



DECISION

Fair Work Act 2009

s.437 - Application for a protected action ballot order

Australian Institute of Marine and Power Engineers

v

Mermaid Marine Vessel Operations Pty Ltd & Ors

(B2014/606 & Ors)

COMMISSIONER CLOGHAN

PERTH, 11 SEPTEMBER 2014

Proposed protected action ballot by employees of Mermaid Marine Vessel Operations Pty Ltd and Others.

[1] The Australian Institute of Marine and Power Engineers (**AIMPE or Applicant**) has made applications to the Fair Work Commission (**Commission**) for protected action ballot orders (**PABOs**) pursuant to s.437 of the *Fair Work Act 2009* (**FW Act**) for the relevant employees of the following employers:

- B2014/606 Mermaid Marine Vessel Operations Pty Ltd
- B2014/614 Australian Offshore Solutions Pty Ltd
- B2014/615 Bhagwan Marine Pty Ltd
- B2014/617 DOF Management Australia Pty Ltd
- B2014/618 Go Offshore Pty Ltd
- B2014/619 Offshore Marine Services Pty Ltd
- B2014/620 Maersk Crewing Australia Pty Ltd
- B2014/621 Samson Maritime Pty Ltd
- B2014/622 Svitzer Australia Pty Ltd
- B2014/623 Swire Pacific Ship Management (Australia) Pty Ltd
- B2014/624 Tidewater Marine Australia Pty Ltd
- B2014/625 Total Marine Services Pty Ltd / Programmed Marine Pty Ltd (collectively **Vessel Operators**).

[2] The employees to be balloted are employed by the employers in paragraph [1] and represented by AIMPE in bargaining for the following replacement agreements:

- B2014/606 Mermaid Marine Vessel Operations Pty Ltd Australian Institute of Marine and Power Engineers Agreement 2010
- B2014/614 Australian Offshore Solutions Pty Ltd Australian Institute of Marine and Power Engineers Greenfields Agreement 2011
- B2014/615 Bhagwan Marine Pty Ltd Australian Institute of Marine and Power Engineers Agreement 2010

- B2014/617 DOF Management Australia Pty Ltd Australian Institute of Marine and Power Engineers Greenfields Agreement 2012-2013
- B2014/618 Go Offshore Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
- B2014/619 Offshore Marine Services Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
- B2014/620 Maersk Crewing Australia Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
- B2014/621 Samson Maritime Pty Ltd Australian Institute of Marine and Power Engineers Greenfields Agreement 2010
- B2014/622 Svitzer Australia Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
- B2014/623 Swire Pacific Ship Management (Australia) Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
- B2014/624 Tidewater Marine Australia Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
- B2014/625 Total Marine Services Pty Ltd Australian Institute of Marine and Power Engineers Enterprise Agreement 2010
(collectively the **General Agreements**).

[3] Each of the enterprise agreements in paragraph [2] has a nominal expiry date of 31/30 July 2013.

[4] AIMPE included in the applications that ‘for the purposes of clarity, employees covered by the following [respective] enterprise agreement are not within the scope of this [respective] ballot’:

- B2014/606 Mermaid Marine Vessel Operations Pty Ltd Engineers Gorgon Enterprise Agreement 2012
- B2014/615 Bhagwan Marine Pty Ltd and AIMPE Gorgon Jetty and Marine Structures Contract Enterprise Agreement 2012; Bhagwan Marine Pty Ltd / AIMPE Tugs and Barges Contract-Gorgon Enterprise Agreement 2010; and Bhagwan / AIMPE Gorgon Enterprise Agreement 2013
- B2014/618 Go Offshore Pty Ltd and Engineers Officers Gorgon Project Enterprise Agreement 2012
- B2014/619 Offshore Marine Services Pty Ltd/AIMPE Operations of Vessels-Gorgon Enterprise Agreement 2012

- B2014/621 Samson Maritime Pty Ltd (trading as Samson Express Offshore) Gorgon Enterprise Agreement 2013
- B2014/623 Swire Pacific Ship Management (Australia) Pty Ltd & Engineers Officers Gorgon Jetty and Maritime Structures Contract Enterprise Agreement 2011
- B2014/625 Total Marine Services Pty Ltd and AIMPE Operation of Westsea Vessels Contract - Gorgon Enterprise Agreement 2011 (collectively the **Gorgon Agreements**).

[5] With the exception of the first agreement in paragraph [4] the remaining agreements have an expiry date of has a nominal expiry date of 31 July 2014.

[6] Each application has identical questions to be put to employees who are to be balloted.

[7] Pursuant to s.442 of the FW Act, all of the applications were heard together.

[8] At the hearings, AIMPE was represented by Mr M Burns of counsel and evidence was given on behalf of AIMPE by Mr Henning Christiansen, Federal Secretary.

[9] The Vessel Operators were represented by Mr K Follet of counsel and evidence was given on behalf of the Vessel Operators by:

- B2014/606 Mr B O'Brien and Mr S Smith
- B2014/614 Mr D Sweetman
- B2014/615 Mr C Koltasz
- B2014/617 Mr D Webster
- B2014/618 Ms K Clark
- B2014/619 Mr M Quirk
- B2014/620 Mr D Kearney
- B2014/621 Mr K Head
- B2014/622 Ms N Sanders
- B2014/623 Mr M Hearnden
- B2014/624 Mr M Sutton
- B2014/625 Mr D McCormick

[10] At the conclusion of the hearing, I reserved my decision. This is my decision and reasons for decision.

RELEVANT LEGISLATIVE FRAMEWORK

[11] The relevant legislative framework which will be considered is as follows:

“437 Application for a protected action ballot order

Who may apply for a protected action ballot order

(1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to the FWC for an order (a **protected action ballot order**) requiring a

protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.

(2) ...

Matters to be specified in application

(3) The application must specify:

- (a) the group or groups of employees who are to be balloted; and
- (b) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

(4) ...

(5) A group of employees specified under paragraph (3)(a) is taken to include only employees who:

- (a) will be covered by the proposed enterprise agreement; and
- (b) either:
 - (i) are represented by a bargaining representative who is an applicant for the protected action ballot order; or
 - (ii) are bargaining representatives for themselves but are members of an employee organisation that is an applicant for the protected action ballot order.

Documents to accompany application

(6) The application must be accompanied by any documents and other information prescribed by the regulations.”

“438 Restriction on when application may be made

(1) If one or more enterprise agreements cover the employees who will be covered by the proposed enterprise agreement, an application for a protected action ballot order must not be made earlier than 30 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be).

(2) To avoid doubt, making an application for a protected action ballot order does not constitute organising industrial action.”

“443 When the FWC must make a protected action ballot order

(1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:

- (a) an application has been made under section 437; and

- (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.
- (2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).
- (3) A protected action ballot order must specify the following:
 - (a) the name of each applicant for the order;
 - (b) the group or groups of employees who are to be balloted;
 - (c) the date by which voting in the protected action ballot closes;
 - (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.
- (3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.
- (4) ...
- (5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.”

AIMPE SUBMISSION

[12] AIMPE submitted that the Commission can be satisfied that, for the purposes of each application, AIMPE has been genuinely trying to reach an agreement with each of the Vessel Operators.

[13] AIMPE set out the bargaining meetings which have taken place with the Vessel Operators commencing 27 March 2013.

[14] AIMPE acknowledged that this round of bargaining for replacement agreements with the Vessel Operators is different to previous negotiations. That difference is reflected in Mr Christiansen’s witness statement as follows:

“Over the last 30 years, negotiations has commenced with AIMPE serving a log of claims, inclusive of salary increases.

In the interests of job security for AIMPE members, in this wage round we consciously departed from this inasmuch as AIMPE did not and has not presented a claim for salary increases, only that salary increases be modest/sustainable...and that

salary relativities be maintained and the increase be paid from the day following the expiry of the current EBA, i.e. 1 August 2013”¹.

[15] The primary issues in negotiations for AIMPE are:

- Training
- Foreign Labour
- Salary increases

[16] AIMPE emphasise that for seven (7) of the Vessel Operators where “Gorgon Agreements” are in term, the scope of the proposed agreements in these applications exclude those employees to whom the particular Gorgon Agreement applies. Consequently, there is no overlap between these applications and the respective Gorgon Agreements.

[17] AIMPE assert that the questions to be put to employees in the ballot are clear and there is no ambiguity or lack of clarity.

[18] Finally, AIMPE submits that there are no exceptional circumstances which justify the period of written notice for the taking of protected industrial action being greater than three (3) working days.

[19] Having satisfied the jurisdictional requirements, AIMPE submits that the Commission should make the PABOs as sought in the amended/further amended applications.

VESSEL OPERATORS’ SUBMISSIONS

[20] The Vessel Operators submit that the applications have been made in the context of bargaining in the offshore oil and gas industry for proposed identical enterprise agreements for AIMPE members employed by the Vessel Operators.

[21] The Vessel Operators oppose AIMPE’s applications for PABOs. However, if the Commission is satisfied that the applications should be made, the Vessel Operators seek that the period of written notice for the taking of protected industrial action be extended to seven (7) working days.

[22] The Vessel Operators do not oppose the amended/further amended applications. However, the Vessel Operators do oppose the substantive applications on the following grounds.

s.438(1) of the FW Act

[23] For those seven (7) Vessel Operators who have in place in-term Gorgon Agreements, the PABO applications are opposed pursuant to the provisions of s.438(1) of the FW Act. Where more than one enterprise agreement covers the relevant employees, s.438 (1) restricts an application for a PABO being made no earlier than 30 days before the latest nominal expiry date of the enterprise agreements.

¹ Exhibit A2

[24] The Vessel Operators submit that the words included in the applications to exclude employees covered by Gorgon Agreements, do not avoid the provisions of s.438(1) of the FW Act. Secondly, that the Applicant has not made a claim in negotiations to change the existing scope of the proposed enterprise agreements to exclude those employees covered by the Gorgon Agreements.

The “purpose” challenge

[25] In the alternative to the s.438(1) of the FW Act submission above, the Vessel Operators submit that, if it is accepted that the applications in respect to those Vessel Operators who have in place Gorgon Agreements, does exclude employees subject to the Gorgon Agreements, the question arises as to the Applicant’s purpose in making the relevant application.

[26] The Vessel Operators submit: is AIMPE “genuinely” trying to reach an agreement with the narrower scope or has that scope now been advanced for an ulterior motive or purpose - namely, to avoid the operation of s.438(1) of the FW Act?

[27] The Vessel Operators with Gorgon Agreements, submit that the chronology of events lead to the conclusion that AIMPE has not been “genuinely trying to reach agreement” on the proposed enterprise agreements which are intended to exclude employees covered by the Gorgon Agreements.

The “bargaining” challenge

[28] The Vessel Operators with Gorgon Agreements submit that, the first time they became aware that they were bargaining with AIMPE for proposed enterprise agreements which excluded employees covered by the Gorgon Agreements, was on 19 and 21 March 2014 when these PABO applications were made.

[29] The Vessel Operators submit that, in the absence of any negotiations in respect of the Applicant’s “purported enterprise agreement”, it cannot be said that the Applicant is “genuinely trying to reach agreement”. Shortly put, AIMPE has not been “trying” to reach agreement, “genuine or otherwise” on the now proposed enterprise agreements.

The wages claim and genuinely trying to reach agreement

[30] The Vessel Operators submit, notwithstanding that AIMPE has no actual wage increases claim in the proposed enterprise agreements, it is seeking to maintain relativities with whatever is agreed between the Vessel Operators and the Maritime Union of Australia (MUA) in its negotiations for replacement agreements in the offshore oil and gas industry.

[31] The Vessel Operators submit that they cannot reach agreement with AIMPE for a replacement enterprise agreement, unless and until agreement is reached with a third party. Consequently, Vessel Operators are not, irrespective of protected industrial action by AIMPE, able to reach agreement on a proposed enterprise agreement.

Foreign labour claim and genuinely trying to reach an agreement

[32] As the Vessel Operators understand AIMPE's claim, it is to prohibit the use of foreign labour in aid of "job security".

[33] The Vessel Operators submit that, on the authorities cited, this is a non-permitted matter, and for this reason, the Commission cannot be satisfied that AIMPE is genuinely trying to reach agreement with the Vessel Operators.

The training claim and genuinely trying to reach agreement

[34] The Vessel Operators are not entirely clear on this claim by AIMPE, however, as they understand it, it is to impose an obligation to fund training for a "pool" of trainee engineers, which may or may not be needed by the industry or the particular Vessel Operator.

[35] The Vessel Operators submit that such a claim does not pertain to the relationship between the employer and its employees. The claim is a non-permitted matter, and importantly, a substantive term. Consequently, such a claim precludes a finding that AIMPE has been and is genuinely "trying to reach agreement".

The nature of the proposed industrial action

[36] The Vessel Operators submit that the questions to be put to employees who are to be balloted are ambiguous concerning the proposed industrial action. The ambiguity relates to the exemption to protected industrial action. This ambiguity gives rise to two issues. Firstly, the voters are unable to make an informed vote. Secondly, there is widespread uncertainty among the Vessel Operators as to what work is excluded during the proposed industrial action.

[37] For the above reasons, the Vessel Operators submit that the applications are invalid.

Extension to the written notice period

[38] The Vessel Operators submit that there are exceptional circumstances, as demonstrated by witness evidence, to justify a longer period of written notice of industrial action. The Vessel Operators seek seven (7) working days notice.

[39] In conclusion, the Vessel Operators submit that the Commission cannot be satisfied that the PABOs sought in the amended applications have met the legislative requirements. Accordingly, the applications should be dismissed. In the alternative, should the Commission be satisfied that the statutory requirements have been met, the written notice period for the taking of industrial action should be extended to seven (7) working days.

CONSIDERATION

s.438(1) of the FW Act

[40] Negotiations for successor enterprise agreements to the General Agreements commenced on 27 March 2013. Discussions were initially held with AIMPE, AMMA as the bargaining representative for PMS, and PMS representatives. Negotiations with AIMPE,

AMMA as the bargaining representative for Mermaid Marine and Mermaid Marine representatives commenced on 11 April 2013. From 13 June 2013, industry wide negotiations have taken place between AIMPE, AMMA as the bargaining representative for Vessel Operators and some Employer representatives named in the 12 General Agreements. These negotiations are referred to as **industry negotiations**. The industry negotiations can be divided into two - “**claims**” negotiations and “**drafting**” of the proposed replacement enterprise agreements to be put to the respective employees.

[41] It is useful at this point to add that similar industry/vessel operator negotiations are taking place between the MUA and all of the named Vessel Operators with the exception of DOF.

[42] Who will be covered by the proposed enterprise agreement? To answer this question, it is necessary to examine the evidence as presented in the hearing.

[43] The coverage of the replacement General Agreements first arose at a meeting with AIMPE, AMMA and Mermaid Marine on 8 May 2013. At that meeting, a draft replacement enterprise agreement for Mermaid Marine was tabled and the parties undertook what is described as a “page turn”. A “page turn” is examining a draft agreement on a clause by clause basis. The minutes of the meeting do not record any reference to the exclusion of those employees covered by the Gorgon Agreements².

[44] The draft replacement agreements set out “coverage” as follows:

“This agreement covers the Employer and Employees engaged in the Maritime Offshore Oil and Gas industry and employed by the Employer in the classifications contained within this agreement.”³

[45] “*Maritime Offshore Oil and Gas Industry*” means the operation, utilisation, control, maintenance, repair and service of vessels (as defined) in or in connection with offshore oil and gas operations.⁴ Put simply, a definition without any exclusion. It should be noted that the definition of “*Maritime Offshore Oil and Gas Industry*” is not contained in the definitions clause in the current Mermaid Marine general agreement and is defined for the first time in the proposed replacement agreement.

[46] Further industry meetings were held on 13 and 14 June and 9, 10 and 11 July 2013.

[47] On 6/7 August 2013, Mr Christiansen wrote to five Vessel Operators and copied AMMA under the heading “Re: AIMPE enterprise agreement negotiations 2013”. The relevant parts of the correspondence are as follows:

“2 CAPACITY TO BARGAIN & INFORMATION

The capacity of your company and AIMPE to bargain in respect of employees whom are, or may from time to time be, covered by the...[relevant Gorgon Agreement] **needs clarification: any employee at all times covered by the GORGON Agreement is**

² Exhibit R3 (4)

³ Exhibit R3 (4)

⁴ Exhibit R3 (4)

covered by a current enterprise agreement is not entitled to bargain in these proceedings. Nor is the company entitled to bargain about that person's conditions in their absence."⁵

[48] Further, under the heading "**BACKPAY**" is the following relevant parts of the correspondence:

"However, it is a term of the GORGON Agreement that the GORGON Agreement will incorporate and apply the terms and conditions contained in any new agreement that replaces the existing AIMPE/company EBA that expired on 31 July 2013.

How is AIMPE to interpret this for the purposes of these negotiations? Two options come to mind:

- (a) ...
- (b) ...

Your company's intentions in this need to be clearly set out so that AIMPE can inform its members, your employees, of how it affects them."⁶

[49] The contents of AIMPE's correspondence regarding the capacity to bargain and backpay described in paragraphs [46] and [47] above, were discussed at an industry meeting on 7 August 2013 without any clear resolution.⁷

[50] In cross examination, Mr Christiansen was asked:

"You would appreciate, would you not, that there is a distinction to be drawn between a person's capacity to bargain and the scope of an enterprise agreement? ---No, I don't appreciate that.

You don't appreciate that. All right. Well, whether someone can bargain or not for a particular enterprise agreement is not the same thing as saying, "I want to exclude from coverage of an enterprise agreement certain people"?---I didn't take a law degree; I took an engineering qualification."⁸

"You're not actually saying in your letter, are you, "We will not bargain with respect to these people," or, "We want a different scope." You've simply said that it requires clarification. Do you agree with that?---It commences by saying, "We require to clarify," and it makes a statement."⁹

"Can I suggest to you at no point in time do you use the form of words or any similar form of words, "We need to exclude from the coverage of this agreement people

⁵ Exhibit A3 (1)

⁶ Exhibit A3 (1)

⁷ Exhibit A3 (7)

⁸ Transcript PN404 to PN405

⁹ Transcript PN407

covered by Gorgon agreements." **Correct?---That would be correct, I did not use those words.**"¹⁰

"That wasn't my question. Let me ask it this way: the employees working on Gorgon projects are working in the offshore oil and gas industry. Correct?---Yes.

Therefore, if the agreement that has expired says it covers all the engineers in the offshore oil and gas industry, then, on the face of that clause, it applies to those employees on Gorgon?---**Yes.**"¹¹

Sure. Are you aware of the proposition stated by Mr O'Brien that a Gorgon employee or employee who worked on Gorgon was present in the negotiation meetings, at least three of them for this agreement?---Is that in his statement?"¹²

"How is it that employees came to be present in negotiation meetings? Presumably they just didn't turn up off their own back, did they?---No, employees were asked to turn up in respect to negotiating with their employer, but - - -

But if your position was quite clear that Gorgon employees, you weren't bargaining for them, why would a Gorgon employee want to turn up?---**How do I know who is covered by the ambit of the Gorgon agreement?**

I'm not asking you, I'm asking why the employee might turn up?---Well, I can only ask employees who have an interest in the proceedings to turn up and put that out amongst the ships. We asked employers to tell us which ships and which employees were covered under the scope of the Gorgon agreements and they didn't tell us."¹³

"I'm asking you a question. Do you agree or disagree with the proposition that after or since the issue of capacity to bargain was discussed in the meeting on 7 August, it has not subsequently been raised or discussed?---No, my recollection was that in the next subsequent meeting, I actually asked why we still hadn't been provided with the information about Gorgon employees.

All right. Apart from what you say now that you might have said, do you agree that you, other than that, there were no discussions at any point in time about the question of capacity to bargain or scope of the agreement?---That's correct.

To the extent that you say it's always been your position that Gorgon would be excluded, you've only articulated that up to 7 August, but you haven't articulated it subsequently?---There's a great many matters we disagreed about. If we start at every meeting by having to reannunciate everything that we disagreed about, we would never get to agree about anything."¹⁴

¹⁰ Transcript PN417

¹¹ Transcript PN419 and PN420

¹² Transcript PN422

¹³ Transcript PN424 to PN426

¹⁴ Transcript PN428 to PN430

“Is it your position that you were not bargaining for a scope that included Gorgon employees, well, since February 2013?---It's my position that the decision we announced on 7 August stands.”¹⁵

[51] If AIMPE was of the view, even though unstated, that negotiations commenced in March 2013 on the footing that it excluded employees covered by the Gorgon Agreements, why would it find it necessary to raise the issue on 6 August 2013? Further, and importantly, Mr Christiansen’s introductory comments are “the capacity of your company **and AIMPE** to bargain in respect to employees whom are...covered by the [Gorgon Agreement] needs clarification”. These words, of themselves, indicate that, up until 6 August 2013, AIMPE, AMMA and the Vessel Operators were bargaining on an industry basis for replacement agreements which included the Gorgon Agreements.

[52] I am satisfied from the evidence that from the commencement of negotiations on 27 March 2013 to at least 6/7 August 2013, discussions on the scope or coverage of the successor enterprise agreements to the General Agreements were firmly based on the existing scope without any carve out of the Gorgon Agreements.

[53] Mr Christiansen’s witness statement is succinct, and in my view, reflective of the nature and extent of the scope issue of the replacement general agreements; it is as follows:

“AIMPE wrote to the company on 6 August 2013 **seeking information** on which employees were covered by the GORGON Agreement and which were not. The company did not provide the information.”¹⁶ (my emphasis)

[54] AIMPE’s approach to the scope clause and other clauses is summed up in Mr Christiansen’s witness statement when he states:

“On 8 May 2013...Mr Olsen reported that a Draft EBA was tabled by AMMA (for Mermaid) that omits much of the current EBA and seeks to negotiate this document **rather than argue for changes on the basis of the current EBA.**”¹⁷ (my emphasis)

[55] Further,

“...we are only prepared to commence with the current AIMPE/Mermaid and the current AIMPE/PTS Agreements **as our working documents. If AMMA can persuade us of the merit of a change and we agree...then we will agree to import that...clause into the current [proposed] EBA.**”¹⁸ (my emphasis)

[56] Finally,

“...There is a “Draft Agreement” on the table from AIMPE members **and it is the current EBA.** Variations to that can only be made by discussion and agreement at the

¹⁵ Transcript PN433

¹⁶ Exhibit A2

¹⁷ Exhibit A2

¹⁸ Exhibit A2

bargaining table, not by one side in isolation drafting the document and serving it on the other side.”¹⁹ (my emphasis)

[57] By his own evidence, Mr Christiansen makes it clear that the current scope clauses in the general agreements remain intact. Variation to the scope clause, with one exception to which I have referred to, were not discussed at the bargaining table or considered as part of the draft replacement agreements. With the exception of seeking information on 6/7 August 2013, AIMPE cannot now distance itself from the approach it adopted throughout bargaining and the documents produced for replacement to the general agreements.

[58] I am not persuaded by Mr Christiansen’s evidence that the “draft” replacement agreements are “no more than an AMMA Claim Document” on behalf of the Vessel Operators. If AIMPE had concerns regarding AMMA being the “custodian” of the draft replacement agreement, I was not given in evidence, a discrete AIMPE draft enterprise agreement which excluded the scope of the Gorgon Agreements.

[59] Mr Christiansen states in correspondence to Mermaid Marine on 6 August 2013 “any employee at all times covered by the Gorgon Agreement is covered by a current enterprise agreement and is not entitled to bargain in these proceedings. Nor is the company entitled to bargain about that person’s conditions in their absence.” Mr Christiansen refers to these words as an AIMPE “decision”²⁰ in his oral evidence and demonstrable of the position that the scope of the replacement general agreements excluded the Gorgon Agreement employees from negotiations for a replacement enterprise agreement.

[60] However, while Mr Christiansen characterises this as a “decision” by AIMPE regarding coverage of the replacement agreement, he continues immediately in his correspondence:

“Accordingly, in order that AIMPE and your company are able to usefully negotiate **the above question...** AIMPE request that you provide us with a list...”²¹

[61] The parties addressed the “question” at the industry meeting on 7 August 2013. It is fair to say that different views were expressed between the parties and the status of the “question” remained “open”.

[62] I am unable to accept the proposition put by AIMPE that, as at 6 August 2013, it sought to exclude the Gorgon employees from bargaining for the replacement enterprise agreements. The documentary evidence relied upon does not explicitly state that AIMPE was seeking a replacement agreement which excluded Gorgon Agreement employees. I am of the view that the correspondence was seeking information in order to determine which employees had the ability to be present at bargaining for the replacement agreements.

[63] In my view, while the capacity for an individual to be present at bargaining meetings and coverage of an enterprise agreement are connected, the issue was raised by AIMPE under the heading “capacity to bargain” and not scope of the proposed replacement enterprise agreement. Further, contemporaneous actions and documentation are important in the

¹⁹ Exhibit A2

²⁰ Transcript PN433

²¹ Exhibit A3 (1)

Commission as evidence of facts asserted. There is, in my view, good reason to represent documents in a particular way retrospectively to support what is asserted. However, in this case, AIMPE put an issue “on the table” for clarification and discussion and there was no resolution of the “question” regarding capacity to bargain.

[64] The evidence of Mr Christiansen is that “with neither side having convinced the other of their differing position [regarding capacity to bargain] the meeting moved on”.

[65] Following further drafting meetings, the proposed draft enterprise agreement was revised to read:

“4. Coverage

4.1 This Agreement covers the Employer and the Employees engaged in the Maritime Offshore Oil and Gas Industry and employed by the Employer in the classifications contained within this Agreement.

4.2 AIMPE is the bargaining representative for those Employees whom are its members and AIMPE will apply to FWC to be covered by the Agreement.”

[66] Mr Christiansen’s response is:

“Since AMMA first tabled the previous version (BJO-4) AIMPE refused to regard it as a negotiating document but rather AMMA claims. Nevertheless AIMPE declared our willingness to consider single clauses for importation into our existing 2010 agreement if and only if AIMPE agreed to that clause.”²²

[67] Mr Christiansen appears to take the view that the only evidence, for the Commission which is relevant and carries any weight on AIMPE’s position, is that authorised by the Institute itself. It is not uncommon for one party (usually the employer) to draft agreements as negotiations progress. These documents become “working drafts” and give focus to negotiations. If, as Mr Christiansen states in his evidence, that the draft enterprise agreements have no more status or relevance than AMMA’s log of claims, how does he address the fact that in these proceedings I only have AMMA’s draft replacement agreements.

[68] The Commission can only reach a conclusion on the material presented and not on the basis, after the event, that the documentary material presented by the Vessel Operators does not represent AIMPE’s views or position.

[69] I am satisfied, on the evidence, that until the applications were filed in the Commission, the Vessel Operators were unaware that they were negotiating for replacement general agreements which excluded employees covered by Gorgon Agreements.

[70] It would be inattentive of the Commission not to make some observations on the similarities between these applications and parallel applications by the MUA in relation to replacement enterprise agreements in the offshore oil and gas industry for employees it represents.

²² Exhibit A3

[71] On 21 November 2013, the MUA made an application to the Commission for a protected action ballot order in relation to its members employed by Mermaid Marine. The MUA also had the equivalent of a general agreement and a Gorgon agreement. When confronted with the difficulties posed by s.438(1) of the FW Act, the MUA withdrew its application. Subsequently, the MUA specifically narrowed the scope clause of bargaining for a replacement general agreement by excluding the specific Gorgon agreement. The MUA refilled for a protected action ballot order, and ultimately, the Commission made the order as sought by the MUA.

[72] While AIMPE has attempted, in its applications which have Gorgon Agreements, to “clarify” which employees are to be balloted by excluding those employees covered by the Gorgon Agreements, that is not on point. The substance of paragraph 443(1)(b) of the FW Act is the actions or representations of applicants up to making the applications and not attempting to remedy those actions by a statement or clarification in the applications themselves.

[73] If AIMPE had, at the commencement or during bargaining, sought to include in the relevant applications, a scope clause which excluded those employees covered by the Gorgon Agreements, then this challenge by the Vessel Operators would not have arisen; it did not, and consequently, is not on “all fours” with the Mermaid Marine and Swire decisions which involved the MUA. I have no evidence, on which to be satisfied, that the parties were bargaining for anything other than the current scope clause in the General Agreements.

[74] The nearest AIMPE came to providing evidence of the exclusion of the Gorgon Agreement employees was in correspondence of 6/7 August 2013 to Vessel Operators which essentially put on the table an issue of who could be present at bargaining. This issue was discussed on 7 August 2013 and not raised any further.

[75] The short point to be made is that, on the evidence, the Applicant has been bargaining with those Vessel Operators for a proposed enterprise agreement with a scope clause which will cover the Gorgon Agreement employees. The Gorgon Agreements have not passed their nominal expiry date and the respective applications have been made more than 30 days before the nominal expiry dates. Accordingly, AIMPE is restricted from making the applications which have Gorgon Agreements in accordance with s.438(1) of the FW Act.

[76] Having disposed of the applications which concern the Vessel Operators with related Gorgon Agreements, it is not necessary to examine the respondents’ grounds pertaining to the “purpose” and “bargaining” challenges. However, for those remaining applications, it is necessary to address AIMPE’s wages, foreign labour and training claims as they relate to whether the Applicant has been and is genuinely trying to reach agreement with the Vessel Operators.

The wages claim and genuinely trying to reach agreement

[77] AIMPE has not made a specific salary increase as part of negotiations for replacement of the General Agreements. AIMPE’s position is that “salary increases must be modest/sustainable and that salary relativities be maintained”.

[78] Such a position in negotiations has inherent tension. This tension is aptly described by Mr Christiansen in his supplementary evidence as follows:

“...[what AIMPE’s claim means] AIMPE wants the company to pay the same percentage to AIMPE members as the company ultimately determines to pay to others, simply because to do otherwise would compress the long standing relativities between the different departments on a ship [and a]...change in the relativities would undermine industrial harmony on board as it is a matter that has been settled for many years. Furthermore, it would reduce motivation to take on qualifications and responsibility of an engineer officer position.”²³

[79] This is the real position of AIMPE - all other narrative is immaterial.

[80] Relativities between occupations is common and Mr Christiansen’s evidence is most probably sound and sensible, but that is not the point in these applications.

[81] Section 443(3) of the FW Act sets out when the Commission must not make a protected action ballot order. The Commission must not make a protected action ballot order **except** in the circumstances set out in s.443(2) of the FW Act. Section 443(2) of the FW Act requires the Commission to be satisfied that AIMPE is genuinely trying to reach an agreement with the Vessel Operators.

[82] In such circumstances above, what can the Commission be “satisfied” of? In terms of the facts, I have no idea what AIMPE’s salary claim is, or what amount it is genuinely trying to reach agreement with the Vessel Operators on. What I do have, as the Vessel Operators have, is knowledge of the real position of AIMPE which is to maintain relativities with other occupational groups in the industry.

[83] Put differently, has AIMPE advanced a salary claim, even a “modest/sustainable” claim - the answer is “no”. With AIMPE not having a salary claim, how can I be satisfied that it is genuinely trying to reach agreement with the Vessel Operators; I cannot.

[84] At most, the only confidence I can have of the parties in genuinely trying to reach agreement, is that at the conclusion of the industry negotiations with other occupational groups, the parties to these applications may reach agreement on a salary increase outcome. The deficiencies in such a situation are readily apparent, and that is there can be no agreement between the parties to these applications, unless and until, separate negotiations involving a third party are completed.

[85] AIMPE may know how to ride a tandem bicycle and where it wants to go. However, that is not much good to AIMPE, if access to the bicycle is only available after the MUA and Vessel Operators have finished with the bicycle in other negotiations.

[86] The difficulty for AIMPE in such circumstances is twofold. Firstly, salary claims are usually one of the main reasons why employees vote to take protected industrial action. The connection between protected industrial action and a salary claim is usually directly observable in evidence and can meet the discretionary standard of the Commission being satisfied that the parties are genuinely trying to reach agreement. For example, a union is seeking a 4.5% per annum wage increase and the employer is offering 3%. However, in these applications, the discretionary standard for the Commission to be satisfied of the parties

²³ Exhibit A3

genuinely trying to reach agreement, is dependent on the conclusion of third party negotiations. My satisfaction that the parties are genuinely trying to reach agreement would essentially be supported by assumptions or presumptions which could readily be mistaken.

[87] Secondly, the purpose of a protected action ballot order, should the ballot be successful, is to enable employees to take protected industrial action for an unlimited number of 24 hour stoppages.

[88] In the “preamble” to the questions on the ballot papers it reads “in support of reaching an agreement with your employer, do you authorise protected industrial action...”. The reason for taking the protected industrial action is in support of reaching an agreement. How can agreement be achieved, if the key claim of salary increases is not identified and agreement is dependent on a third party outcome.

[89] If authorised by a ballot, protected industrial action could take place continuously but the manner in which AIMPE has constructed its salary claim, agreement cannot be reached, unless and until, negotiations with the MUA have been concluded.

[90] Having regard for the evidence, I consider these circumstances contributing, in part, to the reasons why the Commission cannot be satisfied that the provisions of paragraph 443(1)(b) of the FW Act have been met.

Foreign labour claim and genuinely trying to reach an agreement

[91] The precise position of AIMPE in relation to its claim, after the evidence of Mr Christiansen, is difficult to pin down. Foreign labour is a priority issue for AIMPE.

[92] Having received the evidence, the nearest I can get to understand AIMPE’s position is that:

- where an Australian or New Zealand engineer cannot be employed, the Vessel Operator can employ a “foreigner” but the terms and conditions of the foreigner’s employment has to be in accordance with industry enterprise agreements;²⁴
- if a particular vessel requires four (4) engineers on board, all four engineers are to be employed pursuant to the Vessel Operators enterprise agreement;
- however, if using the above example, two (2) of the engineers are employed by another employer (e.g. client), the vessel will be deemed as sailing short handed and the short hand penalties would apply;²⁵
- if the Vessel Operator engages four (4) employees of which only two (2) of the engineers are employed by the actual Vessel Operator, the remaining two (2) engineers employed by another employer, can only be employed by an employer who is employing engineers pursuant to an AIMPE enterprise agreement;²⁶ and

²⁴ Transcript PN661

²⁵ Transcript PN666

²⁶ Transcript PN680

- if the Vessel Operator engages what are referred to as 457 visa holders, the foreign employees must be employed pursuant to the Vessel Operators enterprise agreement²⁷.

[93] It is not disputed that AIMPE's intention is that all engineers are employed pursuant to an AIMPE industry enterprise agreement.

[94] Rather than be confronted with the accusation that AIMPE was in some way "prohibiting" the employment of foreign engineers, it seeks to change the definition of "engineer" to mean an engineer employed by the Vessel Operator. "So if we are one man down, you pay extra allowance to the Australian engineers and therefore you may as well not have had the Norwegian [engineer] there because you're paying extra. It's not a prohibition, it is [an] artifice on our part there's no doubt about that..."²⁸

[95] In short, Mr Christiansen gave evidence that changing the definition of "engineer" and the use of the short hand allowance, is a contrivance to overcome any claim that AIMPE is prohibiting the employment of foreign engineers, but ensuring the same outcome as if it was prohibiting the use of foreign labour.

[96] AIMPE's position is best summarised in the following exchange in cross examination:

"What I've been suggesting to you all along, Mr Christiansen, is that your claim is if vessel operator number 1 cannot crew the entire manning compliment of Australian engineers and you need a foreigner, vessel operator number 2 can provide that foreigner provided that vessel operator number 2 is covered by an AIMPE EBA. Correct?---That's past tense. It was our decision until 4 March where we reached an agreement in contrary terms and changed our position. We reached an agreement contrary to that.

I see. So you had been negotiating for that but then you realised the difficulties of it on 4 March and you withdrew that?---Precisely, and the difficulties were the employers said, 'You're going to put us out of business'."²⁹

[97] Mr Christiansen claims that on 4 March 2014, the parties "reached an agreement". I am unable to find any such agreement.

[98] According to Mr Christiansen's further supplementary statement of 8 April 2014 [after the applications had been filed], the status of the Vessel Operators response to AIMPE's claim, with respect to foreign labour is:

"Yet to reply as there has been no meetings since the offer from AMMA was sent"³⁰.

[99] Although Mr Christiansen claims that agreement in principle was reached on 4 March 2014, he gave evidence that when AMMA sent the proposed "agreement in principle" to him on 23 March 2014 [also after these applications had been filed], he states "...the offer in

²⁷ Transcript PN689

²⁸ Transcript PN693

²⁹ Transcript PN699 and PN700

³⁰ Exhibit A4

relation to preference surprised me because I had given up all hope on that one where I thought we were on 4 March nothing was going to be forthcoming on that at all”.³¹

[100] In addition, there is still disagreement between the parties. AIMPE still wants all engineers to be employed by the Vessel Operators. This is to be achieved by defining engineers as only those employed by the Vessel Operators. To conclude, Mr Christiansen gave evidence that if [AMMA’s proposed response to AIMPE’s claim] **had said** that all engineers will be employed by the Vessel Operators - “the short hand penalties would not apply...”.

[101] Mr Christiansen’s evidence contradicts his earlier evidence that agreement has been reached. There clearly is no agreement and AIMPE’s position remains that:

“if vessel operator number 1 cannot crew the entire manning compliment of Australian engineers and you need a foreigner, vessel operator 2 can provide that foreigner provided that vessel operator 2 is covered by an AIMPE EBA.”³²

[102] Why is it necessary to understand the precise position of AIMPE with regards to its “foreign labour” claim? The answer lies in s.443(2) of the FW Act.

[103] Section 443(2) of the FW Act provides that the Commission must not make a protected action ballot order unless each applicant **has been** and **is** genuinely trying to reach agreement with the employer.

[104] The Vessel Operators submit that AIMPE has not been and is not genuinely trying to reach agreement because it is pursuing a claim which is not a permitted matter for the purposes of an enterprise agreement.

[105] Relevantly, a permitted matter pursuant to s.172(1) of the FW Act is a:

“(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) ...

(d) ...

[106] Accordingly, it is necessary for an applicant, in seeking a protected action ballot order, to be pursuing claims which are permitted matters - if not - the applicant has not and is not genuinely trying to reach agreement.

³¹ Transcript PN717

³² Transcript PN699

[107] Counsel for the Vessel Operators referred the Commission to the *Australian Postal Corporation*³³ decision, and in particular, paragraphs 56 to 60. In the *Australian Postal Corporation* decision, the applicant (CEPU) had been and was pursuing a substantive term of the proposed enterprise agreement with respect to contractors.

[108] In its outline of submission, AIMPE submits that its use of “foreign labour” is akin to the use of contractors or labour hire and should be considered in that context.³⁴

[109] The Applicant concedes that “the difficulty is of course we don’t have a clause that has been put forward to act to reflect that so the Commissioner can hang his hat on it”.³⁵ That is a difficulty especially with numerous references to minutes and other documents, however, I do have Mr Christiansen’s evidence.

[110] Mr Christiansen’s evidence is that where an Australian or New Zealand engineer cannot be employed, the Vessel Operators can employ foreign labour. The inference in such a claim is that Australian or New Zealand engineers must be sourced before foreign engineers are employed. At one end of the continuum, this situation could be described as a restriction or qualifying the employer’s right to employ whoever it considers appropriate, however, it is not a general prohibition on the employment of foreign engineers. A more generous description, at the other end of the continuum, is that AIMPE’s claim is seeking to give preference to Australian and New Zealand engineers.

[111] However, another limb to AIMPE’s claim is that if, having gone through the preference process described in the preceding paragraphs, the vessel operator engages a foreign engineer on its vessel, and the engineer is employed by another employer, that engineer must be employed pursuant to an AIMPE agreement. These circumstances, in my view, clearly attempt to regulate the employment conditions beyond the scope of the proposed agreement and are a non permitted matter.

[112] AIMPE’s claim, which is a substantive claim, attempts to regulate that the contractor engineer engaged on a vessel must have their conditions of employment regulated, in part, by a “AIMPE” enterprise agreement which presumably is one which it has bargained for and has given notice that it wants to be covered by.

[113] Both the *Australian Post Corporation* and the *Airport Fuel Services*³⁶ decisions are authority for the position that the claim being pursued by AIMPE are matters not pertaining to the employment relationship and are incompatible with s.172(1) of the FW Act. Accordingly, as AIMPE has been bargaining for a non permitted matter, it precludes a finding that it is genuinely trying to reach agreement with the Vessel Operators.

The training claim and genuinely trying to reach agreement

[114] AIMPE described its training claim in the following terms “Enhanced levels of new entrant training, career advancement (study leave) training and professional development”³⁷.

³³ [2009] FWAFB 599

³⁴ Exhibit A1

³⁵ Transcript PN2218

³⁶ [2010] FWAFB 4457

³⁷ Exhibit A4

[115] According to Mr Christiansen, Federal Secretary of AIMPE, this is the Institute's number one priority.

[116] Mr Christiansen spends considerable time in his evidence setting out the issues which lead to this being the Institute's number one priority. Accordingly, it is appropriate to consider the exact nature of AIMPE's claim to determine if the Applicant is genuinely trying to reach agreement with the Vessel Operators.

[117] Although I have a description of AIMPE's training claim, I have no AIMPE draft clause to be inserted into the proposed replacement agreements. However, I have clear and unequivocal evidence that AIMPE is not seeking for the Vessel Operators to put money into a pool for the purposes of training on an industry basis³⁸.

[118] Accordingly, it is necessary to examine what evidence the Commission has received to give some preciseness to AIMPE's training claim.

[119] At a meeting on 13 June 2013, the minutes record that AIMPE's claim is to have Vessel Operators make a budgetary allocation to training³⁹.

[120] At the next meeting on 9 July 2013, the following is recorded in the minutes:

“AIMPE were not making a claim regarding training but rather invited VO's to come up with a solution. However, AIMPE outlined that it fundamentally wanted the VO's to commit to paying for training irrespective of the individual VO's operational needs e.g. one VO would training up an engineer who may work for another VO, with the view that in the future that VO would have the benefit of a cadet whose training had been paid for by another VO (i.e. a 'pool')”⁴⁰.

[121] On 10 July 2013, the minutes record:

“AIMPE wants the VOs to train over and about (sic) their immediate i.e. they should training for the future, creating a pool of engineers”⁴¹.

[122] On 11 July 2013, the minutes of the next bargaining meeting record:

“AIMPE began by reiterating that VOs must [when considering their training needs and salary package proposal] move away from the idea that they only need to train for their own enterprise needs - claiming that there will need to be a “spend” and that if one particular VOs spend was not required within their operations then their “spend” would be redirected to other VOs (i.e. competitors) or other industries (i.e. blue water)”⁴².

³⁸ Transcript PN198

³⁹ Exhibit R3

⁴⁰ Exhibit R3

⁴¹ Exhibit R3

⁴² Exhibit R3

[123] In cross examination, Mr Christiansen advanced evidence that Vessel Operators had to train employees even though there may be no business need at that particular time⁴³. If at the end of their training, the Vessel Operator had no requirement for an engineer, it was put to Mr Christiansen what is the employer “supposed to do, sack them?” Mr Christiansen’s response was “that’s up to the company. There’s no obligation on them to continue their employment beyond that”⁴⁴.

[124] Further,

“Your training client [claim] has a range of different aspects to it and the employer’s response in the early days was, “Will consider committing a certain percentage of our overall wages bill to training but we will retain the discretion as to how we allocate that pod of money to training.” Correct?---Yes, the same position the offer just made.

Yes, and your position in response was, “No, that’s not good enough. We want a specific commitment with respect to each of the heads of training we’ve identified so that we can enforce it in the agreement”?---Correct.”⁴⁵

[125] I find that the minutes of the bargaining meetings are the best characterisation of AIMPE’s claim for the proposed replacement enterprise agreements. I specifically say “claim” to distinguish it from the voluminous material describing the “problem” or “issue” which needs addressing.

[126] I find Mr Christiansen attempts to brush aside characterisations of AIMPE’s claim due to the inadequacies of the person writing the minutes as unsustainable⁴⁶. It is unsustainable because, when the minutes were put to him, as a generalisation, he did not resile from the accuracy of their content⁴⁷.

[127] Despite this claim being AIMPE’s number one claim, there is some doubt as to exactly what is being sought by the Institute. From the evidence provided to the Commission, I am satisfied that, in the detail, some aspects go beyond the relationship of employer and employee.

[128] Two particular aspects of the claim demonstrate that AIMPE’s claim go beyond the relationship of employer and employee. Firstly, the claim that the Vessel Operators have to commit to a particular “spend” on training and if that particular “spend” was not exhausted, it would be redirected to another Vessel Operator or industry for training purposes. Secondly, the claim that one Vessel Operator would commit to training of engineers irrespective of business needs. For example, vessel operator A would train an engineer employed by vessel operator B.

[129] While there may be good reasons to increase training and the number of engineers in the offshore oil and gas industry, the manner in which it is achieved through an enterprise bargaining process, must pertain to the relationship of employer and employee. Certain

⁴³ Transcript PN731

⁴⁴ Transcript PN736

⁴⁵ Transcript PN747 and PN748

⁴⁶ Transcript PN782

⁴⁷ Transcript PN782 to PN811

aspects of AIMPE's claim are beyond that relationship and are also incompatible with s.172(1) of the FW Act. Accordingly, I find AIMPE has not and is not genuinely trying to reach agreement with the Vessel Operators.

CONCLUSION

[130] In conclusion, for one or all of the reasons set out above, I am not satisfied that the Applicant is genuinely trying to reach an agreement with the Vessel Operators of the employees to be balloted, pursuant to paragraph 443(1)(b) of the FW Act. Further, for those Vessel Operators which have Gorgon Agreements, I am satisfied that the applications cannot be made in accordance with s.438(1) of the FW Act. Accordingly, the applications will be dismissed and an order to this effect issued jointly with this Decision.



Appearances:

M Burns of counsel for the Applicant.

M Follett of counsel for the Respondents.

Hearing details:

2014:
Perth,
16 April, 8 May (video-link to Sydney); and 21 May.

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