutory context allows for so-called "substantial compliance".

72 The applicants further note there are many examples of statutes which expressly allow for the possibility that "substantial compliance" with various obligations might be regarded as good compliance (see for example, s 445G(3) of the *Corporations Act*; s 25C of the *Acts Interpretation Act 1901* (Cth)): the FW Act is not one of them.

73 For these reasons, the applicants submit, the MUA's defence of "substantial compliance" is misconceived.

Declaratory relief

74 The applicants submit this is an appropriate case for the making of declaratory relief. It is submitted there is a "matter" arising under the FW Act attracting jurisdiction, by reference to, for example, *Tay v Migration Review Tribunal* (2009) 178 FCR 1 at [25]-[38]; [2009] FCA 515. Further, the applicants say the declaratory relief will contribute significant utility to the legal rights and obligations of the parties, referring to *Commonwealth of Australia v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305; [1972] HCA 19 (Barwick CJ); *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135 at [20]-[21] (Siopis J) and [82]-[83] (Tracey and McKerracher JJ); *IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed)* (2004) 211 ALR 231 at [44]; [2004] FCA 1390.

MUA'S SUBMISSIONS

Principles of statutory construction

75 The MUA submits that the legal principles to be applied in the exercise of statutory interpretation are not controversial and observes those principles were explained by the High Court in ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]; [1998] HCA 28. It says, in summary, the Court held that:

(1) the process of construction of a provision must always begin by examining the context of the provision within the statute as a whole, so that:

(a) a statutory provision should be construed so that it is consistent with the language and purpose of other provisions of the statute;

(b) the meaning of a provision must be determined by reference to the language of the statute viewed as a whole; and

(c) the context, general purpose and policy of a provision and its consistency and fairness should be considered;

(2) a statute must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals; and

(3) a court construing a statutory provision must strive to give meaning to every word of the provision, and avoid a result which deprives any part of the provision or the statute of meaning, operation or utility.

76 Particular attention is directed to the passage in *Project Blue Sky* at [69] where McHugh, Gummow, Kirby and Hayne JJ stated:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute [footnote omitted]. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' [footnote omitted]. In *Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed [footnote omitted].

77 These principles are reflected, it is noted, in s l5AA of the *Acts Interpretation Act 1901* (Cth) which states:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

78 The MUA submits that where a literal reading of the particular provision does not accord with the discerned legislative intention, a court may depart from that reading, observing Mason and Wilson JJ so held in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commission of Taxation* (1981) 147 CLR 297 at 320-321; [1981] HCA 26, where they stated:

> When the judge labels the operation of the statute as 'absurd', 'extraordinary',

> 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative operation must be preferred. But the propriety of departing from the literal interpretation is not confined to such situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

79 There is an abundance of High Court authority, it is said, which supports this approach: see *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 (Mason J), 319 (Brennan J) and 321 (Deane J); *Saraswati v The Queen* (1991) 172 CLR 1 at 21-22 (McHugh J); *Parramore v Duggan* (1995) 183 CLR 633 at 644; [1995] HCA 21 (Toohey J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [23]-[24]; [2012] HCA 56 (French CJ and Hayne J); *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [48]; [2013] HCA 35 (French CJ, Hayne, Crennan and Kiefel JJ).

Statutory context

80 The MUA emphasises that enterprise bargaining has a central place in the industrial regulation of workplaces under the FW Act. It notes Jessup J said in *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297; [2012] FCAFC 58 at [5]: "Enterprise Agreements are a significant, if not the predominant, means adopted by the Act for the establishment of terms and conditions of employment".

81 Enterprise bargaining is dealt with in Pt 2-4 of the FW Act. In that Part, s 172 sets out the matters about which enterprise agreements can be made and by whom they can be made. Relevant for present purposes is s 172(2)(a) which provides for an enterprise agreement to be made between an employer and the employees who are employed at the time of the agreement and who will be covered by the agreement.

82 Bargaining for a new enterprise agreement may be initiated by an employer giving a "notice of employee representational rights" to all employees who will be covered by the proposed agreement in accordance with s 173. That notice informs the employees of their ability to appoint a bargaining representative to represent them in the bargaining for the proposed enterprise agreement. Section 174(3) provides that a union (employee organisation) of which any employee is a member is entitled to be the bargaining representative of that employee unless the employee appoints another person as bargaining representative. In the present case, the MUA is the bargaining representative of all its members employed by Swire, Tidewater, Skilled and Mermaid.

83 It will be seen from the statement of agreed facts that the MUA has been engaged in bargaining for new enterprise agreements with the applicants since late 2012.

84 Division 8 of Pt 2-4 prescribes the role of the FWC in facilitating bargaining for enterprise agreements. Section 228 defines "good faith bargaining requirements" that a bargaining representative must meet. The MUA notes that the section does not require the making of concessions during bargaining or agreement being reached.

85 Section 229 of the FW Act allows a bargaining representative to apply to the FWC for a bargaining order if one or more of the other bargaining representatives have not met or are not meeting the good faith bargaining requirements. Section 231 specifies the type of bargaining orders that the FWC may make and s 232 provides that a bargaining order comes into operation on the day that it is made and ceases to be in operation if it is revoked, when the proposed agreement is approved by the FWC, or when the bargaining representatives agree that bargaining has ceased.

86 Section 233 is a civil remedy provision which prohibits contravention of a term of a bargaining order by any person to whom it applies. It is this section that is relied upon in this case by the applicants. Civil remedy provisions may be sued upon under Pt 4-1: see item 6 in the table appended to s 539(2).

87 Upon the establishment of a contravention of a civil remedy provision, s 545 allows the Court to make any order that it considers appropriate, including orders for an injunction to prevent, stop or remedy the effects of a contravention and orders awarding compensation for loss suffered because of a contravention, and s 546 allows for the imposition of pecuniary penalties.

88 The ability to take protected industrial action, the MUA notes, has for many years been an element of Commonwealth industrial legislation dealing with collective bargaining. The current statutory regime for the taking of protected industrial action is contained in Pt 3-3. Protected industrial action, according to s 408, may be one of three kinds of action:

(1) employee claim action (s 409);

(2) employee response action (s 410); and

(3) employer response action (s 411).

89 All the forms of protected industrial action must meet the common requirements set out in Subdiv B of Div 2 of Pt 3-3. Section 413 forms part of that subdivision. Before dealing with s 413 specifically, the MUA refers to the following other provisions of Pt 3-3 which may be relevant contextually.

90 Firstly, s 418 provides for applications to be made to the FWC for orders to stop industrial action which is not protected industrial action. Upon an application under s 418, the FWC may make interim orders pursuant to s 420. Section 421(1) creates a civil remedy provision which prohibits contravention of a term of an order under s 418 or s 420. The section also empowers the Court to grant an injunction to restrain such contraventions but the other powers under s 545 are excluded.

91 Division 8 of Pt 3-3 sets out the procedure for protected action ballots which must be ordered and held before protected industrial action can be taken. Under s 443(1), a necessary precondition for the making of a protected action ballot order by the FWC is that it is satisfied that the bargaining representative applying for the order is and has been genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

Section 413

92 The MUA refers to item 6 in the table appended to s 539(2).

93 Section 413 contains the common requirements which are a necessary precondition for protected industrial action under Pt 3-3.

94 The MUA notes that subs (3) requires that the bargaining representative organising the proposed industrial action must be genuinely trying to reach an agreement. This parallels the requirement in s 443(1) just mentioned. Subsection (4) deals with the requirement to give notice of proposed industrial action under s 414. The particular subsection in issue is s 413(5).

Section 413(5)

95 The MUA submits s 413(5) is expressed in absolute terms and would, if applied literally, have the effect that any bargaining representative who has contravened any order, at any time, and irrespective of the circumstances, is precluded from organising or engaging in any protected industrial action. It says that is an extreme result which has real potential to produce incongruous, irrational and unjust results.

96 In the MUA's submission, the facts of the present case demonstrate the point acutely. The contravention alleged against the MUA is that it failed to file documents dealing with particular negotiation claims that had passed between the parties by 21 July 2014, being the date prescribed by the four interim orders. However it says by the following day, the required documents were filed.

97 Similarly, the MUA submits that if it had filed its documents in time but it transpired that they did not fully meet the content requirements of the order (whether intentionally or unintentionally) that would also constitute a contravention of the orders.

98 The MUA contends, having regard to the context in which s 413(5) appears, it is necessary to try and discern its purpose within the scheme for enterprise bargaining and the taking of protected industrial action.

99 It is also noted that other provisions of the FW Act deal with the failure of a party to bargain in good faith including providing for good faith bargaining orders and court imposed sanctions for contravention of those orders, which include injunctions to act in accordance with them.

100 It is further noted that a protected action ballot order cannot be obtained unless the applicants satisfy the FWC that they are genuinely trying to reach an agreement, and similarly s 413(3) also requires that the bargaining representative organising the proposed protected industrial action is genuinely trying to reach an agreement at that time as well.

101 In the MUA's submission, a contravention of a good faith bargaining order at some time in the past does not preclude a conclusion that the relevant bargaining representative is not at a subsequent time genuinely trying to reach agreement. The MUA points to a hypothetical situation where the bargaining representative has failed to comply strictly with a bargaining order in, say, January, and then shortly thereafter has complied. The bargaining representative may then engage in further good faith negotiations with the employer and be genuinely trying to reach agreement over a period of months. The hypothetical bargaining representative may, for example, in July of the same year, apply for a good faith bargaining order. The fact that in January there was noncompliance with, and arguably a contravention, of an order is not a stated preclusion from obtaining a ballot order. Yet, when that bargaining representative seeks to organise or engage in protected industrial action approved in the ballot, the applicants submit that s 413(5) should be read as precluding it because of the

earlier contravention. The MUA says it strains credulity that such a result was intended by the legislature.

102 The MUA submits these various examples serve to demonstrate that a totally literal application of s 413(5) would produce incongruous, irrational and unjust results. Further, the MUA contends, such outcomes are to be avoided and the courts are entitled to do so by modifying the literal interpretation of a provision to give it a meaning which is more harmonious with relevant surrounding provisions.

103 The MUA notes the role of protected industrial action in the statutory enterprise bargaining scheme is extremely important. It says protected industrial action is the only economic weapon available to employees in support of their bargaining, and is particularly significant because there is no statutory obligation on an employer to concede claims made by employees or to reach agreement: see s 228(2) of the FW Act.

104 The MUA further submits this function of protected industrial action, namely, that it be in aid of claims in relation to a proposed enterprise agreement, is built into the definition in s 408. As noted above, the FW Act also requires that the relevant bargaining representatives are genuinely trying to reach agreement and that the action is being taken in aid of reaching the agreement. Given that s 413(3) already covers the latter requirement, and given that contraventions of orders of the kind referred to in s 413(5) are already and separately amenable to punishment and orders for rectification, the MUA submits it is legitimate to ask what additional purpose may reasonable be attributed to s 413(5).

105 The MUA submits that in the overall statutory context, the intended purpose of s 413(5) is to focus on the point of time at which the protected industrial action is proposed to be arranged or taken, and at that time to prevent the bargaining representatives from approbating and reprobating about their bargaining obligations by continuing contravening conduct while simultaneously seeking to take protected industrial action. It is not intended to be a further means of punishment for contraventions that have occurred and which are complete, in the sense that the offending conduct is no longer continuing.

106 For all the above reasons, MUA submits that the proper construction of s 413(5) is one which limits its application to contraventions where the conduct constituting the contravention is continuing at the time when the relevant bargaining representative is seeking to organise or arrange protected industrial action.

107 It is submitted that construction is a sensible and rational interpretation of s 413(5) that gives it an operation which is harmonious with its statutory context and supportive of the overall enterprise bargaining scheme in the legislation.

Was there substantial compliance with the orders?

108 The MUA contends a further issue for the Court to decide is whether the interim orders made by FWC, and alleged to have been contravened by MUA, allowed for substantial compliance, and if so, whether the MUA did substantially comply.

109 The MUA submits that consistent with the judgment of the plurality in *Project Blue Sky* at [93], the question of whether the interim orders allowed for substantial compliance is one that is to be determined by interpretation of the orders having regard to the purpose and language of the orders. The purpose encompasses the statutory purpose to be served by the orders as well as the specific purpose of the orders themselves. In the present case, the MUA says it has outlined above the enterprise bargaining regime in the statute and the provisions for FWC to facilitate bargaining.

110 It is in the exercise of that facilitative role that FWC made the bargaining orders in question in the present case.

111 The MUA says the information before the Court makes clear the circumstances in which the orders were made, namely to secure from the MUA its responses to a number of matters raised by the applicants for the purposes of advancing bargaining. It says the language of the orders reflects that.

112 It is submitted by the MUA that on a proper construction of the orders having regard to their purposes and language, that they were capable of substantial compliance.

113 It is also submitted that having regard to the purposes of the orders, they should be construed as permitting substantial compliance by delivery of the necessary information beyond, but within a reasonable period after, the specified dates.

114 In particular, the delivery of the material within a day after the specified date should be found by the Court to constitute substantial compliance with the orders.

115 In the MUA's submission, the findings of availability of substantial compliance with the orders, and actual substantial compliance with the orders by MUA, means that there has been no contravention of the orders, and no occasion for the invocation of s 413(5).

DOES S 413(5) OF THE FW ACT APPLY WITHOUT QUALIFICATION TO ANY CONTRAVENTION?

116 Section 413 of the FW Act, as its heading indicates, specifies "common requirements" that apply for "industrial action" to be "protected industrial action".

117 Industrial action, by s 408, is protected industrial action for a proposed enterprise agreement if it is, amongst other things, "employee claim action for the agreement", as to which s 409 is relevant.

118 Section 409 provides as follows:

> **409 Employee claim action**
>
> *Employee claim action*
>
> (1) ***Employee claim action*** for a proposed enterprise agreement is industrial action that:
> (a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and
> (b) is organised or engaged in, against an employer that will be covered by the agreement, by:
> (i) a bargaining representative of an employee who will be covered by the agreement; or
> (ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and
> (c) meets the common requirements set out in Subdivision B; and
> (d) meets the additional requirements set out in this section.
>
> *Protected action ballot is necessary*
>
> (2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).
>
> *Unlawful terms*
>
> (3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.
>
> *Industrial action must not be part of pattern bargaining*
>
> (4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.
>
> *Industrial action must not relate to a demarcation dispute etc.*
>
> (5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation

dispute.

Notice requirements after suspension order must be met

(6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

Officer of an employee organisation

(7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation.

119 As can be seen from these provisions, the making of an "enterprise agreement" is an important feature of the FW Act. Part 2-4 of Ch 2 of the FW Act deals with enterprise agreements. Relevantly, for present purposes, by s 172(2), in Div 2 of Pt 2-4, an employer, or two or more employers that are single interest employers, may make an enterprise agreement – called a single-enterprise agreement.

120 At material times in July 2014, AMMA on behalf of each of the four employers, Swire, Tidewater, Skilled and Mermaid, as their bargaining representative, had been dealing with the MUA as bargaining representative for relevant employees, pursuant to s 176, which is within Div 3 of Pt 2-4.

121 In relation to each set of negotiations, the proposed enterprise agreement was not a greenfields agreement as there was already an agreement in place, each of which had a nominal expiry date of 31 July 2013.

122 As stated in the agreed facts, since December 2012 "until the present time" the relevant employers, by AMMA, and their employees, by the MUA, have been engaged in bargaining for the purposes of making an enterprise agreement.

123 In the result, each of the interim orders (bargaining orders) was made by the FWC under s 230, which is in Div 8 of Pt 2-4.

124 There is no challenge to the validity of the interim orders made by the FWC on 9 July 2014 and, as noted above, save in the case of the Tidewater order, corrected on 10 July 2014.

125 As s 230(3) illustrates, the good faith bargaining requirements specified in s 228 underlie the negotiation of an enterprise agreement and control the power of the FWC to make a bargaining order.

126 In this case, it is not in dispute that each of the interim orders was ultimately made by the consent of the parties, who, in effect, negotiated the timelines by which the things required to be done by each order were set.

127 In each case, paras B[1]-[11] of the interim orders (orders 1 to 11) contain the relevant bargaining orders.

128 The orders it seems were "interim" in the sense that by, order 10, each proceeding in the FWC was listed for a "report-back hearing" on 12 August 2014, with the parties also being granted liberty to apply.

129 By order 1, the MUA was subject to an order in the following terms:

> [1] The MUA must, by no later than close of business on 21 July 2014, clarify, identify and prioritise its claims by providing confirmation in writing to the AMMA, as bargaining representative of Swire Pacific Ship Management (Australia) Pty Ltd (**Company**), of the MUA's binding commitment to a consolidated and exhaustive list setting out:
>
> (a) the claims the MUA wishes to pursue against the Company in relation to the proposed agreement to replace the *Swire Pacific Management (Australia) Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010* and *Swire Pacific Ship Management (Australia) Pty Ltd and MUA Gorgon Jetty and Marine Structures Contract Enterprise Agreement 2011* (**Proposed Agreement**);
>
> (b) which claim(s) or parts thereof are pursued only in relation to the Company and not in relation to any other employer in the offshore maritime industry. In doing so, the MUA must highlight the precise part(s) of the claim(s) which are unique to the Company;
>
> (c) matters that are, at the time of providing that list:
>
> (i) to the best of the MUA's knowledge and belief, agreed in principle by the MUA and the Company;
>
> (ii) to the best of the MUA's knowledge and belief, not agreed in principle by the MUA and the Company; and
>
> (d) a ranking of each of the MUA's claims as of high, medium or low importance to the MUA.
>
> In providing the list referred to in this Order 1, the MUA will provide an undertaking to the Company that it will not pursue any claims in bargaining for the Proposed

Agreement other than those identified pursuant to Order 1(a).

130 Thus, the MUA was required to provide AMMA with a "consolidated and exhaustive list" setting out the matters referred to in paras (a)-(d) and an undertaking to the relevant company that it would not pursue any claims in bargaining for the proposed enterprise agreement other than those identified pursuant to order 1(a).

131 On any view, the provision of the list and the giving of the undertaking can be seen to be important steps in a good faith bargaining process.

132 It is not in dispute that the MUA did not comply with order 1, in that it did not by the close of business on 21 July 2014 provide the required list and the required undertaking.

133 The parties say there is a factual dispute as to whether the substance of order 1 was purportedly met the following day, 22 July 2014, or only on 25 July 2014.

134 In my view, the time lag of one day or four days is immaterial to the question now raised. To the extent however that it is material, it seems to me that the terms of order 1 required the provision of an undertaking by MUA to the company, and that the undertaking was not provided until 25 July 2014. In those circumstances, not until the undertaking was provided on 25 July 2014 was order 1 purportedly satisfied. On the face of it, the MUA did not comply with order 1.

135 By order 8, the FWC ordered that:

> [8] The MUA shall, by close of business on 21 July 2014, provide a written undertaking to the Commission that it will not seek to include in the proposed agreement with the Company:
>
> (a) any term that would have the effect of requiring the Company to directly or indirectly discriminate against a person on the basis of their sex, age, race or nationality in breach of any anti-discrimination law;
>
> (b) any term that pertains only to the relationship between the MUA, its members and/or potential members and that the MUA does not reasonably believe is a permitted matter;
>
> (c) any term that would have the effect of placing a restriction or prohibition on the Company's use of contractors; and
>
> (d) any term that would have the effect of rendering lawful what would otherwise be unprotected industrial action.

136 Order 8 was arguably complied with one day late, on 22 July 2014. On that day, the MUA advised AMMA that it had that day provided the FWC with an undertaking pursuant to order 8 of the interim orders. However, there was some qualification expressed as to some of the claims or clauses included in the list that were highlighted in yellow, in relation to which the MUA said it was still seeking legal advice to ensure they did not contain any non-permitted, or unlawful content. The response to the allegations in the attached consolidated list was described as "our preliminary response".

137 By letter dated 25 July 2014, however, the MUA clearly and without qualification provided an undertaking that complied with order 8.

138 In my view, in the circumstances, not until the unqualified undertaking was given can it be said that order 8 was purportedly complied with. In those circumstances, the MUA was four days late in meeting order 8.

139 The proper judgement to be made, therefore, is that there was no purported compliance with either order 1 or order 8 until 25 July 2014, four days after the required compliance time, which was the close of business on 21 July 2014.

140 The apparent significance of the non-compliance is that, for the purposes of s 409, action will not be protected industrial action unless, amongst other things, in relation to this type of employee claim action, the employee claim action is industrial action that by s 409(1)(c) meets the common requirements set out in Subdiv B, which by s 413(5) relevantly provides for compliance with orders in the following terms:

> (5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
>
> (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;
>
> (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the employee and the bargaining representative of the employee.

141 The notice of proposed protected industrial action that the MUA had given on 18 July 2014 under s 414 of the FW Act was withdrawn by the MUA on 24 July 214, in the agreed factual circumstances set out above at [48] to [56].

142 In this case, the applicants submit that the MUA remains unable to take protected industrial action because it, as the bargaining representative, contravened orders 1 and 8 of the interim orders that apply to it and that relate to industrial action relating to the enterprise agreements in question or a matter that arose during bargaining for the agreements. The MUA rejects that casting of its failure to comply with those orders.

143 Ultimately, the primary question is whether, by not providing the list and the undertakings required by orders 1 and 8 by the close of business on 21 July 2014, the MUA "contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement".

144 The MUA do not contest that the orders in question in each case *relate to a matter that arose during bargaining for the enterprise agreement* in each case.

145 The MUA contends, however, that properly construed, the expression "must not have contravened any orders that apply to them", when it comes to the taking of protected industrial action does not comprehend the MUA's conduct in failing to comply with orders 1 and 8 by the close of business on 21 July 2014, where it four days later complied with the substance of those orders, and bargaining for an enterprise agreement has been conducted from December 2012 "until the present time".

146 In the course of argument at the hearing, senior counsel for the MUA accepted that, in a literal sense, the MUA by failing to comply with the requirement to provide the relevant documentation to AMMA by the close of business on 21 July 2014 "contravened" orders 1 and 8.

147 Senior counsel submitted, however, that the relevant text of s 413(5) should be construed as if it read:

> The following persons must not have contravened and **be continuing to contravene** any orders that apply to them …

148 By reference to the authorities relied on by the MUA and set out above, senior counsel submits that a capricious or incongruous or unjust result would be achieved if the conduct of the MUA in not complying with the orders made on the due date (conduct which it is noted the applicants do not suggest constitutes "serious breaches" for the purposes of ss 234 and 235 of the FW Act) is held to support a declaration that it cannot now take protected industrial action.

149 The MUA says that a literal construction of the provision would produce a capricious or incongruous or unjust result in that the right to strike – to take protected industrial action – that is provided by the FW Act would be stripped of it during the bargaining process that has continued until the present time.

150 In my view, when one has regard to the terms of s 408 which define "protected industrial action", and the related definition of "employee claim action" in s 409, the "industrial action" in question is to be regarded at the particular point in time it is proposed.

151 It follows, in my view, that when one comes to the common requirements that apply for "industrial action" to be "protected industrial action", in s 413, the question is whether those requirements apply at the time the industrial action is proposed.

152 When one has regard to the terms of s 413(3), for example, which requires that in a case such as the present the MUA is "genuinely trying to reach an agreement", that issue must be determined at the time of the proposed industrial action, although no doubt the history of a party's conduct stretching back in time might be relevant to the determination of that question. But the question is whether at the time the industrial action is proposed that party is genuinely trying to reach an agreement.

153 So far as the requirement of s 413(4) is concerned, that is a question of fact so that the notice requirements set out in s 414 must have been met when the industrial action is proposed.

154 When it comes to s 413(5), relevantly the MUA "must not have contravened any orders that apply to them and that relate to … a matter that arose during bargaining for the agreement".

155 When assessed at the time industrial action is proposed, the use of the expression "must not have contravened any orders", may, as the applicants contend, suggest that any past contravention of orders "that apply to them and that relate to … a matter that arose during bargaining for the agreement" will disqualify the proposed industrial action from being protected industrial action.

156 However, in my view, the use of the words "that apply to them" that appear in the composite expression "must not have contravened any orders *that apply to them*" significantly militates against such a simple textual outcome.

157 The reference to "any orders that apply to them" suggests that, at the time of the proposed industrial action, there are currently orders "that apply to them", which orders have not previously been contravened.

158 It would appear relevant therefore, at the time any industrial action is proposed, to ask whether the interim orders apply to the MUA, having regard to the events described above and set out in the statement of agreed facts. If, at the time of any proposed industrial action, orders 1 and 8 do not "apply" to the MUA, then it should not be concluded that the MUA has "contravened any orders that apply to them".

159 If, however, one were to construe the expression "any orders that apply to them" as meaning any orders that apply to them currently *and that applied to them at material times during bargaining for the agreement*, then plainly enough there will have been contravention of such orders. The MUA literally did not comply with orders 1 and 8, in that they did not provide the relevant documentation at the required time (whether one day or four days late).

160 In short, the MUA submits that by reason of its conduct between 22 and 25 July 2015, immediately after the required time for compliance, it provided the relevant documentation and bargaining has since continued between the parties. This is consistent with the statement of agreed facts. The only question therefore, it says, is whether their non-compliance, for a very short period (whether one or four days), means that they cannot now take protected industrial action by virtue of s 413(5).

161 Senior counsel for the applicants submits that the relevant orders do apply now, and will continue to apply until some decision is made that they do not apply, and that the reason for that is to be found in orders 3, 9 and 11 of the interim orders.

162 Those orders, which are set out above, may be conveniently set out again here:

> [3] With reference to the clarification provided at Orders 1 and 2, the MUA, for the term of this Order, shall commit to honour all positions that are agreed in principle as at the date of this Order and the undertaking provided pursuant to Order 1 other than to the extent that the MUA provides written justification as to any proposed variation to a position that has been agreed in principle or the undertaking provided pursuant to Order 1, including with specific detail as to how such variation would enable the parties to move closer towards reaching an agreement on the terms of the Proposed Agreement.
>
> …
>
> [9] The MUA shall not during the term of this Order pursue any claim that is substantially to the same effect as any claim which has, at some stage prior to this Order, been withdrawn in response to a concern raised by or on behalf of the Company that the claim is, or may be, a matter that is not permitted or is an unlawful

> term within the meaning of the FW Act.
> …
> [11] This order is operative from 9 July 2014.

163 Senior counsel for the applicants sought to explain his submission by saying that the point of those orders was "to try to bring the claims within a ring" and to ensure that no additional claims were made thereafter.

164 Senior counsel said that one of the complaints made leading up to the making of the interim orders was that it was very hard for vessel operators to work out which claims were within the ring and which ones were not because claims they thought were in the ring were outside it. He said the order thus attempts, during its currency, that is for the purposes of the bargaining, to add discipline to the process, as may be seen from order 11 – making the order operative from 9 July 2014. Thus the applicants contend there is no question that, as of the date of the hearing, for example, the interim orders apply to the MUA.

165 Senior counsel for the applicants also draws attention to s 233, which provides a civil remedy in respect of the breach of a bargaining order, such as the interim orders here. Section 233 provides:

> A person to whom a bargaining order applies must not contravene a term of the order.
>
> Note: This section is a civil remedy provision (see Part 4-1).

166 He submits that the verb "applies" is used in s 233 in the same active sense as the word "apply" is used in s 413(5). The express submission is made that while it is possible that s 233 and s 413(5) only have operation during the time that the order applies and not thereafter, the better construction is that both those sections have operation when the order applies or in circumstances when it did apply.

167 The applicants submit that is not an issue that arises in this case but could arise in a case where the order is "spent". The argument would then arise as to whether later industrial action taken in relation to an order that was spent was inconsistent with s 413(5). However, senior counsel for the applicants submits the point is really one for drafting of the declaration that should be made in this case by the Court and could be met by saying that during the currency of or during the period during which the orders applied, they were contravened.

168 The comparison between s 233 and the reference to "[a] person to whom a bargaining order applies", and s 413(5) where the relevant expression is that "[t]he following persons must not have contravened any orders that apply to them" is not particularly helpful, in my view, in properly construing s 413(5). Plainly enough, if at a time a bargaining order applies it is not complied with, then it may be said that it has been contravened for the purposes of s 233. No relevant analogy or guidance is obtained from that example for the purposes of construing s 413(5) and the compendious expression there used involving the words "any orders that apply".

169 The real point is that the expression "orders that apply to them", in the context of a definition dealing with protected industrial action, necessarily has to do with orders that apply at the time the industrial action is proposed. If the Parliament had intended that any contravention – whenever it occurred – in respect of a bargaining order made, and that related to a matter that arose during bargaining for the agreement, should disqualify the proposed industrial action from being protected industrial action, then a different form of words would have been used in s 413(5). The appropriate words, for example, might have been: "The following persons must not have contravened any orders that apply ***or applied*** to them".

170 In coming to this view, the Court is mindful of the very clear guidance provided in a number of decisions of the High Court of Australia as to how the task of statutory interpretation should be carried out. In particular, a court should not purport to ascribe a particular legislative purpose to an Act and then construe difficult text in light of the asserted purpose. The point has been emphasised most recently in *Minister for Immigration and Border Protection v Han* [2015] FCAFC 79. The Full Court (Flick, Murphy and Griffiths JJ) essayed "the modern approach" to statutory construction at [26]-[32]. I pay due regard to the general principles there set out. In particular I note that in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [26] French CJ and Hayne J, in a joint judgment, warned against the making of some a priori assumption about a statute's purpose, noting the purpose of legislation must be derived from what the legislation says and not from any assumption about the desired or desirable reach or operation of the relevant provisions.

171 The MUA contends and observes that an incongruous or unjust result would be achieved by adopting the construction of s 413(5) that AMMA urges upon the Court, because the fundamental right to strike would, in effect, be removed in some circumstances by a relatively innocuous breach of a bargaining order at any time in the bargaining process, and

for that reason the Court should not ascribe such an intent to the Parliament; however, it is not that approach to statutory construction that causes me to construe s 413(5) as I do. Rather, it is that Parliament could easily have made it quite clear – which I do not consider it has – that *any* breach of a bargaining order of the relevant kind disqualifies industrial action from being protected industrial action. Because it is industrial action proposed at a particular point in time that falls for consideration as to whether or not it is protected industrial action as defined, I consider the expression "any orders that apply to them and that relate to … a matter that arose during bargaining for the agreement" must be taken necessarily to focus on any orders that apply to the bargaining representative or employee at the time the industrial action is proposed.

172 I do not accept the submissions made on behalf of the applicants that, in the circumstances of this case, orders 1 and 8 currently apply to the MUA. To use the expression offered by senior counsel for the applicants, it indeed may be said that in this case those orders are "spent". The suite of orders 1 to 11 were made in order to facilitate good faith bargaining, which had broken down at a certain point in time, and the provision of the documentation required by orders 1 and 8 by the MUA, albeit after the close of business on 21 July 2014, has facilitated the continuation of the good faith bargaining process generally in accordance with the requirements of the bargaining orders made to the present time.

173 In that context, orders 1 and 8 have no continuing work to do, even though the suite of orders may, in a general sense, be said still to apply. There is no demand for the satisfaction of orders 1 and 8 at the time of the hearing because there is nothing that can now be done to satisfy those orders. They have been satisfied. In no relevant sense can it be said that those orders "apply" to the MUA as at the present time.

174 The legislative intention that may be derived from the proper construction of the relevant provisions concerning protected industrial action is that a bargaining representative of the employee, in a case such as the present, will not be entitled to take protected industrial action if it is in contravention of any orders that, at the time of the proposed industrial action, apply to that bargaining representative.

175 I therefore consider that s 413(5) does not apply without qualification, as the MUA put it, to any contravention no matter when it occurred, whether the contravening conduct is continuing, whether it has been rectified; or indeed whether it has been punished or enjoined under other provisions of the FW Act.

176 I would therefore not make the declarations as sought by the applicants, the terms of which are set out in paras 5 to 8 at [2] above.

177 Nor do I see any utility in making declarations in terms of paras 1 to 4 at [2] above, as proposed by the applicants. Those proposed declarations as to contravention are intended to preface the making of the subsequent proposed declarations in paras 5 to 8 concerning any industrial action not being protected industrial action.

178 Additionally, in circumstances where, as revealed above, a party which contravenes a bargaining order that applies to it may be prosecuted for a civil penalty under s 233, it is not appropriate for this Court to prejudice any such proceedings (if they are not now statute barred).

179 In any event, the making of such declarations would not appear to serve any other useful purpose or otherwise quell a controversy and thus it is not appropriate for this Court separately to make those declarations.

WERE ORDERS 1 AND 8 CAPABLE OF BEING SUBSTANTIALLY COMPLIED WITH AND, IF SO, DID THE MUA SUBSTANTIALLY COMPLY WITH THEM?

180 In my view, the contentions pressed on behalf of the MUA to the effect that the interim orders "allowed for substantial compliance" are in many respects misconceived.

181 The argument does not focus on whether the relevant provisions of the FW Act enabling the making of bargaining orders allow for substantial compliance with any such orders made, but expressly focusses on the interim orders themselves and whether they allow for substantial compliance.

182 In my view, it is of no particular assistance to refer to such authorities as *Project Blue Sky*, as the MUA does, in order to deal with the question whether the interim orders allowed for substantial compliance with their terms. Rather, it is necessary to go to the interim orders themselves. In this case, the particular orders in question are orders 1 and 8. There is nothing in their terms (or the terms of orders 1 to 11) that suggests "substantial compliance" is an option. Each order requires the provision of certain documentation by the close of business on 21 July 2014. The terms of the orders in that regard were unambiguous and the information had to be supplied by the "close of business" on that day.

183 To the extent that there is any ambiguity in the two relevant orders, it can only be with respect to the expression "close of business". Nothing in the orders themselves suggested

that they had to be filed in the FWC and that the time the registry or office of the FWC ordinarily closes would provide an indication of the relevant time of the "close of business". It may simply be, as occurred in this case, that the required information could be sent directly by the MUA electronically to both the FWC and AMMA at some time late in the afternoon.

184 The argument that the MUA puts is closely related to the substance of the argument pressed in relation to the preceding constructional issue. In essence it is contended that, if failure "strictly to comply" with a procedural bargaining order requirement to provide documentation, to facilitate bargaining, by a particular time, can lead to a subsequent inability to take protected industrial action, then there should be considered to be some leeway so that the late provision of documentation for that purpose will not be considered to be in breach of the orders made.

185 However, to state that proposition is, in my view, to reveal its weaknesses. If late provision is permissible, how late can it be: three weeks; four days; one day? A very subjective assessment would be required. In effect, there would be no rule at all. To the extent that it is suggested that some orders might be less important, in the scheme of bargaining, than others, who is to make that assessment?

186 In this case, if the MUA had thought that it was going to have difficulties providing the required documentation at the required time, it may have been able to apply, as it could have done under order 11, to vary the terms of the interim orders by extending the time for compliance under orders 1 and 8. But it did not do so.

187 Whether or not it could have applied for retrospective extension of the compliance period is something that senior counsel for the MUA told the Court had been considered but not pursued, accepting that probably such a course is not available, in any event, and would not obviate a contention that, up to the point of extension of the compliance period, there had already been contravention of the relevant orders.

188 In my view, there is no doctrine of substantial compliance when it comes to the question whether orders 1 and 8 were complied with, that is to say, contravened, in this case.

189 Either the relevant orders were complied with according to their terms or they were not. On the face of it they were not.

190 In light of the answer to the question concerning the proper construction of s 413(5) dealt with above, it is strictly not necessary to deal with this further contention on behalf of

the MUA, but to the extent that I am wrong in relation to that constructional issue, I do not accept the submissions made on behalf of the MUA to the effect that it is possible to substantially comply with orders 1 and 8 and that the MUA did substantially comply with those orders.

CONCLUSION AND ORDERS

191 For the reasons given above considering the proper construction of s 413(5) of the FW Act, I would refuse to make the declarations sought.

192 The parties agree that this is a proceeding in which there should be no order as to costs, having regard to the terms of s 570 of the FW Act.

193 The appropriate order in this case is that:

(1) The originating application of the applicants filed 14 August 2014 be dismissed.

I certify that the preceding one hundred and ninety-three (193) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 3 July 2015