

FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [2011] FCAFC 91

Citation: Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [2011] FCAFC 91

Appeal from: Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [2010] FCA 822

Parties: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v PILBARA IRON COMPANY (SERVICES) PTY LTD (ACN 107 210 248)**

File number: NSD 1062 of 2010

Judges: **GRAY, LANDER & KATZMANN JJ**

Date of judgment: 25 July 2011

Catchwords: **INDUSTRIAL RELATIONS** – collective agreement – validity – agreement made with employees commencing after a certain date – whether made with employees in part of a single business

WORDS AND PHRASES – *part of a single business*

Legislation: *Acts Interpretation Act 1901* (Cth) ss 15AA, 15AB, 15AB(2), 15AD(a), 23(b)
Fair Work (Registered Organisations) Act 2009 (Cth)
Workplace Relations Act 1996 (Cth) ss 3, 3(d), 3(e), 5, 6, 7, 170LI, 170LU(8), 322, 322(3), 326, 327, 328, 329, 330, 331, 333(b), 340, 340(2), 341, 342(1), 344, 347, 347A, 347A(1), 351(b), 421(3), 421(4), 423, 423(2), 426, 426(a), 430(10), 431(4), 824(1), 824(2)
Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth)

Cases cited: *Australian Municipal, Administrative, Clerical, and Services Union v Boroondara City Council* (unreported, Dec 945/99 M Print R8158,) considered
Bilfinger Berger Services (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2008] AIRCFB 763 (2008) 176 IR 121 considered

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Tyco Australia Pty Ltd (t/as Wormald) (2006) 157 IR 15 considered
Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission [1999] FCA 847 (1999) 93 FCR 317 referred to
Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [2010] FCA 822 reversed

Date of hearing: 1 March 2011

Place: Sydney

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 51

Counsel for the appellant: Ms C Howell and Mr A Slevin

Solicitor for the appellant: Slater and Gordon

Counsel for the respondent: Mr JN West QC and Mr AB Gotting

Solicitor for the respondent: Freehills

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION**

NSD 1062 of 2010

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

**BETWEEN: CONSTRUCTION, FORESTRY, MINING AND ENERGY
 UNION
 Appellant**

**AND: PILBARA IRON COMPANY (SERVICES) PTY LTD
 (ACN 107 210 248)
 Respondent**

JUDGES: GRAY, LANDER & KATZMANN JJ

DATE OF ORDER: 25 JULY 2011

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The order made on 5 August 2010 in proceeding no NSD 567 of 2009 be set aside.
3. In lieu of that order, it be declared that the Pilbara Iron Employee Agreement did not come into operation as a valid workplace agreement pursuant to Pt 8 of the *Workplace Relations Act 1996* (Cth).
4. There be no order as to the costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION**

NSD 1062 of 2010

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **CONSTRUCTION, FORESTRY, MINING AND ENERGY
UNION
Appellant**

AND: **PILBARA IRON COMPANY (SERVICES) PTY LTD (ACN
107 210 248)
Respondent**

JUDGES: **GRAY, LANDER & KATZMANN JJ**

DATE: **25 JULY 2011**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

The nature and history of the proceeding

1 The question in this appeal is whether an agreement entered into between an employer and certain of its employees is an agreement made by the employer with “persons employed at the time in a single business (or part of a single business) of the employer whose employment will...be subject to the agreement.” In particular, the question is whether a “part” of a single business means nothing other than something less than the whole of that single business, so that the choice of how the part is to be defined is a matter for the employer, or whether the agreement must be made with employees in what is otherwise recognisable as a part of the single business.

2 The answer to the question turns on the proper construction of s 327 of the *Workplace Relations Act 1996* (Cth) (“the Workplace Relations Act”), as it stood following amendments made by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (“the Transition Act”), which came into operation on 20 March 2008. The relevant provisions of the Workplace Relations Act have ceased to operate directly since they were repealed by the *Fair Work Act 2009* (Cth) (“the Fair Work Act”) on 1 July 2009, but an

agreement brought into existence pursuant to those provisions is given continuing operation by the provisions in Pt 2 of Sch 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

3 At the relevant time, the effect of s 347A(1) of the Workplace Relations Act was that a workplace agreement did not come into operation unless the requirements of Div 2 of Pt 8 of the Workplace Relations Act, and s 340, had been met in relation to the agreement. Section 327 was found in Div 2 of Pt 8. Hence, it is common ground that, if the agreement concerned was not an agreement made with persons employed at the time in part of the single business of the employer, it had not come into operation.

4 The agreement concerned is entitled the Pilbara Iron Employee Agreement (“the PIEA”). The parties to the PIEA are the respondent to this appeal, Pilbara Iron Company (Services) Pty Ltd (“Pilbara Iron”) and 10 of its employees. By cl 3.1, the PIEA is expressed to apply to employees of Pilbara Iron:

employed on or after 28 July 2008, in classifications set out in this Agreement and employed in iron ore mining, processing, smelting, reducing and refining of ores and all ancillary operations within Australia, but outside of the central business district of any capital city and shall also apply to employees of the Company on secondment to related bodies corporate.

5 The appellant is the Construction, Forestry, Mining and Energy Union (“the CFMEU”), an organisation of employees registered pursuant to provisions now found in the *Fair Work (Registered Organisations) Act 2009* (Cth), which are in like form to provisions formerly found in Sch 1 to the Workplace Relations Act and in earlier legislation. The CFMEU has a significant number of members employed by Pilbara Iron in work of one or more of the kinds described in cl 3.1 of the PIEA, including members employed after 28 July 2008. In its statement of claim, the CFMEU also claimed to be representing a particular member, who was not among those employed after 28 July 2008, but was otherwise employed by Pilbara Iron in work that would fall within cl 3.1 of the PIEA. The question of the standing of the CFMEU to challenge the validity of the PIEA was in issue at first instance (where it was determined in favour of the CFMEU), but not in this appeal. Another issue at first instance (but not on appeal) was whether the 10 employees who entered into the PIEA had been employed before 28 July 2008. Those employees had entered into contracts of employment with Pilbara Iron before that date, but had not begun to perform work for Pilbara

Iron until that date or later. It was common ground in the appeal, that the 10 employees were employed on or after 28 July 2008, for the purposes of cl 3.1 of the PIEA.

6 The learned primary judge rejected the contention of the CFMEU that a group of employees chosen by reference to the date of commencement of their employment could not constitute part of a single business, for the purposes of s 327 of the Workplace Relations Act, and that s 327 required an employer wishing to enter into an employee collective agreement with persons employed in a single business or part of a single business to enter into such an agreement with all of those persons, not merely with some. See *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd* [2010] FCA 822.

The legislation

7 Before the Transition Act came into operation, the Workplace Relations Act had contained provisions permitting an employer to enter into an individual statutory agreement, called an Australian Workplace Agreement (“AWA”), with an employee, as well as provisions permitting employee collective agreements and union collective agreements. One of the changes effected by the Transition Act was to prevent the making of any further AWAs, and to substitute for them a kind of agreement called an individual transitional employment agreement (“ITEA”). Section 326 of the Workplace Relations Act made provision for an employer to make an ITEA with an employee. Section 327 provided:

An employer may make an agreement (an *employee collective agreement*) in writing with persons employed at the time in a single business (or part of a single business) of the employer whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement.

8 Section 328 provided for an employer to make an agreement with an organisation of employees in the circumstances it prescribed. The succeeding sections made provision for other kinds of agreements, being a union greenfields agreement (s 329), an employer greenfields agreement (s 330) and a multiple-business agreement (s 331). Section 333(b) provided that an employee collective agreement was made at the time when the agreement was approved in accordance with s 340. Section 340(2) provided:

An employee collective agreement or union collective agreement is *approved* if:

- (a) the employer has given all of the persons employed at the time whose employment will, or would but for the operation of an ITEA that has passed

its nominal expiry date, be subject to the agreement a reasonable opportunity to decide whether they want to approve the agreement; and

- (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the agreement; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the agreement.

9 The effect of s 341 was that an employer lodging a workplace agreement that had not been approved in accordance with s 340 could be subject to a penalty. Section 342(1) required lodgement of an employee collective agreement, approved in accordance with s 340, with the Workplace Authority Director in accordance with s 344, within 14 days after the approval.

10 Section 347 contained provisions as to when a workplace agreement was to come into operation, and to cease operation. Section 347A(1) provided:

Despite section 347, a workplace agreement does not come into operation unless the requirements in Division 2 and section 340 have been met in relation to the agreement.

11 Section 327 is found in Div 2 of Pt 8 of the Workplace Relations Act.

12 Reference should be made to one further provision, found within Div 1 of Pt 8. Section 322 provides:

- (1) For the purposes of this Part, a *single business* is:
 - (a) a business, project or undertaking that is carried on by an employer;
or
 - (b) the activities carried on by:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
 - (iii) any other body in which the Commonwealth, a State or a Territory has a controlling interest.

- (2) For the purposes of this Part:
- (a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and
 - (b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act 2001* each carry on a single business:
 - (i) the corporations may be treated as one employer; and
 - (ii) the single businesses may be treated as one single business.
- (3) For the purposes of this Part, a part of a single business includes, for example:
- (a) a geographically distinct part of the single business; or
 - (b) a distinct operational or organisational unit within the single business.

The facts

13 Pilbara Iron operates a large enterprise in Western Australia, engaged in the mining and processing of iron ore and other operations. Part of its operations is a rail network. At the time relevant to this case, Pilbara Iron employed 2,793 persons in four groups of classifications performing work in connection with the rail network. Of those, 159 were members of the CFMEU, of whom 31 were employed after 28 July 2008.

14 Following the amendments made to the Workplace Relations Act by the Transition Act, Pilbara Iron decided that it would take steps to enter into an employee collective agreement reflecting the terms of AWAs to which it was a party with its existing employees. Pilbara Iron decided, however, that it would not offer to enter into an employee collective agreement with its existing employees, who were employed under AWAs still within their nominal terms, AWAs whose nominal terms had expired, ITEAs and common law contracts underpinned by a federal award to which the CFMEU was not a party.

15 Between 8 and 11 July 2008, Pilbara Iron offered contracts of employment to 10 new employees, which were accepted on various dates between 9 and 28 July 2008. All prospective employees were advised that, when they commenced work on 28 July 2008, steps would be taken to make an agreement with them and other employees commencing employment, which would apply both to them and to future employees in similar positions.

Each of the 10 employees was engaged in classifications connected with the rail network. The terms of the proposed agreement were capable of application to existing employees if they fell within its general operation. The classification structure of the proposed agreement would have applied to existing employees as it did to the 10 new employees. The new employees performed work of the same kind and at the same locations as the existing employees who were employed as operators or maintainers in the rail network. Pilbara Iron did not give to any of its existing employees the opportunity to consider or to approve the terms of the PIEA.

16 After they had begun work, the 10 new employees approved the agreement and entered into it. Pilbara Iron lodged the agreement with the Workplace Authority Director on 1 August 2008. On 18 November 2008, Pilbara Iron was notified that the agreement had been approved. It therefore came into operation nominally from 25 November 2008 (see ss 346M(1) and 347(1)(b) of the Workplace Relations Act). From that date, Pilbara Iron applied the terms of the PIEA in relation to any new employees in the relevant classifications and the relevant types of work, but not to any employees who had continued to be employed by Pilbara Iron since before 28 July 2008. The PIEA was so applied on the basis that it was binding on Pilbara Iron in respect of all employees in relevant classifications commencing employment on or after 28 July 2008, but not to any of the then existing employees.

The primary judge's reasons for judgment

17 In his reasons for judgment, the primary judge referred to the history of the legislation. At [6], his Honour pointed out that, before 27 March 2008, the Workplace Relations Act made provision for various instruments regulating the terms and conditions of employment of employees, including AWAs. Under amendments to the Workplace Relations Act that came into effect on that date, as his Honour said, an emphasis on collective negotiation of terms and conditions of employment was reintroduced.

18 At [26], his Honour dealt with an argument, put on behalf of the CFMEU, that s 327 of the Workplace Relations Act required that an employee collective agreement be made with all the persons who were employed at the time in the single business or part of the single business to which the agreement applied. His Honour pointed out that this argument required that s 327 be construed as if the word "all" appeared before the phrase "persons employed at the time". His Honour felt that s 327 "would have an intelligible and effective operation

without that assumption being made.” His Honour then referred to the examples of a part of a single business found in s 322(3) of the Workplace Relations Act. At [27], his Honour accepted the argument that identification of a group of employees by reference only to the time from which their employment commenced was not consonant with those examples. His Honour said:

The examples given by s 322(3) clearly relate to functional matters reflecting the organisation of an employer’s business. They do not, in that sense, relate to factors which would serve to identify various groups of employees by reference to the characteristics of those employees. In any business, or individual workplace, it is possible, and likely in many cases, that employees in different classifications or using different skills will be engaged. To take a very simple example, there may be employees working in a number of different trades or callings at a single worksite. Notwithstanding an argument to the contrary by the respondent, I do not think that the identification of a group of employees by reference to their trade or calling would necessarily, or in most cases, sufficiently describe “a part of a single business”. Nor do I accept that identifying a group of employees by reference to the date upon which their employment commenced would achieve that objective.

19 At [28], his Honour considered the CFMEU faced a different problem. As his Honour saw it, that problem was “that there is no reason arising from the fact that an agreement may be made with employees in a part of a single business to conclude that it must necessarily have been made with *all* such persons.” His Honour referred to the CFMEU’s argument that it would not have been necessary to permit an agreement to be made in part of a single business if it was possible to make an agreement with any group of employees in a single business. His Honour rejected this argument by reference to surrounding provisions, which he said made it tolerably clear that there was work for the concept of part of a single business to do without serving the purpose for which the CFMEU contended. As an example, his Honour referred to s 331 of the Workplace Relations Act, which permits entry into a “multiple-business agreement”. His Honour expressed the view that an agreement relating to geographically distinct parts of a single business, or to more than one distinct operational or organisational unit within a single business, would have been a multiple-business agreement, requiring authorisation by the Workplace Authority Director.

20 At [29], his Honour referred to other indications in the Workplace Relations Act suggesting that it was unnecessary to make an agreement relating to all persons in a single business or part of a single business. The reference was to s 423 and s 426 of the Workplace Relations Act, concerning the initiation of a bargaining period by an employee acting on his or her own behalf and on behalf of other employees, and the requirement that the initiating

notice be accompanied by particulars of the types of employees whose employment will be subject to the proposed agreement and the other persons who would be bound by it. At [30], his Honour said that the requirement to identify the types of employees whose employment would be subject to the proposed agreement seemed inconsistent with the notion that an agreement was intended to extend to all persons in the single business or part of the single business.

21 At [31], the primary judge dealt with the question whether s 327 of the Workplace Relations Act was intended to permit an employer to make an agreement with only 10 new employees, which would apply for five years and extend to all new employees joining the workforce. His Honour referred to s 328 of the Workplace Relations Act, which permitted a registered organisation to make a union collective agreement even if it had only one member whose employment would be subject to the agreement. Such an agreement also might have a life of five years and apply to new employees. At [32], his Honour said:

When adequate account is taken of the overall structure of the provisions which interacted with s 327 I am unable to find a foundation for the restriction which the applicant asks to be assumed or inferred.

22 At [33], the primary judge referred to an analysis of the history of the provisions in the legislation, concentrating on references to a single business or part of a single business. His Honour said:

At one time those concepts were used in a different way. From 1996 until 2005 there was an express requirement that some agreements apply to all persons in a single business or part of a single business. There were also restrictions on agreements that applied only to a part of a single business that was not geographically or operationally distinct. Those requirements and restrictions were removed. That circumstance gives some support to the submission by the respondent that the construction urged by the applicant in the present case should not be accepted but I am inclined to give it relatively little weight in the light of the difficulty, to which I earlier referred, of the changing background of political and policy considerations.

23 At [34], his Honour concluded that it was not necessary to base his conclusions concerning the question of construction on the legislative history. In his Honour's opinion, a sufficient answer to the CFMEU's contentions was to be found in a consideration of the provisions of the Workplace Relations Act which applied at the time the agreement was made. His Honour held that the CFMEU had not established its case of showing that the PIEA did not meet the requirements of s 327.

Construing section 327

24 In construing any provision of any Act, the starting point is the words of the provision itself. Words that are undefined in the Act are presumed to have their ordinary and natural meaning, subject to the existence of any special or technical meaning pertaining to the subject-matter of the Act in question. The context of the words, both within the particular provision and in other provisions of the same Act, can have an important bearing on the construction adopted. So also can the history of legislative provisions, including additions to or deletions from earlier provisions that have otherwise been re-enacted substantially. If the words of the provision are capable of more than one construction, s 15AA of the *Acts Interpretation Act 1901* (Cth) (“the Acts Interpretation Act”) requires that a construction that would promote the purpose or object underlying the Act, whether that purpose or object is stated expressly in the Act or not, is to be preferred to a construction that would not promote that purpose or object. Section 15AB of the Acts Interpretation Act permits resort to extrinsic material “capable of assisting in the ascertainment of the meaning of the provision”, to confirm that the meaning is the ordinary meaning (taking into account the context and the purpose or object underlying the Act) or to determine the meaning where there is ambiguity or obscurity, or the ordinary meaning would lead to a result that is manifestly absurd or is unreasonable. Among the extrinsic materials that may be considered, s 15AB(2) of the Acts Interpretation Act mentions specifically any explanatory memorandum furnished to the members of either House of Parliament by a Minister before the provision was enacted, and relating to the Bill containing the provision.

25 The class of persons with whom s 327 of the Workplace Relations Act permitted an employer to make an employee collective agreement contained three elements. The first element was “persons employed at the time”, i.e. current employees. The second element was “in a single business (or part of a single business) of the employer”. The third element was “whose employment will...be subject to the agreement.” The importance of the first and third elements was made clear in relation to an earlier similar provision by the Full Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [1999] FCA 847 (1999) 93 FCR 317 at [121]-[123] per Wilcox and Madgwick JJ, with whom Moore J agreed.

26 The use of the preposition “in” to connect the first and second elements of the group to which s 327 refers may be of significance to the question arising in the present case. The

current employees must be employed “in” the single business or part of a single business of the employer. This suggests that, in the case of a part of a single business, the part must be identified otherwise than by reference to the employees whose employment will be subject to the agreement. In other words, the part cannot be identified simply by reference to those employees. Employees who constituted the part could not be said to be employed “in” the part.

27 The words used in s 327 of the Workplace Relations Act are relevantly undefined. The definitions of “*employee*” in s 5, “*employer*” in s 6 and “*employment*” in s 7 are not of significance for the present case. The definition of “a part of a single business” (quoted in [10] above) is clearly not exhaustive. In addition to using the word “includes”, that definition uses the words “for example”. Section 15AD(a) of the Acts Interpretation Act makes it clear that an example is not to be taken to provide an exhaustive definition. There is no evidence of any special use of the word “part” pertaining to the subject-matter of the Workplace Relations Act. Resort must therefore be had to the ordinary and natural meaning of that word.

28 In three separate decisions, the Full Bench of the Australian Industrial Relations Commission expressed the view that the word “part” should be given its ordinary and natural meaning and not a meaning confined by reference to some supposed policy considerations. The first of those decisions was *Australian Municipal, Administrative, Clerical and Services Union v Boroondara City Council* (unreported, Dec 945/99 M Print R8158, 13 August 1999) (“*Boroondara*”). That decision concerned an agreement between a municipal council and its employees who supervised school crossings. The applicable provision (s 170LI of the Workplace Relations Act) was ancestral to s 327 of the Workplace Relations Act at the time of the present case. Section 170LI(1) required that, for an application to be made to the Industrial Relations Commission to certify certain agreements, there must be an agreement in writing, amongst other things, with “(b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business of the employer and whose employment is subject to the agreement”. At [6], the Full Bench said:

We have concluded that the term “part of a single business” in s.170LI(1)(b) is to be given its ordinary meaning. In particular the term is not to be read in any special way informed by policy considerations of the kind urged upon us by the appellants. Section 170LB(3), which is set out above, provides that a part of a single business includes a geographically distinct part of a business or a distinct operational or

organisational unit of a business, but it does so by example only. This leaves open the possibility that a part of a single business may be constituted by something which is neither geographically distinct, nor a distinct operational or organisational [*sic*] unit.

29 The Full Bench then referred to what was then s 170LU(8), and continued:

The effect of this section is that where application is made to certify an agreement and the agreement defines a part of a business other than in terms of geographic, operational or organisational distinctiveness the Commission must refuse to certify the agreement if it considers that employees have been unfairly excluded from the agreement's coverage. The clear implication is that the term "part of a business" is not to be given a narrow construction.

30 It should be noted that the *Boroondara* case concerned an agreement applicable to all crossing supervisors employed by the employer. It appears from [5] that the employees concerned were not regarded as operationally distinct, but were part of a local laws team charged with responsibility for safety. This leaves open the possibility that the part of a single business in which those persons were employed was that operationally distinct local laws team charged with the responsibility for safety, and that the agreement could relate to the crossing supervisors because it was confined to the work performed by them. In other words, the third element confined the scope of the agreement in that case.

31 The second of the decisions is *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Tyco Australia Pty Ltd (t/as Wormald)* (2006) 157 IR 15 ("Tyco"). In that case, a union was attempting to negotiate an agreement with an employer in relation to a particular site. Again, the agreement would apply to the employment of all persons on that site performing particular kinds of work. The Full Bench rejected the argument of the employer that the proposed agreement would not relate to part of a single business, because the actual number of employees was only two and, in the near future, was intended to be decreased to one. At [27], the Full Bench expressed the view that the site in question was a geographically distinct part of the employer's business. At [29], the Full Bench said:

There seems no reason of policy or statutory construction to limit the broad meaning which the section gives to the expression "part of a single business." Furthermore a broad meaning is consistent with the promotion of a range of options for enterprise level bargaining, which we take to be encompassed by the objects of the Act.

32

The third decision of the Full Bench is *Bilfinger Berger Services (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2008] AIRCFB 763 (2008) 176 IR 121. This case concerned the provisions of the Workplace Relations Act as they stood at the time of the present case. A union wished to make a collective agreement with an employer in respect of all employees employed in the business of the employer, eligible to become members of the union, engaged in specified classifications, but excluding work performed in a particular industry, work performed at a particular site and work performed in maintenance at power stations in a particular locality. The employer operated five businesses, which were organisationally separate. The union applied successfully for a protected action ballot pursuant to s 451 of the Workplace Relations Act, to determine during the bargaining period for the agreement whether proposed industrial action had the support of the relevant employees. The Full Bench dealt with the appeal from the decision ordering that a ballot of the relevant employees be held. In the course of dismissing the appeal, the Full Bench considered the question whether the employees described in the union's notice were employed in a single business or a part of a single business. At [14], the Full Bench said:

[The employer] submitted that it is clear on the face of the bargaining notice that the agreement does not purport to apply to the single business of [the employer] because various employees and different locations are excluded. This submission is not without its difficulties. It seems to assume that unless an agreement applies to all of the operations and all of the employees of an employer it is not, to use the words of s 423(2), "a collective agreement...in relation to employees who are employed in a single business." We doubt that s 423(2) was intended to operate in such a restrictive fashion. Provided an agreement is confined in its application to employees in a single business as defined, there is no additional requirement that the agreement should apply to all of the employees. That said, it seems clear enough that the section distinguishes between a single business and a part of a single business.

33

At [15], the Full Bench dealt with an argument that the word "part" should not be given its ordinary meaning. In the view of the Full Bench, "there is no reason to think that the legislature intended to place limitations on the ordinary meaning of the word "part"". In response to a submission that the examples given in s 322(3) of the Workplace Relations Act would be unnecessary if part of a single business could be anything less than the whole, the Full Bench said:

The difficulty with this submission is that the examples are only that. They do not identify a single criterion but rather two criteria, and the section leaves open the possibility of other criteria. The criterion in s 322(3)(a) is geographical distinctiveness. The criterion in s 322(3)(b) is operational or organisational

separation. There is no warrant for reading s 322(3) as limiting the criteria that might be applied in identifying a part of a single business.

The Full Bench then quoted from *Tyco* and, at [16], from the Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) (see [33] below). At [17], the Full Bench said:

In this case it appears, by reference to the terms of the bargaining notice and the CEPU's rules, that it wants to try and make an agreement with [the employer] covering electricians other than those employed in specified industries or locations. On the construction we favour such an agreement would relate to employees in a part of a single business, as the Senior Deputy President found.

34 Two things should be noted about these three decisions of the Full Bench. First, in none of those decisions was the Full Bench faced with an issue of the kind raised in the present case, in which the defining characteristic of what was said to be a part of a single business is a group of employees distinguished by the date on which they started work. Second, although in each case the Full Bench said that the word "part" should be given its ordinary meaning, but begs the question about what is the ordinary meaning. None of the cases involves an examination of what its ordinary meaning might be in the context in which it appears in 327 of the Workplace Relations Act.

35 Dictionary definitions can cast light on the meaning of a word. In the case of the word "part", in the general sense in which it is used in s 327 of the Workplace Relations Act, definitions from the Oxford English Dictionary ("OED") and the Macquarie Dictionary ("Macquarie") demonstrate an interesting duality of meanings. On the one hand, "part" can be used to signify "anything less than the whole": e.g. "an amount, but not all, of a thing or a number of things (material or immaterial)" (OED); "Some" (OED); or "a piece, fragment" (Macquarie). On the other hand, "part" may be used to signify something more recognisable as having its own form and limits which, together with others makes up the whole: "A piece or section of something which together with another or others makes up the whole (whether actually separate from the rest or not)" (OED); "any of the smaller things into which a thing is or may be divided (in reality or notionally)" (OED); "a portion, segment, constituent, fraction" (OED); "An essential element; an integral portion of a larger whole" (OED); "a portion or division of a whole, separate in reality, or in thought only" (Macquarie); or "a piece, fragment, fraction, or section; a constituent" (Macquarie).

36 In determining which of these meanings is the appropriate one, extrinsic materials are not of much assistance. The Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) at para 795 says of the clause that became s 322(3) of the Workplace Relations Act that it:

defines a part of a single business to include a geographically distinct part or a distinct operational or organisational unit within the single business. The definition is inclusive and does not limit the scope for collective agreements to apply to a part of a single business that may be constituted in any relevant way (e.g. all of the boilermakers employed in the business).

Perhaps the only small piece of assistance that this paragraph provides as to the meaning of “part” is the suggestion that the part of a single business “may be constituted in any relevant way”. It could be argued that, if the person who drafted the Bill had intended that the part could be constituted in any way at all, the word “relevant” in the Explanatory Memorandum would not have been used. With respect to the author of the Explanatory Memorandum, the example given in parenthesis may be less of an example of a part of a single business than an example of a group of employees with whom an employer might make an agreement under s 327 of the Workplace Relations Act, i.e. all current employees employed in the single business in relation to the work of boilermaking. It would make no sense to include in an agreement relating to the terms and conditions on which boilermaking work was to be performed an employee who happened to have the qualifications of a boilermaker, but was employed to perform some totally different kind of work.

37 The ascertainment of a legislative purpose underlying s 327 of the Workplace Relations Act is difficult, as such searches often are. Resort to the quite lengthy list of aspirations in s 3, together described as the “**Principal object**” of the Workplace Relations Act, is of little assistance. To attempt to discern the relevance of each of the 15 or so paragraphs of that principal object to an employee collective agreement would be an unrewarding task. The danger in selecting from among those paragraphs is that a selection might be made that leads to a predetermined conclusion. In any event, the objects are generally expressed in a vague way, so as to cast no real light on the intended meaning of any particular provision. Two examples will suffice:

- (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

- (e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances

On the one hand, it might be said that para (d) suggests that s 327 is directed to agreements at the workplace or enterprise level. This would be somewhat undermined by para (e) if a particular employer and its employees were to choose as the most appropriate form of agreement for their particular circumstances something at a different level.

38

It is possible to discern in Div 2 of Pt 8 of the Workplace Relations Act something of an underlying purpose, when the legislative history is taken into account. AWAs were replaced by ITEAs, which could have only a limited life. As the primary judge said at [6] of his reasons for judgment, “An emphasis on collective negotiation of terms and conditions of employment was re-introduced into the WR Act”. If the underlying purpose of the legislative scheme that included s 327 of the Workplace Relations Act is to reduce the emphasis on individual negotiation, and to increase the emphasis on collective negotiation, this might assist in the interpretation of s 327. If it were possible for an employer to choose any employees it wishes, and to designate them as the employees in part of its single business with whom it wishes to make a collective agreement, the underlying purpose of promoting collective negotiation might be subverted. The proposition can be tested this way. Instead of entering into an agreement with a group of employees chosen by reference to their date of commencement of work, an employer could use other criteria. Thus, an employer wishing to negotiate for terms and conditions of employment more favourable to it, and less favourable to employees, could choose to enter into an agreement only with those employees who were prepared to accept the employer’s proposal. If the resulting agreement bound employees who came to work for the employer at a later date (as the PIEA is intended to do), over time an employer could downgrade terms and conditions of employment without any real opportunity for its relevant workforce at the time of entry into the agreement to raise objection to this. An employer whose proposed agreement is rejected by a majority of a group of employees could simply select as a new group the minority who would have approved the agreement and impose the employer’s choice of terms and conditions on subsequent employees. The group selected could be as small as two employees. Indeed, if the principle found in s 23(b) of the Acts Interpretation Act that, in the absence of a contrary intention, the plural includes the singular, were to be regarded as applicable, the employer could select a group consisting of one employee. In any of these ways, a construction of s 327 of the Workplace Relations Act that permitted arbitrary selection of the group of employees with whom an agreement was to

be made would be contrary to the underlying purpose of the legislation that brought the Workplace Relations Act into the form it was at the time of the events the subject of this case.

39 It is no answer to these contentions to say, as the primary judge did at [31] of his reasons for judgment, that a union collective agreement could be entered into in respect of a very small number of employees. So also could s 327 result in an agreement applicable only to a very small number of employees, if there were only a small number of employees employed in a part of a single business whose work would be subject to that agreement. The issue is not one of numbers, but of composition of the group. The question is whether the employees concerned can be selected by reference to some arbitrary criterion and then, having been selected, labelled as the part of a single business to which the agreement is to relate.

40 Little assistance can be gained from other provisions of the Workplace Relations Act. Counsel for the CFMEU referred to a number of provisions of Pt 9, in which the words “a single business or part of a single business” appeared. They included: s 421(3) and (4), dealing with an exemption to the prohibition on pattern bargaining; s 423(2), dealing with the initiation of a bargaining period; s 426(a), relating to the initiating notice; and s 430(10) and s 431(4), relating to applications for suspension or termination of bargaining periods. Nothing in any of those provisions casts any light on the meaning of s 327. Similarly, counsel for Pilbara Iron relied on s 351(b), which makes a workplace agreement binding on all persons whose employment is, at any time when the agreement is in operation, subject to the agreement, as an indication that it was open to an employer to choose which employees would be subject to the agreement. Section 351(b) does no more than reflect the third element of s 327. It provides no aid to the interpretation of s 327.

41 Some slight guidance as to the meaning of s 327 might be found in s 340(2), which provides for the approval of an employee collective agreement or union collective agreement. In substance, all of the persons employed at the time whose employment will be subject to the agreement must have a reasonable opportunity to decide whether they want to approve the agreement. There must then be a manifestation of that decision, either by a vote or by some other means, and a majority of those persons must decide that they want to approve the agreement. This provision demonstrates the intended collective nature of the agreement. It makes clear that, even though there might be employees who do not approve the agreement,

their wishes can be overridden by a majority approval. The dissenters will also be bound by the agreement. In the event that there was majority disapproval of a proposed agreement, to construe s 327 as allowing the employer the option of going ahead with the proposed agreement only with the minority who approved it would make nonsense of the process contemplated by s 340(2).

42 Nor does an examination of the legislative history of s 327 provide much assistance. Counsel for Pilbara Iron drew attention to the fact that the word “all” appeared in what was then s 170LI of the Workplace Relations Act after 1996, in the formulation “all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement.” In 2006, the word “all” was removed, when s 327 came to resemble the form it had at the time relevant to this case. At [33] of his reasons for judgment, the primary judge treated that circumstance as giving some support to the submissions on behalf of Pilbara Iron. His Honour was inclined to give it relatively little weight in the light of the “changing background of political and policy considerations.” With respect, that comment is apposite.

43 It can therefore be seen that there is no factor decisive of the construction of s 327 of the Workplace Relations Act to be found in the underlying legislative purpose, extrinsic materials, statutory context or legislative history. To some extent, the underlying purpose favours the construction advanced by the CFMEU. To a lesser extent, the statutory context, in the form of s 340(2) also supports that construction. To a lesser extent still, legislative history tends towards the construction favoured by Pilbara Iron. To resolve the central issue in the present case, it is necessary to return to the words of s 327 themselves, in conjunction with the inclusive definition found in s 322(3).

44 It must be conceded that it is difficult to imagine a discrete part of a single business that is not identifiable by reference to distinct geographical, operational or organisational factors (although in *Boroondara* it appears to have been accepted that the local crossing supervisors were not). It may be that the definition in s 322(3) was cast in inclusive form so as to recognise that a part of a single business may be identified by a combination of any two, or all three of the categories of distinct factors, geographical, operational and organisational. There would certainly be scope for a part of a single business to be so identified.

45

In the end, the feature of s 327 most significant to its construction is the use of the preposition “in”. The fact that the employees with whom the agreement is made must be employees “in” a single business or part of a single business is the clearest indication that the identification of the part of the single business (if that is the choice made) must be separate from the identification of the persons employed in it. The part of the single business concerned cannot simply be the employees with whom the employer has chosen to make the agreement. The part must be identifiable by reference to factors other than the employees themselves or the date they acquire that characteristic. The part cannot be constituted simply by those employees whom the employer has chosen as the other parties to the proposed agreement. This conclusion leads to the proposition that the part of a single business must itself be a recognisable section, segment or constituent of the business, consistently with the ordinary and natural meaning of the word “part”. The alternative construction, that a “part of a single business” is wide enough to include any of the employees employed in the business, selected on any basis whatsoever, including when they became employees, does not conform with the ordinary meaning. Moreover, Pilbara Iron’s principal argument, that the agreement was valid because it was formed with employees in the single business, would render the words “part of a single business” redundant. Indeed, if Pilbara Iron’s position were correct, the references to both “a single business” and “part of a single business” would be superfluous. It would be sufficient to provide for an agreement with persons employed at the time whose employment will be subject to the agreement, as the Fair Work Act has done in the case of enterprise agreements. A court construing a statutory provision must strive to give meaning to every word of it: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71]. Pilbara Iron submitted that the words did not add anything; they were merely facilitative. Facilitative of what it never explained. Words that add nothing, however, facilitate nothing.

46

The reason the primary judge found against the CFMEU was that he considered that the construction for which the CFMEU contended required reading into the section the word “all” before the words “persons employed at the time in a single business (or part of a single business)”. It is unnecessary, however, to go that far. The third element of s 327, the identification of the persons with whom an agreement may be made by reference to their employment, provides ample scope for the making of an agreement with some only of the persons employed in part of a single business. An employer is able to choose the type or types of employment to which the agreement will relate, so that it applies only to the persons

in the part of a single business engaged in that type or those types of employment. The choice may be made by reference to the trades or callings of employees (as the example of “all of the boilermakers” in the Explanatory Memorandum suggests) or to the tasks on which employees are engaged, such as maintenance, as distinct from production, as distinct from sales. Thus, there may be more than one agreement covering part of a single business, made with persons employed in that part in distinct types of employment.

47 When s 327 is read in this way, it becomes clear that the notional insertion of the word “all” before “persons employed” is hardly necessary. The agreement contemplated by s 327 is an agreement made with persons employed in a part of a single business whose employment will be subject to the agreement. It is not to be made with only some of those persons. It is to be an agreement for that section or division of the business.

48 Such a construction of s 327 is a sensible one. It accords with the underlying purpose of the relevant legislative provisions, identified in [38] above. It gives proper effect to the approval mechanism found in s 340(2), so that the minority of employees in the relevant category who do not approve the agreement can be bound, as well as future employees who come into the part of the single business and whose employment is of the type or types covered by the agreement. It demonstrates that the omission of the word “all”, which appeared in a previous provision, is of no practical consequence. For these reasons, that construction should be adopted.

Conclusion


49 The adoption of the construction of s 327 of the Workplace Relations Act referred to in [45] above leads to the conclusion that the PIEA was not an agreement made pursuant to that section. Clause 3.1 of the PIEA identified as the group of employees to which the agreement related something less than the entire category of persons employed in a single business or part of a single business whose employment would be subject to the agreement. The PIEA could not be lodged with the Workplace Authority Director, pursuant to s 342(1) of the Workplace Relations Act, because it was not an agreement of a type referred to in that section. In particular, it was not an “employee collective agreement”. By virtue of s 347A of the Workplace Relations Act, despite the provisions of s 347, the PIEA did not come into operation, because the requirements of Div 2 of Pt 8 of the Workplace Relations Act were not met in relation to it.

50 It follows that the primary judge was in error in dismissing the CFMEU's application. The appeal must be allowed. The order dismissing the application at first instance must be set aside. There should be substituted for that order a declaration to the effect that the PIEA did not come into operation as a workplace agreement under Pt 8 of the Workplace Relations Act.

Costs

51 Section 824(1) of the Workplace Relations Act provided that a party to a proceeding, including an appeal, in a matter arising under the Workplace Relations Act must not be ordered to pay costs incurred by any other party to the proceeding unless the proceeding was instituted vexatiously or without reasonable cause. As the CFMEU has been successful in its appeal, it could not be said that the appeal was instituted vexatiously or without reasonable cause. Section 824(2) provided for costs orders in the event of unreasonable act or omission by a party, causing another party to incur costs. There was no contention by either party that any such unreasonable act or omission had occurred. For these reasons, there can be no order as to the costs of the appeal.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justices Gray, Lander and Katzmann.

Associate: 

Dated: 25 July 2011

