FEDERAL COURT OF AUSTRALIA

Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2) [2016] FCA 2

File number:	QUD 847 of 2015
Judge:	**BROMBERG J**
Date of judgment:	5 January 2016
Catchwords:	**INDUSTRIAL LAW** – application by employer company seeking declaration that clauses of a document constituting an "incentive payment system" for piece-rate remuneration of its employees were not part of, and did not vary, the relevant enterprise agreement ("EA") – cl 3.10.1 of EA contemplated that where "parties" agreed on terms and conditions to remunerate employees under incentive payment system, such terms and conditions would be incorporated into the EA – EA made on 6 January 2009; document containing incentive payment system executed on 23 November 2009; application for approval of EA by Fair Work Commission ("Commission") made 24 November 2009; EA operative 1 January 2010 – whether s 257 *Fair Work Act 2009* (Cth) and s 46AA *Acts Interpretation Act 1901* (Cth) ("incorporation provisions") limited to authorising only incorporation of material in existence at the time of the making of an EA – incorporation provisions not so limited – whether incorporation of material otherwise than in existence at the time of the making of an EA inconsistent with or repugnant to the scheme of the FW Act for variation of EAs – that nature of incorporation not inconsistent with or repugnant to the scheme of the FW Act – consideration of how apparent tension between FW Act scheme for approval and variation of EAs on the one hand, and incorporation provisions on the other hand, is reconcilable – consideration of Commission's supervisory role on approval and variation of EAs – consideration of whether permissible to read words into s 257 FW Act – consideration of whether cl 3.10.1 is a "facilitative provision".
Legislation:	*Acts Interpretation Act 1901* (Cth) ss 46, 46AA, 46AA *Fair Work Act 2009* (Cth) ss 55, 63, 93, 101, 113A, 118, 121, 123, 126, 127, 172, 173, 180, 181, 182, 184, 185, 186, 187, 188, 190, 193, 194, 195, 196, 198, 199, 207, 209, 216, 217, 217A, 218, 253, 257, 570, Pt 2-2, Pt 2-4 Divs 2, 3, 4,

and 7

Workplace Relations Act 1996 (Cth), s 170MD

Explanatory Memorandum, Fair Work Bill 2008 (Cth)

Explanatory Memorandum, Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003 (Cth)

Revised Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth)

Cases cited:

Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813

City of Wanneroo v Holmes (1989) 30 IR 362

Director of Public Prosecutions (DPP) v Leys (2012) 296 ALR 96

Finance Sector Union of Australia v Commonwealth Bank of Australia (2005) 147 FCR 158

Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 at 592; [2000] 2 All ER 109

James Hardie & Coy Pty Ltd v Seltsam Pty Limited (1998) 196 CLR 53

Jones v Wrotham Park Estates [1980] AC 74

Kucks v CSR Limited (1996) 66 IR 182

Mills v Meeking (1990) 169 CLR 214

Newcastle City Council v GIO General Limited (1997) 191 CLR 85

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Rail Corporation New South Wales v Brown (2012) 82 NSWLR 318

Secretary, Department of Health and Ageing v Nguyen (2002) 124 FCR 425

Tallerman and Company Proprietary Limited v Nathan's Merchandise (Victoria) Proprietary Limited (1957) 98 CLR 93

Taylor v The Owners - Strata Plan No 11564 (2014) 253 CLR 531

Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union [2015] FCA 1033

Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union (2015) 230 FCR 565

Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union [2015] FCAFC 105

Teys Bros (Beenleigh) Pty Ltd / AMIEU Production

	Departments Enterprise Agreement 2010 [2009] FWAA 1894 *The Australasian Meat Industry Employees Union v Kilcoy Pastoral Company Limited* [2002] AIRC 419 *The Australasian Meat Industry Employees Union v Teys Australia Beenleigh Pty Ltd* [2014] FWCFB 5643 *The Australasian Meat Industry Employees Union v Teys Australia Beenleigh Pty Ltd* [2014] FWCFB 8589 *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* [2010] FWA 2731
Date of hearing:	20 and 21 October 2015
Registry:	Queensland
Division:	Fair Work
National Practice Area:	Employment and Industrial Relations
Category:	Catchwords
Number of paragraphs:	147
Counsel for the Applicant:	Mr SJ Wood QC with Mr RW Haddrick
Solicitor for the Applicant:	FCB Workplace Law
Counsel for the First Respondent:	Mr E Dalgleish with Mr C Buckley
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

QUD 847 of 2015

BETWEEN:	**TEYS AUSTRALIA BEENLEIGH PTY LTD** Applicant
AND:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION** First Respondent
	FAIR WORK COMMISSION Second Respondent
JUDGE:	**BROMBERG J**
DATE OF ORDER:	**5 JANUARY 2016**

THE COURT ORDERS THAT:

1. The application is dismissed.

2. Unless an application is made for costs within 7 days hereof, there be no order as to costs.

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

REASONS FOR JUDGMENT

BROMBERG J:

1 The Applicant (**Teys**) seeks a declaration that:

> … the *Teys Bros (Beenleigh) Pty Ltd Enterprise Agreement 2010 Remuneration Document October 2009* does not form part of, or vary, the *Teys Bros (Beenleigh) Pty Ltd/AMIEU Production Departments Enterprise Agreement 2010*, an enterprise agreement approved under the *Fair Work Act 2009* (Cth) …

2 An interlocutory application, made with the Originating Application, was heard on 15 September 2015 and was dealt with by my reasons for judgment published as *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCA 1033 (**interlocutory judgment**). There are uncontroversial background facts set out in the interlocutory judgment, in an agreed statement of facts, and which can be derived from other decisions and judgments in what has become a saga of litigation. Those facts are as follows.

3 Teys is a member of a group of companies engaged in beef producing, including at a meat-processing plant at Beenleigh in Queensland. The First Respondent (**AMIEU**) has representation rights in relation to certain of the employees of Teys. The Second Respondent filed a submitting appearance, save as to costs, and played no active part in this proceeding. In these reasons, a reference to "the parties" is to the active parties—that is, Teys and the AMIEU—only.

4 On 6 November 2009 a valid majority of employees approved and made the *Teys Bros (Beenleigh) Pty Ltd / AMIEU Production Departments Enterprise Agreement 2010* (**2010 EA**). Clause 3.10.1 of the 2010 EA included the following (italicisation in original):

> **3.10.1 Conditions Associated with Schemes**
>
> The parties may agree on terms and conditions to remunerate an Employee or group of Employees under an incentive payment system (*as an alternative to the time work payment system provided in this Agreement*) and any such terms and conditions and/or associated or incidental terms and conditions entered into and signed by the Union and/or the Joint Consultative Committee and Teys Bros, shall be
>
> - *binding on both parties, and*
> - *implemented in lieu of the time work payment system under this Agreement for the affected Employees, provided that the minimum level of remuneration that must be paid to Employees who are engaged under such incentive payment system must be at a rate which is no less than the relevant rate contained in paragraph 3.1.1 of this Agreement, and*

- *all wages and other entitlements payable under such a system will constitute terms of this Agreement.*

5 On a date no later than 23 November 2009, a document called the *Teys Bros (Beenleigh) Pty Ltd Enterprise Agreement 2010 Remuneration Document October 2009*, dealing with remuneration (**Remuneration Document**), was brought into existence. On 23 November 2009, the Remuneration Document was signed by representatives of Teys and the AMIEU.

6 On 24 November 2009, an application was filed in Fair Work Australia, now called the Fair Work Commission (**Commission**), to approve the 2010 EA. On 22 December 2009, Spencer C approved the 2010 EA (*Teys Bros (Beenleigh) Pty Ltd / AMIEU Production Departments Enterprise Agreement 2010* [2009] FWAA 1894). On 1 January 2010, the 2010 EA commenced to operate. It continues to cover and apply to employees at Teys's Beenleigh plant.

7 On 29 January 2010, the Remuneration Document was again signed on behalf of Teys. On 1 February 2010, it was again signed on behalf of the AMIEU. It was agreed as between the parties that there was no material difference as between the Remuneration Document signed in November 2009, and the document signed in January/February 2010, other than the dates upon which the documents were signed. It is not necessary to refer further to the version of the document signed in January/February 2010, and all future references to the "Remuneration Document" are to that document as signed on 23 November 2009.

8 From around 1 January 2010 to 3 October 2013, around 300 employees at the Beenleigh plant were remunerated consistently with the terms of the Remuneration Document.

9 In late 2013, a new enterprise agreement was purportedly made. Teys applied to the Commission for its approval. On 27 September 2013, Asbury DP approved the agreement, with effect on and from 4 October 2013. However, on 25 March 2014, the approval decision was quashed by a Full Bench of the Commission and, on 12 February 2015, Teys's judicial review application to a Full Court of this Court was determined against it: *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union* (2015) 230 FCR 565.

10 In the meantime, on 10 April 2014 Asbury DP again approved the same enterprise agreement (**2013 purported EA**), with effect from 17 April 2014, but that approval was again quashed by a Full Bench, on 18 September 2014: *The Australasian Meat Industry Employees Union v Teys Australia Beenleigh Pty Ltd* [2014] FWCFB 5643. Teys was given an opportunity to

provide undertakings to meet the Full Bench's concerns, but the undertakings given were not accepted and Teys's application for approval of the agreement was dismissed: *The Australasian Meat Industry Employees Union v Teys Australia Beenleigh Pty Ltd* [2014] FWCFB 8589. Teys's judicial review application to a Full Court of this Court, in respect of the last-mentioned decision of the Full Bench, was unsuccessful: *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 105.

11 In consequence, the AMIEU demanded that Teys remedy any underpayments resulting from Teys wrongly applying the 2013 purported EA rather than the 2010 EA. That demand was made on the basis of the AMIEU's view that the "incentive payment system" contained in the Remuneration Document was incorporated into the 2010 EA by cl 3.10.1.

12 In response by letter dated 27 August 2015, and for the first time, Teys denied that the incentive payment system, as provided for by certain clauses in the Remuneration Document, had been incorporated into the 2010 EA. The AMIEU sought to have that controversy dealt with by the Commission. Teys sought to have it dealt with in this Court by this proceeding. The effect of the interlocutory judgment is that Teys's position prevailed. It is that controversy—whether the incentive payment system, the terms of which are contained in the Remuneration Document, was validly incorporated into the 2010 EA—that is in issue in this proceeding.

13 Some detail is required as to what is meant by "incentive payment system." Historically, at the Beenleigh plant (and, it appears, elsewhere in the meat-processing industry), at least the following two modes of remuneration have been utilised: time-based remuneration, and piece-rate remuneration. The subject of an "incentive payment system" is piece-rate remuneration. An example of time-based remuneration can be found in the 2010 EA in cl 3.1, in which it is provided (for example) that a K4-class slaughterer is to be paid $19.29 per hour, during the period 1 January 2010 to 5 November 2010. Piece-rate remuneration took the form of payment either per kilogram of meat processed in the "boning room" of the plant, or per head of cattle slaughtered and processed on the "slaughter floor" of the plant. As an instance, cl 2.1.1 of the Remuneration Document provided that boners would be paid 3.753 cents per kilogram, measured on a "cold weight input" into the boning room, during the period 4 October 2009 to 5 November 2010. Clause 2.2.1 provided that a K1-class slaughterer would be paid $7.75 per head of cattle processed on the slaughter floor during the period 4 October 2009 to 5 November 2010.

14 The issue in this litigation arises because, whereas the time-based remuneration provisions are found both in the 2010 EA itself and in the Remuneration Document, the piece-rate or incentive-based remuneration clauses (which shall henceforth be collectively referred to as the **incentive payment system**) were contained only in the Remuneration Document. Thus, if Teys was able to establish that the incentive payment system was not incorporated into the 2010 EA, that may well have the effect that amounts contemplated in the incentive payment system clauses were not payable—at least under the 2010 EA—by Teys to its employees.

15 In so far as that outcome would allow Teys to avoid paying its employees pursuant to the more remunerative incentive payment system, that would be a fairly radical departure from how the parties had historically conducted themselves. As appears from the evidence of Mr Matthew Journeaux (an AMIEU organiser, called by the AMIEU), there is a not insubstantial history of Teys paying its employees purportedly pursuant to incorporated incentive payment systems, including in the immediately-previous round of agreements. Mr Journeaux became responsible for organising AMIEU members at the Beenleigh plant in 2005. In 2006, he was involved in the negotiation of a new certified agreement for boning room employees. That culminated in the making of the *Teys Bros (Beenleigh) Pty Ltd Boning Room and Associated Departments Certified Agreement 2006* (**2006 Boning Room EBA**), cl 1.8 of which was as follows:

> Any agreements, including production agreements and arrangements, entered into and signed by the Union and/or the Joint Consultative Committee and the Company, shall be binding on both parties, provided that any such agreements have been negotiated and finalised in accordance with this Agreement.

16 A document called the *Beenleigh Boning Room E.B.A. Remuneration Document February 2006* was made. That document included per-kilogram rates and other matters related thereto. It appears that the parties treated that document as having been incorporated or caught by cl 1.8 of the 2006 Boning Room EBA—or, at least and in any event, that the employees covered by the 2006 Boning Room EBA were paid, where applicable, in accordance with the incentive rates in the boning room remuneration document.

17 There was also a certified agreement in relation to slaughter floor employees, being the *Teys Bros (Beenleigh Pty Ltd) Slaughter Floor and Associated Departments Certified Agreement 2004* (**2004 Slaughter Floor EBA**), cl 1.8 of which was identical to cl 1.8 of the 2006 boning room EBA. Again, it appears that the parties treated a remuneration document, which contained incentive payments, made for the purposes of the 2004 slaughter floor EBA

(the *Beenleigh Slaughter Floor and Associated Departments E.B.A. 2004 Remuneration Document*), as having been incorporated or caught by cl 1.8 of the 2004 Slaughter Floor EBA, or at least and in any event that the employees covered by the 2004 Slaughter Floor EBA were paid, where applicable, in accordance with the incentive rates in the slaughter floor remuneration document.

18 Mr Journeaux deposed that the 2004 Slaughter Floor EBA was due to expire in 2007, but that Teys indicated to the AMIEU that it had a desire to harmonise its boning room and slaughter floor agreements, and that it was proposed that an interim scheme be implemented to carry over the 2004 Slaughter Floor EBA until Teys was ready to negotiate a single harmonised agreement for the entire Beenleigh facility. That involved the continued operation of the 2004 Slaughter Floor EBA, subject to agreed modifications, and subject to the making of an interim remuneration document, called the *Beenleigh Slaughter Floor and Associated Departments E.B.A. 2004 Interim Remuneration Document October 2007*. Again, there is no suggestion that slaughter floor employees were not paid in accordance with the incentive rates, where applicable, set out in the interim slaughter floor remuneration document.

19 The next step was the negotiations for and making of the 2010 EA, about which more will be been said below. However, it is apparent from the foregoing that incentive payment systems were well recognised at Teys's Beenleigh plant, and had been in force for years prior to the making of the 2010 EA. Teys's own witnesses, including persons whose titles and participation in the negotiations for the 2010 EA indicate that they were fairly senior employees, thought that the terms of the 2010 EA included an incentive payment system. While, ultimately, this case turns on an issue of statutory construction, in so far as the interpretation of cl 3.10.1 is in issue I take into account, as a surrounding circumstance, that, prior to the 2010 EA, incentive remuneration pursuant to separate remuneration documents made for the purposes of industrial agreements had been used in relation to both boning room and slaughter floor employees.

20 It was not, then, surprising that for a significant period following the making of the 2010 EA and the Remuneration Document, Teys conducted itself as though the incentive payment system contained in the latter had been incorporated into the former. It was more surprising, given what is in issue in this litigation, that witnesses called by Teys *in this proceeding* maintained the view that the incentive payment system was part of the 2010 EA. When taken

to the issue in cross-examination, Mr Shane Gee, the General Manager of Operations Beenleigh, gave this evidence:

> MR DALGLEISH: Do you acknowledge that skilled employees are remunerated on a piece-rate basis under the 2010 agreement?
>
> MR GEE: Yes.
>
> MR DALGLEISH: So you're not suggesting that the incentive rates are not terms of the 2010 agreement?
>
> MR GEE: No. I'm not.

21 Mr Archie, a human resources manager employed and called by Teys, gave this evidence:

> MR DALGLEISH: … Do you acknowledge that skilled employees are remunerated, Mr Archie, on a piece-rate basis under the 2010 agreement?
>
> MR ARCHIE: Yes.
>
> MR DALGLEISH: So you're not suggesting that incentive rates paid to skilled employees are not terms of the 2010 agreement?
>
> MR ARCHIE: No. There's a kilo rate in there. That's correct.
>
> MR DALGLEISH: There's a kilo rate. And there's a head rate, is there, in the 2010 enterprise agreement?
>
> MR ARCHIE: … I believe so.
>
> [Mr Archie was asked to identify clauses in the 2010 agreement that dealt with a kilo rate, a head rate, and bull penalties, which he was unable to do.]
>
> MR DALGLEISH: Do you still acknowledge that skilled employees are remunerated on piece-rate basis under the 2010 agreement, Mr Archie?
>
> MR ARCHIE: They have been. Yes.

22 Those acknowledgements reveal that the argument Teys advanced in this proceeding was not one that was consistent with its own senior employees' understanding of the effect of the 2010 EA. Nor does it necessarily accord with ordinary conceptions of fairness, a matter expressly alluded to by Teys's senior counsel. Nevertheless, that is a different issue to its legal merit, and it is the legal merit of the respective positions advanced by Teys and the AMIEU to which I will presently turn.

23 As a final preliminary issue, I note the following: the parties each appeared to direct their submissions to whether the "Remuneration Document" was incorporated into the 2010 EA. And, the declaration sought by Teys used that kind of terminology. But it is clear from cl 3.10.1 that only terms and conditions to remunerate an employee under an incentive payment system (and associated terms) can be incorporated, and so terms having nothing to do with incentive payment could not attract the operation of cl 3.10.1. I think that this must have been clear to the parties, and so I think that when they referred to the incorporation of the Remuneration Document, really what they meant was that, in so far as the Remuneration Document contained an incentive payment system, the clauses constituting that system were or were not incorporated. I will proceed on the basis of that understanding.

THE COMPETING CONTENTIONS

24 The AMIEU contended that the terms of the incentive payment system were incorporated into the 2010 EA by the operation of cl 3.10.1. The AMIEU relied upon s 257 of the *Fair Work Act 2009* (Cth) (**FW Act**) as authorising the incorporation effectuated by cl 3.10.1.

25 Teys submitted that the incorporation contended for by the AMIEU was not authorised by s 257 and was not supported by cl 3.10.1. Teys contended that there were five preconditions identified by the terms of cl 3.10.1 that must have been satisfied for an incorporation to have been effectuated. First, there must have been an agreement made between Teys and the AMIEU (**agreement precondition**). In that regard, Teys accepted that when cl 3.10.1 referred to "the parties" it meant the industrial parties who had negotiated the 2010 EA. Second, the terms to be incorporated must have dealt with an "incentive payment system". Third, the incentive payment system to be incorporated must operate as an alternative to the "time work payment system". A fourth precondition asserted by Teys, although acknowledged as no different to the first precondition, was that the agreement referred to by the clause must have been "entered into". Fifth, cl 3.10.1 required the agreement to have been signed by Teys and the AMIEU or Teys and the "Joint Consultative Committee" (**signature precondition**).

26 Contrary to what was said at [14] and [16] of Teys's written submissions in reply (which I regard as not pressed), Teys accepted in oral submissions that if all those preconditions had been satisfied *at the time that the 2010 EA was made,* cl 3.10.1 would have operated to incorporate the terms and conditions of an incentive payment system and such an incorporation would have been authorised by s 257.

27 There was no issue that the time that an enterprise agreement is made is the time when a majority of eligible employees who cast a valid vote approve the agreement: s 182(1) of the FW Act. Nor was there any issue that, in relation to the 2010 EA, that occurred on 6 November 2009.

28 Teys contended that, on that date, neither the agreement precondition nor the signature precondition was satisfied, and there was no capacity for the incentive payment system to have been incorporated in a manner authorised by either s 257 or cl 3.10.1.

29 On the submission of Teys, that was so because, properly construed, s 257 only authorises the incorporation of "material contained in an instrument or other writing" that is in existence at the time that the enterprise agreement is made. It contended that material of the kind that the AMIEU contended had been incorporated was not, on 6 November 2009, in existence because it did not exist in the form mandated by cl 3.10.1. That was so because the agreement precondition and the signature precondition had not been satisfied. Interestingly, in Teys's letter to the AMIEU dated 27 August 2015, its rationale for saying the Remuneration Document was not incorporated was that it had not been entered into at the time of Commission approval. But, in fact, it had: the parties subsequently agreed, in the Statement of Agreed Facts, that the Remuneration Document was signed on 23 November 2009. In this proceeding, Teys's rationale was instead that the Remuneration Document had not been entered into at the time of the *making* of the 2010 EA.

30 Alternatively, Teys contended that if s 257 and cl 3.10.1 did permit incorporation on a date after the 2010 EA was made, that would effectuate a variation of the 2010 EA. That consequence, so Teys contended, would be inconsistent with or repugnant to the scheme of the FW Act and, in particular, the scheme contained in Div 7 of Pt 2–4 for the variation of enterprise agreements.

31 In addition to its primary submission relying upon s 257, the AMIEU contended that, as a matter of fact, the agreement precondition had been satisfied on or shortly before 22 October 2009. The AMIEU contended that, by that time, it and Teys or Teys and the "Joint Consultative Committee" referred to in cl 3.10.1 had agreed to the incentive payment system as part of an agreement ultimately embodied by the Remuneration Document.

32 It is not in issue that the Remuneration Document was not signed by Teys and the AMIEU until 23 November 2009 and that the signature precondition was not satisfied on 6 November

2009. But, the AMIEU submitted that cl 3.10.1 facilitated the incorporation of the kind of agreement which its terms specified, and that it was not necessary for every precondition specified by cl 3.10.1 to be in place at the time that the 2010 EA was made. It was sufficient, on the AMIEU's argument, that the preconditions for incorporation were satisfied at the time of incorporation. The AMIEU contended that, so long as incorporation occurred at a time no later than when the 2010 EA came to have operative effect, the incorporation was valid. It was not in contest that the 2010 EA operated from 1 January 2010. As the signature precondition was satisfied on 23 November 2009, the AMIEU contended that all of the preconditions necessary for incorporation of the incentive payment system were in place when cl 3.10.1 first had operative effect on 1 January 2010. The AMIEU rejected the limitations placed upon the operation of s 257 by Teys, other than that it accepted that any incorporation made after the 2010 EA came into effect would be invalid.

33 The contest between Teys and the AMIEU raises important issues about the operation of the FW Act's scheme for the making and variation of enterprise agreements. It is necessary that I turn to the statutory framework and identify those of its features which inform the resolution of the issues at hand.

THE STATUTORY FRAMEWORK

34 In *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152, Jessup, Tracey and Perram JJ considered whether a clause of an enterprise agreement could prohibit or, alternatively, impose a precondition upon, an employer seeking that a variation be made to an enterprise agreement pursuant to Div 7 of Pt 2–4 of the FW Act (**Div 7**). The Full Court held that to the extent that the provision of the enterprise agreement in question prohibited or conditioned the pursuance of a variation proposed to be made under Div 7, the provision was invalid as inconsistent with or repugnant to the scheme of the FW Act: at [86]–[113]. For reasons that will be apparent, the issues before the Full Court were different to those raised here. However, the Full Court gave detailed consideration to the scheme of the FW Act for the making and variation of enterprise agreements.

35 Rather than repeating the exercise carried out by the Full Court, it is convenient to identify, through the survey undertaken by the Full Court, the main provisions of the FW Act which are relevant to my consideration of the issues here raised. Where necessary, I will supplement that survey with additional provisions of relevance. At [14]–[30], the Full Court said:

[14] The provisions of the FW Act that are relevant to the present appeal are to be found in Div 2 of Pt 2-1 and in Pt 2-4 thereof. Chapter 2 of the FW Act deals with the subject "Terms and Conditions of Employment". It is divided into nine parts, Pt 2-4 being concerned with "Enterprise Agreements". On any view, the establishment of terms and conditions of employment by enterprise agreement is a central pillar of the regulatory regime established by the FW Act. Indeed, s 3(f) makes it an object of the FW Act to:

> provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by … achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action …

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

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

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

> (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:
> (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
> (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;
> (c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;
> (d) how the agreement will operate.
>
> Note 1: For when an enterprise agreement covers an employer, employee or employee organisation, see section 53.
>
> Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement will be

covered by the agreement if the organisation notifies FWA under section 183 that it wants to be covered.

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a single-enterprise agreement):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

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

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

…

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

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

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

[22] Then s 182(1) provides as follows:

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

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

> 186 When the FWC must approve an enterprise agreement—general requirements
>
> *Basic rule*
>
> (1) If an application for the approval of an enterprise agreement is made under section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.
>
> Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).
>
> *Requirements relating to the safety net etc.*
>
> (2) The FWC must be satisfied that:
>
> (a) if the agreement is not a greenfields agreement — the agreement has been genuinely agreed to by the employees covered by the agreement; and
>
> …
>
> (c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and
>
> (d) the agreement passes the better off overall test.
>
> Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.
>
> Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).
>
> Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).
>
> *Requirement that the group of employees covered by the agreement is fairly chosen*
>
> (3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.
>
> (3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.
>
> *Requirement that there be no unlawful terms*
>
> (4) The FWC must be satisfied that the agreement does not

include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

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

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

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

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

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

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

Additional requirements

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

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

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

Requirement relating to notice of variation of agreement

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

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

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

(2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

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

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

(a) the agreement is in operation;

(b) the agreement covers the employee, employer or organisation; and

(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation."

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

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

(1) An enterprise agreement approved by the FWC operates from:

(a) 7 days after the agreement is approved; or

(b) if a later day is specified in the agreement-that later day.

(2) An enterprise agreement ceases to operate on the earlier of the following days:

(a) the day on which a termination of the agreement comes into operation under section 224 or 227;

(b) the day on which section 58 first has the effect that there is no employee to whom the agreement applies.

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

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

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

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

> The following may jointly make a variation of an enterprise agreement:
> (a) if the agreement covers a single employer — the employer and:
> (i) the employees employed at the time who are covered by the agreement; and
> (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC …

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

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

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

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

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

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

36 As the Full Court observed at [21], there are two levels of approval for the making of an enterprise agreement. First, by relevant employees and, second, by the Commission. As to the former, the Full Court's survey did not set out a provision of some consequence to the

issues which arise in this case. Section 180 of the FW Act sets out the "pre-approval requirements" for employee approval. It provides:

> **Employees must be given a copy of a proposed enterprise agreement etc.**
> *Pre-approval requirements*
>
> (1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.
>
> *Employees must be given copy of the agreement etc.*
>
> (2) The employer must take all reasonable steps to ensure that:
> (a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:
> (i) the written text of the agreement;
> (ii) any other material incorporated by reference in the agreement; or
>
> (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.
>
> (3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:
> (a) the time and place at which the vote will occur;
> (b) the voting method that will be used.
>
> (4) The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).
>
> *Terms of the agreement must be explained to employees etc.*
>
> (5) The employer must take all reasonable steps to ensure that:
> (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
> (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.
>
> (6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:
> (a) employees from culturally and linguistically diverse backgrounds;
> (b) young employees;
> (c) employees who did not have a bargaining representative for the agreement.

37 At [77], the Full Court made an observation of some importance about the duality of limitations imposed by the FW Act upon the capacity of an employer and its employees to make an enterprise agreement. The Full Court said:

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

38 The limitations expressly imposed by the FW Act through the Commission approval process were then recounted by the Full Court, at [78]. At [80]–[83], the Full Court dealt with those provisions that invalidated or rendered as of no effect particular terms in enterprise agreements, thereby imposing further restrictions on the permissible content of such agreements. I deal in some detail with the procedure for approval by the Commission, including the matters the Commission is required to take into account and the limitations on permissible content, at paragraphs [64]–[76] below, and therefore do not set out the aforementioned paragraphs of the Full Court's judgment in *Toyota*.

39 However, I do note that the rationale behind both sets of limitations was identified by the Full Court, at [79] and at [84], as being the avoidance of terms which would have a "tendency to undermine the policy and scheme of the FW Act itself".

40 It is instructive to observe that, at [68], the Full Court stated, by reference to the terms of ss 172(2) and 182(1), that an enterprise agreement is made by the employer and the relevant employees and not by the Commission. As an enterprise agreement is not made by the Commission, the Full Court concluded that s 46 of the *Acts Interpretation Act 1901* (Cth) (**AI Act**), which applies where "a provision confers on an authority the power to make an instrument", was not applicable and of no assistance as an aid to the construction of an enterprise agreement. For that reason, the Full Court relied upon the common law to identify the applicable principles for determining whether a provision in an enterprise agreement could be said to be invalid.

41 The Full Court accepted the proposition "that a subordinate instrument made pursuant to statutory power which is inconsistent with the Act under which it is made will be invalid and void to the extent of the inconsistency": at [94]. At [96], the Full Court said:

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

of Jordan CJ in *Re Lynch; Ex parte Reid* (1943) 43 SR (NSW) 207 at 215.

42 At [97], the Full Court noted that an enterprise agreement was not a regulation but was nevertheless "a specific instrument made only after the detailed regime for which Pt 2–4 provides and enforceable only as provided by the FW Act". The Full Court concluded that, to that extent, "we consider that the general principle applicable to the invalidity of regulations on account of repugnancy with their authorising statute" was relevant in determining the validity of a provision of an enterprise agreement.

THE SECTION 257 CASE

43 The Full Court in *Toyota* had no reason to consider s 257. It is necessary to set out the terms of s 257, which are as follows:

> **Enterprise agreements may incorporate material in force from time to time etc.**
> Despite section 46AA of the *Acts Interpretation Act 1901*, an enterprise agreement may incorporate material contained in an instrument or other writing:
> (a) as in force at a particular time; or
> (b) as in force from time to time.

44 The terms of s 257 reveal a connection to s 46AA of the AI Act. Section 46AA commenced on 1 January 2005. At the times of the making, approval, and taking effect of the 2010 EA, it provided as follows:

> **Prescribing matters by reference to other instruments**
> (1) If legislation authorises or requires provision to be made in relation to any matter in an instrument that is neither a legislative instrument for the purposes of the *Legislative Instruments Act 2003* nor a rule of court, that instrument may, unless the contrary intention appears, make provision in relation to that matter:
> (a) by applying, adopting or incorporating, with or without modification, the provisions of any Act, or of any disallowable legislative instrument for the purposes of the *Legislative Instruments Act 2003*, as in force at a particular time or as in force from time to time; or
> (b) subject to subsection (2), by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned instrument takes effect.
>
> (2) Unless the contrary intention appears, the instrument may not make provision in relation to that matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.
>
> Note: This provision has a parallel, in relation to legislative instruments, in section 14 of the *Legislative Instruments Act 2003*.

45 In relation to s 46AA, the Explanatory Memorandum to the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003* (Cth), which inserted s 46AA into the AI Act, said this (at page 5) (emphasis added):

> Proposed section 46AA deals with instruments, which are not legislative instruments for the purposes of the 2003 Act or rules of court, and which incorporate material by reference.
>
> Proposed section 46AA enables non-legislative instruments to make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any Commonwealth Act, or disallowable legislative instrument as in force at the time of incorporation or from time to time. *The clause also enables non-legislative instruments to make provision for matters by applying, adopting or incorporating (with or without modification) the provisions of any other instrument or writing which is in force at the time of incorporation. Subclause 46(2) makes it clear that unless the enabling legislation allows instruments in this latter category to be incorporated "from time to time", then they may only be incorporated in the form that exists as at the date of incorporation.*
>
> …

46 Sections 121(3) and 123(4)(c) of the FW Act also deal with incorporation of material into enterprise agreements. Those provisions deal with specific and unrelated circumstances and are of no assistance in construing s 257. There is, however, one other relevant provision that refers to incorporation. Section 180(2) sets out one of the "pre-approval requirements" for the making of an enterprise agreement. That provision provides (bold in original; italicisation added by way of emphasis):

> (2) The employer must take all reasonable steps to ensure that:
>
> (a) during the access period for the agreement, the employees (the **relevant employees**) employed at the time who will be covered by the agreement are given a copy of the following materials:
>
> (i) the written text of the agreement;
>
> (ii) *any other material incorporated by reference in the agreement*; or
>
> (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

47 The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) deals with what became s 257 at [1073]–[1075], as follows:

> [1073] This clause provides that an enterprise agreement may incorporate material contained in an instrument or other writing as in force at a particular time or as in force from time to time.
>
> [1074] An enterprise agreement may incorporate material contained in instruments

> or other writing such as modern awards or enterprise awards, State or Territory laws and workplace policies.
>
> [1075] This clause enables an agreement to incorporate, e.g., a workplace policy as in force on the day the agreement was made. It also enables an agreement to incorporate material as in force from time to time so that if, for example, an agreement incorporates the terms of a modern award that is amended six months after the agreement commences operation the agreement will incorporate the amended award terms.

Teys's Contentions

48 In response to the AMIEU's reliance upon s 257, Teys's primary case was that, as a matter of statutory construction, the ambit of s 257 was narrower than a literal reading may suggest. Teys contended that, read in the context of the FW Act as a whole, s 257 must be construed as only authorising the incorporation of "material contained in an instrument or other writing" that was in existence at the time the agreement was made. That submission was made as part of a construction of s 257 contended for in Teys's submission in reply, as follows (emphasis in original, footnotes removed and the first point, which was not pressed, omitted):

> 8. **Second**, s 257 must be read "so that it is consistent with the language and purpose of all the provisions of the statute".
>
> 9. **Third**, the meaning of the word "material", contained in s 257, must be construed having regard to the language and purpose of the provisions of [sic] entire FW Act.
>
> 10. **Fourth**, within the ambit of s 257:
>
> (a) an enterprise agreement may contain references to other material in the nature of modern awards or enterprise agreements (both of which require FWC approval);
>
> (b) an enterprise agreement may incorporate workplace policies that are in force from time to time.
>
> 11 **Fifth**, it is beyond the ambit of s 257 for:
>
> (a) an enterprise agreement to incorporate material which permits the alteration of the terms and conditions of an enterprise agreement, which were previously "approved" by the FWC in performance of its statutory function.
>
> (b) an enterprise agreement to incorporate a clause which permits some party, or parties, to change the terms and conditions of an enterprise agreement, without complying with the statutory scheme for varying an enterprise agreement, which requires the variation to be *made* and *approved*;

(c) the word "material" in s 257 to be construed as referring to material which:

(i) did not *exist* (as opposed to *in force*) at the time the enterprise agreement was approved by the FWC;

(ii) was not provided to the employees throughout the access period for the purposes of s 180(2)(a)(ii) of the FW Act;

(iii) changes the substance of the terms and conditions of the enterprise agreement which were the subject of the statutory processes of being *made* and *approved* [referring to Divs 2–6 of Pt 2–4]; and

(iv) would, in substance, require approval, as an approved variation of an existing enterprise agreement pursuant to the statutory scheme for variations [referring to Div 7 of Pt 2–4].

(d) that section (being the power to incorporate material) to be used to establish an *alternative pathway* or *scheme* for the varying of existing enterprise agreements, so as to render the work to be done by the statutory scheme as being irrelevant.

49 It may well be that at [11(c)(i)] the reply submission was meant to say, "at the time the enterprise agreement was *made*" rather than "approved". I assume that to be so because otherwise there would be a substantial and perhaps crucial inconsistency with the oral case put by Teys.

50 Also included in the submission were a number of non-substantive footnote references to sections of the FW Act, but also a substantive footnote, numbered 7 and relating to [11(c)(i)] in the above submission, as follows:

> Note that s 257 refers to "material contained in an instrument or other writing" which are *in force* at "a particular time", or "from time to time"; this submission is textually supported by the wording of paragraph 1075 of the Explanatory Memorandum for the Fair Work Bill 2009 [sic; scilicet "2008"] which states that: [paragraph 1075 was then set out]. It is emphasised that these two examples in the Explanatory Memorandum speak to documents which already exist as at the date the agreement was *made*. The mere presence of s 180(2)(a)(ii) of the FW Act necessitates this conclusion.

51 Teys's submission is that s 257 must be construed consistently with Divs 2, 3, 4 and 7 of Pt 2–4 "so that it is consistent with the language and purpose of all the provisions of the statute": *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ). The primary basis for the submission is that, unless read down, s 257 would provide a means (an "alternative pathway") by which the

detailed and specific processes required by Div 4 of Part 2–4 (**Div 4**) for the approval of enterprise agreements, and by Div 7 for the variation of enterprise agreements, could be circumvented. There is substantial force in the idea that Parliament would not have intended the Div 7 process, including the scrutiny and approval of the Commission therein required, to be side-stepped by a post-approval incorporation which effectuated a variation of the terms of an enterprise agreement. Likewise, it is unlikely that it was intended that the detailed and specific processes of Div 4, providing for the scrutiny and approval of an enterprise agreement, should be circumvented by the incorporation of terms into an enterprise agreement at a later time.

52 It is necessary to note that the statutory provisions that are potentially in conflict have been too narrowly identified by Teys. Incorporation of material into an enterprise agreement is not solely dealt with by s 257. It is also the subject of s 46AA of the AI Act. As I will later explain, s 257 expands the classes of permissible incorporations of material into an enterprise agreement. Any relevant tension or conflict is therefore between, *firstly*, s 46AA and s 257 on the one hand (**the incorporation provisions**), and Div 7 (or more precisely, subdiv A of Div 7) on the other (**the Div 7 provisions**) and *secondly*, the incorporation provisions on the one hand and Div 4 (**the Div 4 provisions**) on the other.

Is cl 3.10.1 Capable of Effectuating a Variation?

53 I turn first to the potential for tension or conflict in relation to Div 7. That could only arise if, through an incorporation made under cl 3.10.1, a *variation* of the 2010 EA would have been effectuated.

54 On the common understanding of what an incorporation by reference entails, there is no doubt that an incorporation can vary the agreement into which terms are incorporated. The incorporation of material into an agreement may, and often will, constitute a variation. As Taylor J said in *Tallerman and Company Proprietary Limited v Nathan's Merchandise (Victoria) Proprietary Limited* (1957) 98 CLR 93 at 144, a variation of a contract may occur by way of partial rescission without the substitution of new terms in place of those rescinded, or by way of partial rescission with the substitution of new terms for those rescinded, or by the addition of new terms without any partial rescission at all. None of those features is present when an incorporation by reference of terms contained in another document occurs contemporaneously with the formation or making of an agreement. But one or other of those features will be present where incorporation occurs post-formation. An alteration to the

content of an enterprise agreement, if it is able to be effectuated by post-formation incorporation, will result in the enterprise agreement being varied. That must be regarded as a variation.

55 It is then necessary to have regard to the nature and operation of cl 3.10.1. It was not in contest that the clause contemplates the incorporation of an incentive payment system. That conclusion seems to follow from the terms of the clause, including that the clause provides that all wages and other entitlements payable under an incentive payment system "will constitute terms of this Agreement". There can be no doubt that, on its face, the terms of cl 3.10.1 contemplate the incorporation of an incentive payment system agreed to after the 2010 EA is made. The future tense of the words "[t]he parties may agree" suggests that the clause may be concerned only with the incorporation of agreements that post-date the making of the 2010 EA. However, Teys accepted (contrary to [17] of its written submission in reply) that the terms of cl 3.10.1 were also capable of extending to the incorporation of an incentive payment system on the formation of the 2010 EA.

56 If the incentive payment system was incorporated on the making of the enterprise agreement, there can be no suggestion of a variation of the 2010 EA or of any tension or conflict between the incorporation provisions and the Div 7 provisions or, indeed, the Div 4 provisions. One of the AMIEU's contentions, which I later reject, was to the effect that the incentive payment system was incorporated on the making of the 2010 EA, notwithstanding that it was not signed until later. For reasons given below, I do not accept that the incentive payment system was incorporated on the making of the 2010 EA on 6 November 2009, and I find that if any incorporation of the incentive payment system into the 2010 EA occurred, it did so on 23 November 2009. It is not in contest that, by that time, each of the preconditions, including the agreement and signature preconditions, had been satisfied.

57 As an incorporation that post-dated formation, any incorporation which occurred on 23 November 2009 must have varied the terms of the 2010 EA as made. If so, the question that arises on this part of the Teys's case is whether, in so far as cl 3.10.1 purported to permit the 2010 EA to be varied at that time (post-employee approval and pre-Commission approval), it was invalid and beyond the ambit of the incorporation provisions.

58 To assess the nature and extent of any textual tension between the incorporation provisions and the Div 7 provisions, it is necessary to turn to the text of those provisions and to consider the nature and extent of any overlap.

Commonality of Subject Matter

59 There can be no doubt that the terms of s 257 are open to be construed as authorising an incorporation that effectuates a variation of an enterprise agreement. The text of s 257 does not support a construction that confines its operation to incorporations made contemporaneously with the making or formation of an enterprise agreement. Textually, the provision not only fails to provide any positive support for that construction, it supports the contrary construction. If terms or other material are able to be incorporated "as in force from time to time", it is axiomatic that (unless read down) s 257 contemplates that terms that do not exist at the time the agreement was made may be incorporated post-formation by variation of the incorporated document. The Explanatory Memorandum at [1075] supports that conclusion.

60 Support for that view is also found in the interrelation of s 46AA of the AI Act and s 257 of the FW Act. To my mind, s 46AA establishes the default position in respect of incorporation. Relevantly, it is that "if [the FW Act] authorises or requires provision to be made in relation to any matter in an [enterprise agreement], that [enterprise agreement] may, unless the contrary intention appears, make provision in relation to that matter … subject to subsection (2), by … incorporating … any matter contained in any other instrument or writing *as in force or existing at the time when the [enterprise agreement] takes effect*" (emphasis added). Subsection (2) provides that the enterprise agreement may not incorporate material contained in an instrument or other writing as in force or existing from time to time. On a purely textual analysis, s 46AA(1)(b) and s 46AA(2), unmodified by s 257, would have the effect that incorporation may occur at the time that an enterprise agreement takes effect (though not also from time to time thereafter). What, then, is the effect of the s 257 modification? It is, and again taking a purely textual approach, to provide that *in addition* to it being permissible to incorporate a document existing or as in force at the date of taking effect of an enterprise agreement (but not from time to time thereafter), it is permissible to incorporate a document as in force at a different date (s 257(a)), and to incorporate a document as in force from time to time (s 257(b)). In other words, and on a purely textual analysis, I view s 257 as extending the classes of permissible incorporation otherwise provided for by s 46AA of the AI Act.

61 Unless the legal meanings of the incorporation provisions are construed as being inconsistent with their grammatical meanings, it is plain that, whilst those provisions also deal with other means of incorporation, their subject matter includes a process for effectuating variations to an enterprise agreement as made.

62 Div 7 deals with the variation as well as the termination of enterprise agreements. It is not necessary to consider those provisions that deal with termination. Subdivision B of Div 7 deals with three matters. Section 217 addresses the capacity of the Commission to vary an enterprise agreement to remove an ambiguity. Section 217A deals with the resolution of disputes by the Commission about a "proposed variation" to an enterprise agreement. Section 218 deals with review by the Commission of an enterprise agreement on referral by the Australian Human Rights Commission. None of those provisions is relevant. It is Subdiv A of Div 7 that contains the provisions of significance to the issues here raised. It deals with the variation of an enterprise agreement by an employer and its employees. The detailed scheme for effectuating such a variation, which includes Commission approval, closely mirrors the requirements for the making of an enterprise agreement. The variation is "made" when a majority of the affected employees who cast a valid vote approve it: s 209(1). A variation has no effect unless it is approved by the Commission: s 207(3). The variation comes into operation when approved by the Commission from the date specified in the decision to approve: s 216. I will say more shortly about the informed and genuine agreement of employees, which the Div 7 provisions require, as well as the scrutiny involved in obtaining Commission approval. It is apparent that the subject of the Div 7 provisions is a process for effectuating variations to enterprise agreements as made by the makers of those agreements.

63 The commonality of subject matter between the incorporation provisions and the Div 7 provisions is manifest. On their face, both provide a process by which the makers of an enterprise agreement can effectuate a variation to the terms of their agreement as made. The potential for conflict between the two sets of provisions arises because they do not deal with the same subject matter conformably. The processes for effectuating a variation are not only different, but the Div 7 provisions are subject to stringent employee and Commission approval requirements which involve a high level of scrutiny not directly applicable to the incorporation provisions.

The Div 4 and Div 7 Approval Requirements

64 Where an application for a variation has been made under Div 7, unless the Commission is satisfied that there are serious public interest grounds for not approving the variation, the Commission must approve the variation if satisfied that: (a) had an application been made under s 185 for the approval of the agreement as proposed to be varied, the Commission

would have been required to approve the agreement under s 186; and, (b) the variation would not result in the nominal expiry date of the enterprise agreement being extended to a time more than four years after the date on which the agreement was first approved. With some modifications, of no relevance for current purposes, in order to be satisfied of (a), the Commission is required to undertake the same process as is required by Div 4 on the approval of an enterprise agreement. I turn, then, to the Div 4 provisions, the detail of which is not only relevant to the asserted conflict between the incorporation provisions and the Div 7 provisions (for the reasons just identified) but also to the asserted conflict between the incorporation provisions and the Div 4 provisions themselves.

65 When an enterprise agreement is made, a bargaining representative must apply to the Commission for approval of the agreement (s 185(1)), generally within 14 days after the agreement is made (s 185(3)(a)). If an application for approval is made, the Commission must approve the agreement under s 186 if the requirements in ss 186 and 187 are met (s 186(1)). Taking only the case of a non-greenfields agreement (such as the present), those requirements are numerous, and I will presently set them out. I noted above at paragraph [38] that the Full Court in *Toyota* engaged in a similar exercise at [78] and [80]–[83]. My analysis is not dissimilar to the Full Court's except that—in the context of this case—genuine agreement by employees has greater significance that in *Toyota*, and so I set out the requirements of ss 180 and 188, whereas the Full Court did not need to set out the content of those provisions in the same level of detail. There are other areas where I have set out the requirements or limitations in greater detail than the Full Court, for similar reasons.

66 My purpose in setting out the requirements is to demonstrate that the task that the legislature has invested in the Commission is a complex one, with many moving parts, calling for careful assessment and the exercise of discretion and judgment. Essentially the same tasks face the Commission on a variation application. It is difficult to accept that, where so careful and structured a protective and supervisory role has been given to the Commission, the legislature would also intend that that role could be avoided, or that its intended outcome could be eroded, whether easily or at all.

67 The Commission must be satisfied that the agreement has been "genuinely agreed to by the employees covered by the agreement" (s 186(2)(a)). That, in turn, requires the Commission to be satisfied of the following (s 188):

(1) That the employer took all reasonable steps to ensure that, during the access period for the agreement, the employees who were to be covered were given a copy of:

(a) the written text of the agreement (s 180(2)(a)(i)); and

(b) any other material incorporated by reference (s 180(2)(a)(ii)), or

that the employer took all reasonable steps to ensure that the relevant employees had access, throughout the access period, to a copy of those materials (s 180(2)(b));

(2) That the employer took all reasonable steps to notify the relevant employees, by the start of the access period, of:

(a) the time and place at which the vote was to occur (s 180(3)(a)); and

(b) the voting method that was to be used (s 180(3)(b));

(3) That the employer took all reasonable steps to ensure that:

(a) the terms of the agreement, and their effect, were explained to the relevant employees (s 180(5)(a)); and

(b) the explanation was provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees (s 180(5)(b)).

(4) That the request by the employer of the relevant employees to approve the agreement by voting for it was not made until at least 21 days after the day on which the last notice of employee representational rights was given (ss 173(1), 181(2));

(5) That a majority of the employees who were asked to approve the agreement and who cast a valid vote approved the agreement (s 182(1)); and

(6) That there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees (s 188(c)).

68 The Commission must be satisfied that, if the agreement is a multi-enterprise agreement, the agreement has been genuinely agreed to by each employer covered by the agreement (s 186(2)(b)(i)), and that no person coerced or threatened to coerce any of the employers to make the agreement (s 186(2)(b)(ii)).

69 The Commission must be satisfied that the terms of the agreement do not contravene s 55 (s 186(2)(c)). That requires the Commission to be satisfied that agreement does not exclude the National Employment Standards (**NES**) or any provision thereof (s 55(1)), except that the agreement may include:

(1) terms expressly contemplated by Pt 2-2 (e.g., as per ss 63, 93, 101, 113A, 118 and 126), or by regulations made for the purposes of s 127 (s 55(2));

(2) terms that are ancillary or incidental to the operation of NES entitlements (s 55(4)(a)), or supplementary thereto (s 55(4)(b)), but only to the extent that the effect of those terms is not detrimental in any respect when compared with the NES (s 55(4));

(3) terms that have the same (or substantially the same) effect as provisions of the NES (s 55(5)).

70 The Commission must be satisfied that the agreement passes the better off overall test (**BOOT**) (s 186(2)(d), though see also s 189). That will be the case where the Commission is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement, rather than the relevant modern award, applied to the employee (s 193(1)). In so assessing, individual flexibility arrangements are to be disregarded (s 193(2)). While the "test time" is the time for application of the approval of the agreement (s 193(6)), the Commission is clearly required to engage in a forward-looking analysis, in that the question is whether the relevant employees "would be" better off if covered by the agreement rather than the modern award. That is a question that cannot sensibly be answered without assessing the likely position of agreement-covered employees, over the course of the enterprise agreement's term.

71 The Commission must be satisfied that the group of employees covered by the agreement was fairly chosen (s 186(3)). In considering that matter, if the agreement does not cover all employees of the employer or employers covered by the agreement, the Commission must take into account whether the group is geographically, operationally, or organisationally distinct (s 186(3A)). The Commission must be satisfied that the agreement specifies a date as its nominal expiry date that is not more than 4 years after the day of approval (s 186(5)), and that the agreement includes a term providing for independent dispute resolution in relation to matters arising under the agreement or the NES, which term must permit for employee representation for the purposes of that procedure (s 186(6)).

72 The Commission must also be satisfied that the agreement *does not* contain certain terms, being the following:—

(1) Unlawful terms (s 186(4)), being:

(a) Discriminatory terms (s 194(a)), where a term is a discriminatory term to the extent that it discriminates against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, etc. (s 195(1)), subject to certain exclusions (ss 195(2), (3));

(b) Objectionable terms (s 194(b)), being terms (broadly) that require or permit a contravention of Pt 3-1 or the payment of a bargaining services fee (ss 12, 353(2)). Part 3-1 deals with protection of workplace rights and their exercise (Div 3), of freedom of association and involvement in lawful industrial activity (Div 4), against (*inter alia*) discrimination (Div 5), and against sham arrangements (Div 6);

(c) Terms providing a method by which an employer or employee may elect not to be covered by the agreement (s 194(ba));

(d) Terms conferring an entitlement to a remedy against unfair dismissal before the employee has completed a minimum employment period specified in Pt 3-2 (s 194(c));

(e) Terms excluding or modifying unfair dismissal protections in Pt 3-2 in a way that is detrimental to a person to who those protections apply (s 194(d));

(f) Terms inconsistent with Pt 3-3, dealing with industrial action (s 194(e));

(g) Terms providing entitlements to enter premises for a s 481 purpose, or to hold discussions of a kind dealt with by s 484, other than in accordance with Pt 3-4 (dealing with rights of entry) (s 194(f));

(h) Terms providing for the exercise of State or Territory OHS rights other than in accordance with Pt 3-4 (s 194(g));

(i) Terms that require or permit superannuation contributions to be made, in certain circumstances, into funds that do not meet certain criteria (s 194(h)); and

(2) Designated outworker terms, being terms, so far as they relate to outworkers in the textile, clothing, or footwear industry, that deal with particular subject matters, impose particular conditions or requirements, or relate to certain liabilities (as defined in s 12)) (s 186(4A).

73 Finally, the Commission must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining for a proposed or actual enterprise

agreement for which a scope order is in operation (s 187(2)), that ss 184(2) and (3) (dealing with variation of multi-enterprise agreements) have been complied with (s 187(3)), and that:

(1) Persons described as shiftworkers in modern awards are described as shiftworkers in the agreement for the purposes of the NES (s 196);

(2) A term that describes a person as a pieceworker, where an applicable award does not contain such a term, does not operate to the employee's detriment in relation to the NES (s 197), or in the reverse circumstance that the lack of inclusion of such a term in the enterprise agreement does not operate to the employee's detriment (s 198); and

(3) Terms of an enterprise agreement dealing with certain leave loadings in relation to school-based apprentices or trainees, where similar terms are contained in a modern award, are not detrimental to the employee when compared with the award (s 199).

74 As is, I think, evident from the foregoing, the Commission's role in relation to the scrutiny of agreements as at the time of approval is immense. The legislature has invested in the Commission great responsibility in ensuring that the process of making the agreement has been satisfactory and that its content complies with the detailed requirements of the Act. In some cases that process of assessment is fairly formulaic or straightforward (e.g., whether there is a nominal expiry date not later than 4 years after the day of approval). In many cases, however, the process of assessment calls for value judgment: would the employees be better off overall?; were "reasonable steps" taken in relation to the provision of information to employees?; was the explanation of the agreement appropriate, taking into account the circumstances and needs of employees?; is the effect of a term "discriminatory," and if so to what extent?; were the employees "reasonably chosen"?; are there any reasons for doubting the genuineness of agreement?; do any terms permit contravention of (e.g.) the freedom of association provisions?; how do the arrangements for shiftworkers and pieceworkers compare with applicable awards?

75 These are difficult questions, upon which reasonable minds might sometimes (perhaps often) differ. The legislature's intent was evidently that they be dealt with—for the benefit of employees and employers both—by independent specialists and experts, through the process of Commission scrutiny. It is impossible to think that the legislature contemplated that this elaborate system of scrutiny and assessment could be circumvented by so simple a device as the inclusion in an agreement of a clause permitting, for example, the incorporation of any and all workplace policies as they exist from time to time.

76 To my mind, the rigorous scrutiny required of the Commission by the Div 4 and Div 7 provisions has three central objectives. *First*, that employees have genuinely agreed to the enterprise agreement as made or as varied. *Second*, that on making or on variation, an employee who is or will be covered by the enterprise agreement "would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee". *Third*, and in relation to content, that on making and on variation, the terms of the enterprise agreement include terms that are required by the FW Act to be included, are restricted to those subject matters that the FW Act permits, and are not infected by the inclusion (even if rendered of no effect by s 253(1)) of terms which are proscribed.

77 If the scheme requires an enterprise agreement to conform to the Act's requirements on being approved and on being varied, it is inconceivable that it was not intended that conformity be maintained throughout. In other words, the scheme contemplates that an approved enterprise agreement should, throughout its operation, be comprised of terms genuinely agreed to by employees and should satisfy both the BOOT and the FW Act's content requirements for enterprise agreements.

78 Yet, Parliament has enacted the incorporation provisions. It must have been intended that they have some work to do: *Project Blue Sky* at [71]. But it cannot have been intended that, in carrying out that work, the incorporation provisions could be used as a mechanism for undermining the genuine agreement, BOOT, or content requirements for an enterprise agreement.

79 The incorporation on the making of an enterprise agreement of terms that are fixed, in the sense that the content of those terms is not susceptible to variation other than via Div 7 (**fixed terms**), presents no problem. There is no tension in relation to an incorporation of that kind because the incorporated terms will have been subjected to the Div 4 provisions. So long as the Commission performs its gatekeeper function properly, each of the genuine agreement, BOOT, and content requirements will have been satisfied and, by reason of the incorporation of fixed terms, cannot be undermined.

80 The potential for tension arises in relation to the incorporation of terms that are not fixed but are variable. In that respect, I have in mind terms which are incorporated "as in force from time to time" (s 257(b)) (**variable terms**). Whilst those terms are able to be scrutinised under Div 4 in the form in which they existed at the time of approval, their capacity to be varied by processes other than those provided for by Div 7 is problematic. The potential for tension is

somewhat ameliorated if, in relation to variable terms, the incorporation provisions are construed (as I think they should be) as intending that the incorporated material is fixed by reference to its subject and as being variable only in relation to the content of the subject dealt with. However, and assuming that to be so, significant tension with the Div 4 and Div 7 provisions remains. Without altering subject matter, the incorporation of a variable term, could nevertheless convert a complying term into a prohibited term (e.g., a non-discriminatory term into a discriminatory term, a term that is not inconsistent with Part 3–3 into one that is, a non-objectionable term into an objectionable term, and so on). Furthermore, an alteration of a variable term could result in the enterprise agreement no longer being BOOT compliant. The extent of the alteration and the manner by which it was made may also impact upon whether, despite the initial approval by employees of the original form of the term, the altered term has genuine employee approval.

81 Secondly, there is tension with the Div 4 and Div 7 provisions if incorporation may be effectuated by a clause (like cl 3.10.1) that facilitates the incorporation of terms after the agreement is made and approved (**post-approval terms**). The incorporation of post-approval terms can also arise where terms are incorporated "as in force at a particular time" (s 257(a)) where the nominated time post-dates the approval time. The same position attends the incorporation of terms "as in force or existing at the time when the [enterprise agreement] takes effect" (s 46AA(1)(b) of the AI Act). If terms are incorporated through either of the processes just mentioned, they will not have been directly subjected to Div 4 scrutiny, either at all or in their form upon incorporation. Nevertheless, if valid, they will have had the effect of varying the enterprise agreement in the absence of Div 7 scrutiny.

How is the Tension Reconciled or Resolved?

82 How, then, is the potential conflict between the Div 4 and Div 7 provisions and the incorporation provisions resolved in relation to the incorporation of variable terms and post-approval terms? Teys's answer is that reconciliation is achieved by construing the word "material" in s 257 having regard to the language and purpose of the FW Act. Teys relied upon the approach to reconciling conflict between statutory provisions explained by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky* at [69]–[70], as follows:

> [69] 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. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, 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.
>
> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

83 Putting in positive terms the content of Teys's submission in reply at [11(c)], it contended that the word "material" in s 257 means material that:

- is in existence (as opposed to in force) at the time the enterprise agreement is made ([11(c)(i)]);
- is provided for employee scrutiny, as per s 180(2), throughout the access period ([11(c)(ii)]);
- does not change the substance of the terms and conditions of the enterprise agreement which were made by the employees and approved by the Commission ([11(c)(iii)]);
- would not, in substance, have required approval, as an approved variation of an existing enterprise agreement pursuant to Div 7 ([11(c)(iv)]).

84 In addition, "material" is to be construed as not including material that: (i) permits the alteration of the terms and conditions of an enterprise agreement, which were previously approved by the Commission ([11(a)]); or, (ii) permits some party, or parties, to change the terms and conditions of an enterprise agreement, without complying with Div 7 ([11(b)]). However, s 257 is to be read, per Teys's submission, as permitting: (iii) inclusion of material in the nature of a modern award or enterprise agreement, both of which require Commission approval ([10(a)]) and inclusion of workplace policies as in force from time to time ([10(b)]).

85 The fundamental difficulty with Teys' contention is manifest. *Project Blue Sky* does not support an approach to statutory construction that entails the wholesale re-writing of a

statutory provision. The work that Teys gives to the word "material" is far-reaching. It impermissibly seeks to have not only words, but a number of sentences, read into s 257.

86 In *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85 at 113, McHugh J adopted what had been said by Lord Diplock in *Jones v Wrotham Park Estates* [1980] AC 74 at 105 concerning when it is permissible to read words into legislation. McHugh J said as follows:

> If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose. In *Jones v Wrotham Park Estates*, Lord Diplock said that three conditions must be met before a court can read words into legislation. First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

87 Lord Diplock's test has also been adopted in *James Hardie & Coy Pty Ltd v Seltsam Pty Limited* (1998) 196 CLR 53 at [73] (Kirby J) and *Mills v Meeking* (1990) 169 CLR 214 at 244 (McHugh J). It has many times been applied (directly or by application of McHugh J in *Newcastle*) at the intermediate appellate level, including in *Director of Public Prosecutions (DPP) v Leys* (2012) 296 ALR 96 at [45]–[112] (Redlich and Tate JJA, T Forrest AJA), *Rail Corporation New South Wales v Brown* (2012) 82 NSWLR 318 at [43]–[47] (Bathurst CJ, with whom Beazley and Basten JJA agreed), and *Secretary, Department of Health and Ageing v Nguyen* (2002) 124 FCR 425 at [22] (Black CJ, Sundberg and Finkelstein JJ)

88 Finally, and probably most relevantly, in *Taylor v The Owners - Strata Plan No 11564* (2014) 253 CLR 531, French CJ, Crennan and Bell JJ said as follows (at [38]–[39]) (citations omitted):

> [38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".
>
> [39] Lord Diplock's three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution*) accord with the statements of principle in *Cooper*

> *Brookes* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme" because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, "[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances".

89 The reformulation in *Inco Europe* to which their Honours referred was explained in a footnote on CLR 548 thus: "[2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115 per Lord Nicholls of Birkenhead. The reformulation was of the third condition: the court must be abundantly sure of the substance, although not necessarily the precise words, the legislature would have enacted."

90 How do the principles set out in cases like *Project Blue Sky* interrelate with those set out in *Wrotham Park*, *Inco Europe*, and *Newcastle City Council*? I think the answer becomes clear from [65]–[66] of *Taylor* (Gageler and Keane JJ):

> Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning … But not always" [*Project Blue Sky*] at 384 [78]). Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation (eg, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 310-311, 319-321; *MacAlister v The Queen* (1990) 169 CLR 324 at 330). The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
>
> Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.

91 Recourse to context, including purpose, as *Project Blue Sky* requires, may disclose that the ordinary grammatical meaning was not intended. An ungrammatical legal meaning may

involve reading in words of limitation or extension. The basis upon which a court reads in those words is one of explanation, not speculation or repair. The way in which a court avoids speculation or repair, and adheres to its explanatory role, is to apply Lord Diplock's three-step test (as adapted in *Taylor* at [39]–[40]). As Lord Nicholls of Birkenhead explained in *Inco Europe* (at WLR 592), "The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation … ." That understanding also finds voice in *Taylor* at [40] (French CJ, Crennan and Bell JJ) (citations omitted):

> Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be "too far-reaching". In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution*.

92 In rejecting Teys's approach to the construction of s 257 I should emphasise that, as is evident from the multi-factorial nature of the work which Teys's submission sought to give to the word "material", the construction that "material" means "material in existence on the making of the enterprise agreement" is not sufficient of itself to resolve the tension which Teys relied upon. That is so primarily because s 257(a) and (b) and s 46AA(1)(b) expressly contemplate the incorporation of variable terms and post-approval terms that, by their nature, will either not be in existence when the enterprise agreement is made, or may have a post-approval form different to their form at that time. For those reasons, Teys's approach seeks to fill a gap which is "too big, or too much at variance with the language in fact used by the legislature."

93 An alternative approach to resolving statutory conflict may have been to construe "incorporate" in s 257 as limited to the incorporation of terms into an enterprise agreement when it is made. That approach would remove the capacity for an incorporation to be a variation. In the absence of paras (a) and (b) of s 257, that approach would have had its attractions. But, unless "particular time" in para (a) is construed to mean "at the time the agreement is made" and para (b) is impermissibly read out, that alternative approach is unsustainable. The presence of paras (a) and (b) in s 257, as well as the phrase "as in force or existing at the time when the [enterprise agreement] takes effect" in s 46AA(1)(b), means that

it must have been intended that, at least to some extent, an incorporation could result in the terms of an enterprise agreement as approved by the Commission being later added to or otherwise altered without resort to the Div7 provisions.

94 The language of s 257 "[does not] admit of a remedial construction" (c.f. *Taylor* at [39]). The tension between the incorporation provisions and the Divs 4 and 7 provisions is not resolved by any possible adjustment to the meaning of s 257 or of s 46AA.

95 However, to my mind, the potential for tension is reconcilable. It is reconciled in the realisation that, just as the incorporation of fixed terms is subject to the full rigour of the Div 4 provisions, so too is the incorporation of variable or post-approval terms. It is the Commission, through its Div 4 and Div 7 scrutiny, that, in my view, is given the function of ensuring that the inclusion of variable terms or post-approval terms does not and will not undermine the genuine approval, BOOT, or content requirements of the FW Act for an enterprise agreement whilst in operation.

96 As I have sought to explain, the functions given to the Commission by Divs 4 and 7 require the Commission to be satisfied that the genuine approval, BOOT, and content requirements will be maintained throughout the operative life of an enterprise agreement. The potential for variable terms or post-approval terms to materially compromise those objectives will need to be avoided if the Commission is to properly perform its Divs 4 and 7 functions. That may involve a refusal to approve an enterprise agreement or a Div 7 variation to an enterprise agreement which contains those terms or provides a facility for their later incorporation. It should involve such a refusal where the potential for variable terms or post-approval terms to materially compromise the genuine agreement, BOOT, or content objectives is not conditioned by sufficient safeguards.

97 The nature of the material which is or may be incorporated may of itself provide a sufficient safeguard. It is common for enterprise agreements to incorporate terms from other enterprise agreements or from modern awards, as in force from time to time. By their nature, instruments of that kind require Commission approval including when varied. That, in itself, may provide a sufficient safeguard.

98 The scope of a clause (such as cl 3.10.1) to facilitate the post-employee approval or post-Commission approval incorporation of what I have called post-approval terms could be confined by textual limitations or restrictions, in the clause, sufficient to satisfy the

Commission that each of the genuine agreement, BOOT, and content requirements will be maintained without being materially compromised. Those restrictions could impose subject matter restrictions, limit the extent of any permissible alteration, impose boundaries of various kinds, and specify fall-back entitlements to ensure that there is no overall disadvantage to the employees covered by the enterprise agreement. The nature and extent of any necessary limitation or restrictions will depend upon the subject and extent of any potential for alteration. The potential for the FW Act's objectives to be compromised may also be negatived by the Commission accepting appropriate undertakings pursuant to s 190 of the FW Act.

99 My point is not to comprehensively survey the scope for appropriate safeguards. Nor is it my purpose to instruct the Commission as to the finer details of its Divs 4 and 7 functions. My point is that, consistently with the Divs 4 and 7 functions given to the Commission, there will be some, though limited, scope for the incorporation of variable terms and post-approval terms.

100 It can be appreciated, therefore, that a great deal of the tension that might otherwise have existed, largely by reason of the existence of the scrutiny required of the Commission by Divs 4 and 7, is avoided by the very existence of that scrutiny. It is not necessary, in those circumstances, to search for a remedial construction of the incorporation provisions. In any event, none is available. For those reasons I reject Teys's primary case. If the incentive payment system was not validly incorporated into the 2010 EA, it is not because of the restricted construction of s 257 for which Teys contended.

THE INCONSISTENCY OR REPUGNANCY SUBMISSION

101 Teys's alternative submission was succinctly set out in its written submission at [17]–[19] as follows (references omitted):

> [17] In this respect, the Applicant submits that the [incentive payment system] is not enforceable against Teys by the AMIEU, or any other party, as terms of an enterprise agreement. This conclusion should be reached because:
>
> (a) the plain words of the FW Act in s 207(3), which provide that: "*A variation of an enterprise agreement has no effect unless it is approved by the FWC under section 211*", plainly leads to that conclusion;
>
> (b) the text and structure of Part 2-4, Div 7 of the FW Act leads one to conclude that it is a necessary statutory requirement to vary the 2010 EA that the parties make an agreement to vary the instrument, then an application is made to the FWC to vary the enterprise agreement, and then the FWC approves the variation of the instrument (see the

Annexure to these submissions); and

(c) the decision of the Full Court of the Federal Court of Australia in *Toyota Motor Corporation Australia Limited v Marmara (Toyota)* leads one to conclude that the FW Act should be construed as requiring FWC approval to vary the 2010 EA.

[18] Seventh, it appears to be common ground that the statutory process for varying the 2010 EA was not adhered to.

[19] Eighth, accordingly, the AMIEU cannot sue upon the 2010 EA to enforce the terms of the [incentive payment system], as if they were terms of the enterprise agreement.

102 In the Annexure referred to, the submission referred to various passages from the reasons for judgment of the Full Court in *Toyota* and said at [43]:

> [43] Similarly, a clause of an existing enterprise agreement which provided a mechanism for achieving *part* of what the FW Act sets out in terms of varying an existing enterprise agreements "would too closely intrude into the area governed by" s 207(3) "in its application to a proposed amendment under" s 211. The absence of a requirement that the FWC approve the variation too closely intrudes into the work to be done by s 207(3), and is therefore repugnant.

103 Teys relied upon *Toyota* to contend that, in so far as cl 3.10.1 permitted the incorporation of the incentive payment system into the 2010 EA at a time later than the making of the 2010 EA, the clause would effectuate a variation of the 2010 EA and was, to that extent, invalid on account of inconsistency with, or repugnancy to, the FW Act and in particular Div 7. In effect, on this part of its case, Teys contended that Div 7 was a code for effectuating a variation to an enterprise agreement.

104 This submission ignored the existence of the incorporation provisions. Indeed, the submission was first made as Teys's primary submission and prior to the AMIEU raising its contention that the incorporation of the incentive payment system by cl 3.10.1 was authorised by s 257.

105 In the absence of the incorporation provisions, Teys's submissions would have much force. However, if a variation to an enterprise agreement may be effectuated through an incorporation authorised by s 257, then, in so far as the FW Act establishes a scheme for the variation of enterprise agreements, s 257 must be part of that scheme. If that is the case, a variation made pursuant to the authority conferred by s 257 cannot be inconsistent with or repugnant to the scheme established under the FW Act for the making of variations. In those circumstances, any variation effectuated by an incorporation made pursuant to s 257 will be made under the scheme and not inconsistently with it.

106 For that reason, Teys's alternative submission collapsed into its primary case. As Teys has failed on its primary case, the alternative submission must also be rejected.

107 I should make two further observations. *First*, Teys's reliance upon s 207(3) to contend that any variation to the 2010 EA effectuated through cl 3.10.1 "has no effect" is misplaced. It is clear from its terms and context that s 207(3) is only dealing with variations made through Div 7. The provision has no application to a variation effectuated by an incorporation. *Second*, Teys's reliance upon various observations made by the Full Court in *Toyota* is also misplaced. The issue in *Toyota* was whether, by their enterprise agreement, the makers could prohibit or impede access by a person covered by the enterprise agreement to the processes for variation provided by the Div 7 provisions. The Full Court determined that a term that did so was inconsistent with or repugnant to the Div 7 provisions. It was not necessary for the Full Court to consider whether a capacity to effectuate a variation of an enterprise agreement existed beyond that provided for by the Div 7 provisions. The Full Court did not need to, and did not, consider the incorporation provisions. No part of the Full Court's reasons addressed the central issue raised by this case.

108 For those reasons, if the incentive payment system was invalidly incorporated into the 2010 EA it was not because a variation was effectuated that was inconsistent with or repugnant to the Div 7 provisions.

THE AMIEU'S ALTERNATIVE CONTENTIONS

Submission as to the interpretation of cl 3.10.1

109 The AMIEU also contended that, if s 257 was construed as requiring the material incorporated into the 2010 EA by cl 3.10.1 to have been in existence at the time that the agreement was made, the "material" (the incentive payment system) did exist as at that time.

110 I reject that contention. In my view, the incentive payment system did not exist in a form capable of being incorporated by cl 3.10.1 until each and every one of the preconditions specified by cl 3.10.1 was fulfilled. As stated earlier, it is not in contest that the signature precondition was not met as at 6 November 2009.

111 The AMIEU sought to downplay the significance of that precondition, contending that, as long as it was satisfied prior to the 2010 EA coming into operation, there was no difficulty. Why that should be so as a matter of the proper construction of cl 3.10.1 was not developed.

If it is so, it can only be so by reference to the intent (objectively determined) of the makers of the 2010 EA.

112 As I will set out shortly, a document purporting to summarise the terms of the proposed 2010 EA (**22 October summary**) was made available to the relevant employees from on or about 22 October 2009. The parties were agreed that the 22 October summary set out all of the terms of the incentive payment system other than one, and in relation to that one term I have found below that the 22 October summary set out the essence or substance of the term that ultimately appeared in the Remuneration Document. The 22 October summary represented to the relevant employees that the proposed 2010 EA included each of those terms. At the same time a draft of the proposed 2010 EA was made available to employees. That draft did not include the terms of the incentive payment system but did include cl 3.10.1. Prudent employees may well have surmised that the only way in which the terms of the incentive payment system would form part of the 2010 EA was via the facility of cl 3.10.1, as in fact the negotiators of the 2010 EA must have intended.

113 Despite that context, it is not possible, in my view, to attribute an intended meaning to cl 3.10.1 which renders the signature precondition entirely unnecessary, or not necessary to be fulfilled until the proposed agreement became operative.

114 Such an intention may be ascribed to Teys for the following reasons. It is clear from the 22 October summary (amongst other evidence including that referred to at paragraphs [13] to [19] above) that Teys intended that, on the making of the 2010 EA, the terms of the incentive payment system would be included in that agreement. Teys must have known that that could only be done through cl 3.10.1, and it knew that the signature precondition was unfulfilled at the time the 2010 EA was made. Teys must therefore have regarded the signature precondition as unnecessary to effectuate incorporation by cl 3.10.1.

115 However, the subjective intent or understanding of Teys is not relevant. The intended meaning of cl 3.10.1 is to be assessed objectively by reference to what a reasonable person would have understood to be the common intention of the makers of the agreement from the text, the surrounding circumstances known to the makers and the purpose and object of the transaction: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). There was no evidence of surrounding circumstances known to the makers of the 2010 EA in relation to the fulfilment of the signature precondition. I accept that cases like *Kucks v CSR Limited* (1996) 66 IR 182,

City of Wanneroo v Holmes (1989) 30 IR 362, *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813, and *Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 stand (in very general terms) for the propositions stated by the AMIEU in its written submissions. But, ultimately, no matter the use that one makes of industrial context or considerations of informality and generosity of interpretation, I am unable to read cl 3.10.1 so as to do away with or otherwise ameliorate what I have called the "signature precondition." For those reasons, I would not attribute an intended meaning to cl 3.10.1 that rendered the signature precondition entirely unnecessary, or not necessary to be fulfilled until the proposed agreement became operative.

116 If I am wrong about that, the fulfilment of the agreement precondition as at 6 November 2009 arises for determination. For the following reasons, I am satisfied that, by 6 November 2009, the terms and conditions of the incentive payment system had been agreed.

117 I start by noting that there was a real lack of precision as to what, precisely, were the clauses that constituted the incentive payment system. The clearest expression of what were the components of the incentive payment system came at [42(l)] of the AMIEU's written submission, as follows (my definitions added in bold text):

> (i) Payment for boners and slicers (C1 and C2) will be per kg as measured on the cold weight input into the boning room [(**per kilogram payment**]);
>
> (ii) Remuneration for all K1, K2 and K3 employees on the slaughter floor will be based on $ per head per slaughter (in the base teams) [(**per head payment**]);
>
> (iii) The slaughtering team as described in the manning team calculation and neck boners will receive the bull penalty for male entire bull carcasses in excess of 270kgs. Penalty at 50% of the head value ([**bull penalty**]);
>
> (iv) That the minimum rates of pay in the 2010 Agreement for K3 employees (C grade slaughters [sic]) are simply where in any pay week the ordinary time earnings of permanently classified employees (pieceworkers) falls short of the weekly minimum rate, the employee must receive the weekly minimum rate of pay for the classification ([**K3 minimum rate**])
>
> (v) Neck boners have an agreed hot neck boning tally ([**hot neck boning tally**]); and
>
> (vi) Existing afternoon shift employees (levels K1, K2, BC1, BC2 and BC3) receive a 10% shift allowance and will continue to be paid this as long as they remain on shift work (grandfathering provision) [(**shift allowance**]);

118 The notion that it is those clauses that are the "incentive payment system" clauses is confirmed by a document prepared by the parties comparing the content of the 22 October summary, the Remuneration Document, and the 2010 EA. Clauses that are in both the Remuneration Document and the 2010 EA are not the subject of controversy, because they are enforceable whether incorporated by cl 3.10.1 or not. The AMIEU's complaint is based on clauses appearing in the 22 October summary (so that employees thought they were voting upon an enterprise agreement including those clauses) but that do not then appear in the 2010 EA. It appears from the parties' comparison document that only the clauses listed above are in that category. There appeared to be some dispute as to whether the hot neck boning tally clause appeared in the 22 October summary document. As is set out below (at paragraph [128]), in my view the substance of what became the hot neck boning tally clause was captured in the 22 October summary, and therefore that clause is also in the category of clauses contained in the summary but not in the 2010 EA.

119 There are other clauses that appeared in the Remuneration Document but did not appear either in the 22 October summary or in the 2010 EA, but the AMIEU did not make submissions concerning these clauses and they do not appear to me to deal with incentive remuneration, and so I do not consider that they are in issue.

120 The matters set out under paragraph [117] above are dealt with in, respectively, cll 2.1.1, 2.2.1, 2.2.2, 2.2.5, 2.2.8, and 4 of the Remuneration Document. The question is whether a document containing those clauses, reflecting an underlying agreement of the industrial parties, existed before or as at 6 November 2009.

121 Before delving into the evidence, some more background is necessary. From around late 2008, negotiations for a new enterprise agreement covering production employees took place at Teys's Beenleigh plant. Those negotiations ultimately resulted in the 2010 EA. Negotiations were conducted including in a "bargaining committee" formed for that purpose (**Bargaining Committee**). Its members included, relevantly, the following persons: for Teys, Mr John Salter (General Manager, Workplace and External Relations), Mr Gee (General Manager Operations, Beenleigh), and Mr Desmond Stewart Archie (Human Resources Manager); for the AMIEU, Mr Journeaux and Mr Brian Crawford; and, as an employee representative, Mr Gregory George Wilcox. Messrs Gee, Archie, Journeaux, and Wilcox gave evidence in this proceeding.

122 On 20 October 2009, Mr Salter emailed Mr Journeaux and Mr Crawford, attaching a memorandum bearing the name of Mr Gee (**20 October memorandum**). The 20 October 2009 memorandum set out details of a proposed ballot (to occur on 29 and 30 October 2009), and said further, and relevantly, as follows:

> We have recently been holding discussions with employee representatives and the AMIEU about replacing the existing slaughter floor and boning room EBA's [sic] with a new single collective agreement. After careful consideration of the views of employees, projected plant requirements and cost considerations, the following is proposed in terms of future employment conditions for production based employees for the next three (3) years and has been endorsed by the Union and the bargaining committee.
>
> It has been necessary to make some changes to existing conditions to comply with the Federal Government's new industrial relations legislation and attached you will find a plain english [sic] summary of the proposed new employment conditions, many of which are the same as they currently are.

123 Attached to the 20 October 2009 memorandum was a document headed as follows:

PROPOSED

BEENLEIGH PRODUCTION EMPLOYEES

AMIEU COLLECTIVE WORKPLACE AGREEMENT

10 OCTOBER 2009

That document (**10 October summary**) went on to set out, over 21 subsequent pages and in some significant detail, what was proposed to be put to vote.

124 It transpired that the vote did not occur on 29 and 30 October 2009. Instead, another memorandum, dated 22 October 2009 and again bearing the name of Mr Gee, was distributed to employees. The memorandum was identical in its terms to the 20 October memorandum, save that the dates for the vote were said to be 5 and 6 November 2009 (**22 October memorandum**). Attached was a document headed identically to the 10 October summary save that it was dated 22 October 2009 (the 22 October summary). The 22 October summary again set out, this time over 19 subsequent pages, what was proposed to be put to vote. The uncontested evidence of Mr Gee was that the 22 October 2009 memorandum and the 22 October summary were made available to the production employees at Beenleigh from on or around 22 October 2009.

125 There was a contest as to why the 20 October memorandum and the 10 October summary were withdrawn or supplanted by the 22 October documents, and a question as to whether they were circulated at all before they were withdrawn or supplanted. Mr Gee's evidence was that the earlier documents were not circulated, and that the reason why they were withdrawn was that the AMIEU wanted to meet with the workforce over the weekend. Mr Journeaux did not know whether the earlier documents were distributed, but said that they were supplanted because Teys realised that the access period was insufficient. "Access period" is a reference to s 180(4) FW Act, and is the 7-day period ending immediately before the start of the voting process referred to in s 181(1). Nothing turns on these questions. It suffices for me to find (and I do so find) that on or around 22 October 2009, the 22 October summary was made available to production employees, that (of course) the document existed as at that date, and that it reflected an agreement that had been reached by Teys and the AMIEU, possibly through the Bargaining Committee process.

126 The parties provided, after hearing, a useful document which set out whether each of the clauses of the Remuneration Document was contained in the 22 October summary and in the 2010 EA. Again, in the context of the incentive payment system, my immediate concern is only with cll 2.1.1, 2.2.1, 2.2.2, 2.2.5, 2.2.8, and 4 of the Remuneration Document. The parties were agreed that the content of the per kilogram payment clause, the per head payment clause, the bull penalty clause, and the shift allowance clause was found in the 22 October summary, in cll 14, 14, 14 and 20 respectively. In relation to the K3 minimum rate clause, there were differences in wording, but they were non-substantive and the parties agreed in their comparison document that the content of cl 2.2.5 of the Remuneration Document was in cl 14 of the 22 October summary. In relation to the hot neck boning tally clause (cl 2.2.8), Teys said that cl 14 summarised the hot neck boning tally payment bullet points in part, but omitted the "example formula" which was found at pages 12 and 13 of the Remuneration Document. The AMIEU substantially agreed with that proposition. For the sake of completeness, the relevant passage in the 22 October summary is as follows:

> The agreed hot neck boning tally will remain at 197.5 bodies for an eight (8) hour day and neck boners will receive the slaughter-floor classification K 1 rate of pay. The number of neck boners required on any given gang is determined by dividing the kill for the extended day by the number of bodies per neck boner eg. 661/197.5 = 3.348 neck boners. Teys Bros has the option of providing 4 neck boners, in which case it is agreed that other tasks may be combined with neck boning tasks to make up the day's work for the extra boner. For example, 661/197.5 = 3.346 or 4 actual neck boners. In this case the company is entitled to utilise the boners on other tasks up to 0.653 of a man.

127 Clause 2.2.8 relevantly provided as follows:

- The agreed hot neck boning tally is 158 bodies per day based on a maximum days slaughtering tally as prescribed by the QMIA Award 1983.
- In the case of the extended day the agreed hot neck boning tally is 197.5 bodies for an eight (8) hour day (AWT)
- Hot neck boners will be receive [sic] the slaughter-floor classification K 1 rate, or the A grade slaughterman rate
- The number of neck boners required on any given gang is determined by dividing the kill for the extended day by the number of bodies per neck boner eg. 661/197.5 = 3.348 neck boners
- Teys Bros has the option of providing 4 neck boners, in which case it is agreed that other tasks may be combined with neck boning tasks to make up the day's work for the extra boner. For example, 661/197.5 = 3.346 or 4 actual neck boners. In this case the company is entitled to utilise the boners on other tasks up to 0.653 of a man.
- Whilst it is unlikely to occur on current kill levels, a situation could occur in the future where neck boners bone over their tally. In such a case and assuming a kill of 700 bodies the following will be the method of payment for over tally:

Example

- Determination of required neck boners – 700/197.5 = 3.544
- Scenario if 3 neck boners were stood – 3 x 197.5 = 592
- Difference between kill tally and maximum tally for neck boners – 700 – 592 = 108 bodies
- Therefore, 108 bodies paid at time and one half
- Payment formula for carcasses over maximum:

$$= \frac{\text{Dollar rate earned by A slaughtermen}}{197.5} \times \frac{\text{No. bodies over max x 1.5}}{\text{No. neck boners}}$$

$$= \frac{\$204.98 \times 108 \times 1.5}{197.5 \times 3}$$

= $56.04 per neck boner

128 Having compared the material, I take the view that the essence of cl 2.2.8 is captured by the 22 October summary. The existence of additional material (including the example) contained in cl 2.2.8 but not contained in the summary document does not alter my view that, prior to

22 October 2009, Teys and the AMIEU had reached an agreement as to the substance of the hot neck boning tally clause in the form of cl 2.2.8 or in a form not materially different.

129 Another controversy centred on an unsigned document headed as follows:

TEYS BROS (BEENLEIGH) PTY LTD
PRODUCTION EMPLOYEES
ENTERPRISE AGREEMENT

2010

REMUNERATION DOCUMENT

Voting Document 29 October 2009

October 2009

130 This document (**Unsigned Remuneration Document**) was nearly identical to the Remuneration Document signed 23 November 2009. Mr Wilcox said in his affidavit that the Unsigned Remuneration Document had been handed out and discussed at a Bargaining Committee meeting before the 2010 EA was voted on by employees. He said that the reason he remembered the document was because it had been agreed that a ten per cent shift allowance would be preserved for some long-serving employees, whose names were listed in the Unsigned Remuneration Document. Mr Wilcox recalled that, during a Bargaining Committee meeting, those names were checked to ensure all names that were required to be included had been included.

131 Conversely, Mr Gee's evidence was as follows:

> … I say that the [Unsigned Remuneration Document] was not ever produced or discussed at any bargaining committee meeting and it was not ever provided by the Applicant to any bargaining committee members or to any employees at any time during the negotiations for the 2010 [EA], or after the 2010 [EA] was made. I do not recall seeing the [Unsigned Remuneration Document] before I was provided with a copy of the Wilcox affidavit.
>
> I attended the bargaining committee meetings where the terms of the 2010 [EA] were discussed and negotiated. I am absolutely certain that the [Unsigned Remuneration Document] was not ever tabled for discussion in any of those meetings, and was never produced to any committee members or to the general production employee population before or after the production employees voted on the 2010 EA.

Indeed, Mr Gee went further: he said that the Remuneration Document, as signed, had also never been made available to employees at the Beenleigh plant.

132 In cross-examination, Mr Wilcox was taken to the 22 October summary. The 22 October summary contained the same list of names of long-serving employees as appeared in the Unsigned Remuneration Document. On that basis, Mr Wilcox frankly conceded that the document that the Bargaining Committee had checked "probably could have been" the 22 October summary, rather than the Unsigned Remuneration Document. Further, Mr Wilcox conceded that it was possible that Mr Gee was correct in saying that the Unsigned Remuneration Document was never given to Bargaining Committee members.

133 Mr Journeaux made no such concessions. His evidence, in cross-examination, was that a draft document "with a banner on the front of it"—that is, the Unsigned Remuneration document—would have gone to the Bargaining Committee. He said that the document would have been agreed to by the Bargaining Committee, the AMIEU, and the company representatives. He said that the document was agreed in a Bargaining Committee meeting and it would then have been distributed. He said that it would have been the participants in the Bargaining Committee meeting who agreed the document, including Messrs Archie, Gee, Salter, and Mr Bradley Teys of Teys. He rejected that he was making his evidence up to suit the AMIEU's case, and rejected that someone had taken another version of the Remuneration Document and added something to it (i.e., he rejected that the Unsigned Remuneration Document had been fabricated). Rather, he said that the Unsigned Remuneration Document was part of a file that he maintained in relation to the 2010 EA, indicating to him that it had been distributed to him as part of the bargaining process.

134 I accept Mr Journeaux's evidence that the document was not fabricated. In part, that is because an allegation of fabrication is a serious one and there is no evidence to support it. Further, there is reason to believe based on the documents themselves that the Unsigned Remuneration Document is what it purports to be, and is not a fabrication.

135 The Unsigned Remuneration Document and the Remuneration Document are not exactly alike. The pages are differently numbered and the layout of some pages differs as between the two (c.f. pages 18–19 and 23–24 of the Unsigned Remuneration Document as against pages 16–17 and 21–22 of the Remuneration Document). Whereas cl 1.2 of the Unsigned Remuneration Document contains, in relation to Slaughtering Minimum Rates, figures for hourly rates and for a 40-hour week, the Remuneration Document contains those figures and also a column for a 38-hour week. And, in relation to the rates of pay for paid leave, the

Unsigned Remuneration Document contained the following in relation to cleaners (bolding and italicisation removed):

	Rates from pay period commencing 4 October 2009	Rates from first annual anniversary of affirmative vote – i.e. in 2010 – 4% increase	Rates from from [sic] 2nd annual anniversary of affirmative vote. – i.e. in 2011 – 4% increase
CLASS.	$ per hr	$ per hr	$ per hr
Leading Hand – includes shift allce	$23.27	$24.20	$25.16
Cleaner – includes shift allce	$21.06	$21.90	$22.77
Probation – includes shift allce	$21.12	$21.97	$22.84

136 On the other hand, the Remuneration Document contained the following (bolding and italicisation removed, emphasis added by bold text):

	Rates from pay period commencing 4 October 2009	Rates from **first full pay period on or after 6 November 2010** – 4% increase	Rates from **first full pay period on or after 6 November 2011** – 4% increase
CLASS.	$ per hr	$ per hr	$ per hr
Leading Hand – includes shift allce	**$23.74**	**$24.69**	**$25.67**
Cleaner – includes shift allce	**$21.48**	**$22.34**	**$22.23**
Probation – includes shift allce	$21.12	$21.97	$22.84

137 It is significant that some figures, and the headings in the final two columns, are different. The same difference exists as between the column headers in the two documents in every table containing rates. That is, the Remuneration Document contains the dates that are, in fact, the anniversaries of the making of the enterprise agreement, whereas the Unsigned Remuneration Document instead uses the "from [first/second] annual anniversary of affirmative vote" description (**column header differences**). Further, it is significant that the rates that appear in the Unsigned Remuneration Document are identical to those that appear in the 10 October summary, the 22 October summary, and, in fact, in cl 5.3.4 of the 2010 EA. For the Unsigned Remuneration Document to be a fabrication, one of two things must be true: *first*, its fabricator re-formatted the Remuneration Document and altered it by adding a third column to cl 1.2, by changing the rates in relation to paid leave for cleaners so that they matched the rates in the summaries and the 2010 EA, and by changing the column headers from the Remuneration Document so as to create the column header differences; or, *second*,

there exists another version or draft of the Remuneration Document that did not require those alterations and required merely the addition of "Voting Document 29 October 2009" on its cover page. Both explanations are, to my mind, unlikely, and neither is supported by any evidence.

138 I consider that the Unsigned Remuneration Document is what it purports to be, and I accept that it came to Mr Journeaux in the course of negotiations for the 2010 EA, and prior to 6 November 2009. The remaining issue is whether the document was put before the Bargaining Committee, or not. If it was not, I would find that it came to Mr Journeaux outside of his capacity as a member of that Committee but still in his capacity as an AMIEU representative. I do not find it necessary to resolve that issue. It suffices to find (and I do find) that the Unsigned Remuneration Document existed on 29 October 2009, that it was nearly identical to the Remuneration Document (subject to the differences noted in previous paragraphs), that in so far as the incentive payment clauses are concerned it was precisely identical to the Remuneration Document (apart from the column header differences, which are immaterial), and that it was in Mr Journeaux's possession prior to 6 November 2009.

139 Thus, I find the following facts. On or around 22 October 2009 Teys put to employees in the 22 October summary a plain English summary of the "proposed new employment conditions," upon which the employees were to vote. From that, I infer that, by 22 October 2009, Teys and the AMIEU were agreed as to the content of that document. The summary document was not merely a summary of proposed clauses, but in relation to each relevant clause included material that was the same, or in substance the same, as the incentive payment clauses that appeared in the later-signed Remuneration Document. On that basis, I infer that Teys and the AMIEU were agreed as to the content of the incentive payment clauses at a time on or prior to 22 October 2009. Further, terms identical to the incentive payment clauses appeared in the Unsigned Remuneration Document, which I find was created on or around 29 October 2009 and was distributed to Mr Journeaux in his capacity as an AMIEU representative at or around that time. From all of that evidence, I infer that, by 22 October 2009, or alternatively by 29 October 2009, or in any event by no later than 6 November 2009, the content of what would become the incentive payment clauses in the Remuneration Document had been agreed as between Teys and the AMIEU and had been distilled in a document that was a final draft of the Remuneration Document in so far as the incentive payment clauses were concerned, and a near-final draft in so far as other clauses were concerned.

140 I find that there existed, before 6 November 2009, a document, which may have been the Unsigned Remuneration Document but need not have been, that was the manifestation of agreement as between Teys and the AMIEU as to the content of the incentive based payment system upon which employees were to vote. It is more likely than not that an earlier draft of the Unsigned Remuneration Document, still constituting a manifestation of that agreement, was the basis for the summary of the incentive based payment system clauses that appears in the 22 October summary, and indeed in the 10 October summary, and I so find.

Submission as to "facilitative provisions"

141 At [42(o)] and [42(p]) of the AMIEU's written outline, the submission was made that the incorporation of terms pursuant to a "facilitative provision" does not vary an enterprise agreement, "as it operates in a way that is in 'excess of' or 'over' the agreement prescribed minimums … ." Because I have determined that nothing stands in the way of cl 3.10.1 incorporating the incentive payment system clauses, these submissions do not require consideration. But, if they did, I would reject them. It is irrelevant in determining whether an agreement has been varied to consider whether the clause that enables the purported variation is "facilitative" or whether any purported variation is more beneficial to employees than the prescribed minimums otherwise provided for by the agreement. The question is not whether the incorporation has varied the terms of the agreement providing for "prescribed minimums" but whether the agreement itself has been varied. The incorporation of terms conferring entitlements "over" or "in excess of" other extant entitlements would constitute a variation to the agreement. In so far as it was held in *Australasian Meat Industry Employees Union v Kilcoy Pastoral Company Limited* [2002] AIRC 419 at [20]–[29] that a clause of a certified agreement that permitted the incorporation of entitlements in excess of those already provided for by the agreement would not allow for or effectuate a variation of that agreement, I would respectfully disagree.

142 At [98]–[104], the AMIEU sought to rely upon what Merkel J said in *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 147 FCR 158 concerning "facilitative provisions," being provisions that provide for the parties to agree upon the details of the manner in which a particular clause is to operate. The AMIEU submitted that cl 3.10.1 was a "facilitative provision," and relied upon what Merkel J said at [78], adopted by Lawler VP in *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* [2010] FWA 2731 at [18], namely that "a facilitative provision may therefore fall within the

marginal note to s 170MD(7) [of the *Workplace Relations Act 1996* (Cth)]." That is, that the operation of such a clause would not result in variation of the agreement which required Commission approval in accordance with s 170MD. This argument also only arises if I am wrong in the way that I have primarily determined this case. But, in that case, there are a number of reasons why I would not accept the AMIEU's submission: *first*, it is not possible to construe cl 3.10.1 as doing nothing more than providing for the details of the manner in which a clause within the 2010 EA is to operate. The clause permits a substantive system of remuneration to be incorporated. *Second*, Merkel J did not need to determine whether "facilitative provisions" constituted an exception to the principle that a certified agreement was required to contain all of the terms that are to have effect, because the impugned clause was not a "facilitative provision" in any case (see at [85]). That is why his Honour stated the *ratio* of the case, at [80], as involving only a "*probable* exception in respect of facilitative provisions" (emphasis added). Even if cl 3.10.1 was a "facilitative provision," I would not read *FSU* as standing for the proposition that the incorporation of documents pursuant thereto was necessarily not a variation of the 2010 EA. *Third*, what Merkel J said related to a different nature of agreement (a certified agreement) made under different legislation. I was taken to nothing in the FW Act, or in cases considering it, that suggested that any special provision for, or treatment of, "facilitative provisions" was intended.

Submission involving references to other industrial instruments

143 Finally, in relation to the AMIEU's arguments, at [111]–[126] of its written submissions the AMIEU sought to rely upon previous awards having utilised "payment by results" schemes as going to the object and purpose of the 2010 EA. I referred to this argument earlier in these reasons. I do not find it necessary to address every one of the various awards referred by the AMIEU. That is because I think it is plain, and it was not really in contest, that cl 3.10.1 was intended to enable the incorporation of a "payment by results" or "incentive payment system" scheme. The question is not whether that was the purpose of the negotiating parties (as clearly it was), but whether that purpose was capable of being carried out consistently with the incorporation provisions and the scheme of the FW Act. That is a question of statutory interpretation, and the various awards to which the AMIEU referred did not assist me in that connection.

CONCLUSION

144 I have not accepted Teys's contention that the incentive payment system was not validly incorporated into the 2010 EA because the incorporation was not permitted by s 257 of the FW Act. Nor have I accepted Teys's alternative contention that any such incorporation was inconsistent with or repugnant to Div 7 of the FW Act and thus invalid.

145 Teys expressly disavowed a challenge to the validity of the Commission's approval of the 2010 EA (c.f. *Finance Sector Union of Australia v Commonwealth Bank of Australia* and *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2007) 157 FCR 329). No other basis was pressed by Teys for rejecting the AMIEU's case that s 257 of the FW Act permitted the incorporation of the incentive payment system which was effectuated by cl 3.10.1. For the reasons stated above, I accepted that that incorporation occurred on 23 November 2009.

146 It follows that the declarations sought by Teys should be refused and its application dismissed. The AMIEU did not seek a declaration or other relief.

147 I presume that no order as to costs is sought because of the operation of s 570(1) of the FW Act. I will, however, give liberty for any application for a cost order to be made within 7 days hereof. Any such application should be accompanied by the filing and service of a short supporting submission. Any responding submission should be filed and served within 7 days thereafter.

I certify that the preceding one hundred and forty-seven (147) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate: 

Dated: 5 January 2016