FEDERAL COURT OF AUSTRALIA

Financial Services Council Ltd v Industry Super Australia Pty Limited [2014] FCAFC 92

Citation:	Financial Services Council Ltd v Industry Super Australia Pty Limited [2014] FCAFC 92
Parties:	**FINANCIAL SERVICES COUNCIL LTD ACN 080 744 163 v INDUSTRY SUPER AUSTRALIA PTY LIMITED ACN 158 563 270, FAIR WORK COMMISSION and MINISTER FOR EMPLOYMENT (INTERVENING)**
File number:	NSD 447 of 2014
Judges:	**GILMOUR, FLICK & PERRAM JJ**
Date of judgment:	25 July 2014
Catchwords:	**INDUSTRIAL LAW** – Fair Work Commission – four yearly review of default fund terms – two members of Expert Panel disqualified due to conflicts of interest – *Fair Work Act 2009* (Cth) ss 620(1A) and 622(3) – whether President entitled to appoint himself to Expert Panel – whether Expert Panel reconstituted in accordance with Act
Legislation:	*Acts Interpretation Act 1901* (Cth) (as at 25 June 2009) s 23 *Fair Work Act 2009* (Cth) ss 40A, 620, 622, 624 and 627
Cases cited:	*ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65 cited *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40 cited *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257 cited *Cooper Brookes (Wollongong) Pty Ltd v Federal Commission of Taxation* (1981) 147 CLR 297 cited *Curtis v Stovin* (1889) 22 QBD 513 cited *Kelly v The Queen* (2004) 218 CLR 216 cited *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 cited *Metropolitan Fire and Emergency Services Board v Churchill* (1998) 14 VAR 9 cited *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 cited *Thiess v Collector of Customs* (2014) 306 ALR 594 cited

	Transport Accident Commission v Treloar [1992] 1 VR 447 cited
Date of hearing:	6 June 2014
Place:	Sydney
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	42
Counsel for the Applicant:	Mr JK Kirk SC and Mr PD Herzfeld
Solicitor for the Applicant:	Ashurst Australia
Counsel for the First Respondent:	Mr RM Niall QC and Mr SJ Moore
Solicitor for the First Respondent:	Holding Redlich
Counsel for the Second Respondent:	The second respondent filed a submitting appearance
Solicitor for the Second Respondent:	Corrs Chambers Westgarth
Counsel for the Intervener:	Mr T Howe QC
Solicitor for the Intervener:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION **NSD 447 of 2014**

BETWEEN:	**FINANCIAL SERVICES COUNCIL LTD ACN 080 744 163** **Applicant**
AND:	**INDUSTRY SUPER AUSTRALIA PTY LIMITED ACN 158 563 270** **First Respondent**
	FAIR WORK COMMISSION **Second Respondent**
	MINISTER FOR EMPLOYMENT **Intervener**

JUDGES:	**GILMOUR, FLICK & PERRAM JJ**
DATE OF ORDER:	**6 JUNE 2014**
WHERE MADE:	**SYDNEY**

THE COURT DECLARES THAT:

1. The direction given by the President of the Second Respondent on 17 April 2014 pursuant to s 622(3) of the *Fair Work Act 2009* (Cth) that the President form part of the Expert Panel in matter AM2014/6 (the Direction) for the purposes of conducting a Review under s 156A of the *Fair Work Act 2009* (Cth) is invalid.
2. The Expert Panel as currently purportedly reconstituted is not reconstituted as required by the provisions of the *Fair Work Act 2009* (Cth), relating to a Review set out in Part 5-1, Division 4, Subdivision B.

THE COURT ORDERS THAT:

1. There be no order as to costs.

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

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AND:	**INDUSTRY SUPER AUSTRALIA PTY LIMITED ACN 158 563 270** **First Respondent**
	FAIR WORK COMMISSION **Second Respondent**
	MINISTER FOR EMPLOYMENT **Intervener**
JUDGES:	**GILMOUR, FLICK & PERRAM JJ**
DATE:	**25 JULY 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The Fair Work Commission ('the Commission') is presently conducting the four yearly review of the default fund terms of all modern awards under the terms of the *Fair Work Act 2009* (Cth) ('the Act'). The first stage in this process involves the Commission formulating what is known as the Default Superannuation List. Only superannuation funds that are on this list may be designated as default funds in a modern award. A default fund is a fund selected by an employer for those of its employees who do not choose their own superannuation fund.

2 When carrying out the statutory task of formulating the Default Superannuation List, the Commission is to be constituted as an Expert Panel. Upon its initial convening an Expert Panel is to consist of seven members of the Commission. At least three of these must be

subject matter experts ('Expert Panel Members') and one must either be the President of the Commission himself or a presidential member appointed by him to chair the panel. A presidential member is the President, either of the Vice-Presidents or a Deputy President. The remaining three positions may be filled by other members of the Commission. They do not need to be Expert Panel Members (although they can be) and can be therefore any of a Commissioner, a Deputy President, a Vice President, the President or an Expert Panel Member.

3 At least so far as this case is concerned, the Expert Panel Members are part-time members of the Commission appointed by the Governor-General following the Minister being satisfied as to their expertise in finance, investment management and/or superannuation. It will be observed that only a minority of an Expert Panel is required to be made up of experts and that the right of the President usually to sit on such a panel as its chair is orthodox. It is confusing, to say the least, that not every member of an Expert Panel is an Expert Panel Member under the legislation.

4 In this case, the President appointed an Expert Panel to conduct the review. Although he was entitled to chair the Expert Panel as the Commission's President, he chose instead to appoint a Deputy President to perform that role. He also appointed, in accordance with the Act, three other ordinary members of the Commission and three Expert Panel Members having the requisite expertise.

5 During the course of the review, two of the three Expert Panel Members became disqualified from the process due to conflicts of interest. In response, the President appointed a further expert to the panel and shortly afterwards he directed that he himself should form part of the panel. On 11 March 2014 (after the appointment of the new Expert Panel Member, but prior to the appointment of the President to the panel), the Commission called for applications for superannuation funds to be included on the Default Superannuation List by 28 April 2014 and written submissions by 10 June 2014. Subject to any order of this Court, the Expert Panel would have proceeded to deal with those submissions.

6 The short question before this Court is whether the President had the power to direct as he did. On Friday 6 June 2014 this Court declared that he did not have that power and that the Expert Panel was not presently constituted in accordance with the requirements of the Act. With the concurrence of the parties, the Court made no order as to costs.

7 What follows are the Court's reasons for making the declarations it did.

The Legislation

8 Critical to this case is the interrelationship between two provisions of the Act, ss 620(1A) and s 622. The former specifies how the Commission is to be constituted in order to review the Default Superannuation List and is in these terms:

> (1A) An Expert Panel constituted under this section for a purpose referred to in subsection 617(4) or (5) consists of 7 FWC Members (except as provided by section 622), and must include:
>
> (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
> (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:
>
> (i) finance;
> (ii) investment management;
> (iii) superannuation.

9 It will be seen that it contemplates an Expert Panel having a particular constitutional quality. There are to be at least three Expert Panel Members and one presidential member of the Commission.

10 Section 622 regulates what is to happen when a vacancy occurs in an Expert Panel. It provides:

> (1) This section applies if:
>
> (a) an FWC Member (the ***unavailable member***) forms part of a Full Bench or an Expert Panel in relation to a matter; and
>
> (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
>
> (2) The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:
>
> (a) for the Expert Panel - the President and at least 2 Expert Panel Members;
>
> (b) for a Full Bench - at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.

> (3) Otherwise, the President must direct another FWC member to form part of the Full Bench or the Expert Panel. After the President does so, the Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member.
>
> Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see section 623).

11 It will be seen that s 622 uses the expression 'FWC Member'. That term is defined broadly enough to include both the ordinary members of the Commission and its Expert Panel Members. This appears from the dictionary in s 12 which defines that expression to mean:

> 'the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.'

12 All parties accepted in this Court that s 622(2)(a) had not been engaged initially and that the President had not purported to act under it. The crucial provision was, therefore, s 622(3). Because of the apparent breadth of the expression 'FWC Member' as including the President it would appear to authorise the President to appoint himself (or any other member of the Commission, whether ordinary or expert) to a casual vacancy that has occurred on an Expert Panel.

13 If the power in s 622(3) is used to appoint an ordinary member of the Commission to fill a vacancy left by the recusal, as here, of one of the three required Expert Panel Members, then the composition of the Expert Panel will no longer be in accordance with s 620(1A). Thus, to take the facts of this case, the decision of the President to appoint himself to the Expert Panel means that it now consists of five ordinary members (including himself) and two Expert Panel Members.

14 The immediate question is whether s 620(1A) is to be read as curtailing the power in s 622(3) or whether s 622(3) is to be read with all the generality which its ordinary language suggests. If the former is the case, then the President will have lacked power to appoint himself to the Expert Panel; if the latter, it will have been lawful.

The Arguments of the Parties

15 The applicant submitted that there were several features of the Act that indicated the centrality of the Expert Panel Members to the process of formulating the Default

Superannuation List. The Court returns to those shortly. Once that centrality was recognized it would be, so it was submitted, impossible to imagine that s 622(3) could be utilized to constitute an Expert Panel without any Expert Panel Members. Yet if its terms were read literally it would permit just such an outcome. Successive applications of s 622(3) could result in the panel having upon it no experts at all. Consequently, it was to be seen as being in direct conflict with (at least) s 620(1A) and, given the primacy of the Expert Panel Members in the process, it was necessary to read down the operation of s 622(3). The result was that the President could not appoint any ordinary member of the Commission (including himself) to replace an Expert Panel Member where this would result in fewer than three Expert Panel Members.

16 The Minister responsible for the administration of the Act intervened in the proceeding before this Court. In his submission, there was no direct conflict between the two provisions but this was because they were to be read harmoniously in light of each other. In effect, although the Minister avoided expressly articulating how this should be done, it is apparent that the Minister's approach must imply that the expression 'FWA member' in s 622(3) would need to be read as meaning 'eligible FWA member'. So construed there would be no direct inconsistency between the two provisions. Nevertheless, this slightly different style of reasoning led the Minister to the same conclusion as the applicant, namely, that the Expert Panel was not properly constituted.

17 The respondent emphasized a number of matters. First, it drew particular attention to the fact that the language of s 622(3), on its face, permitted the President to act as he had and here, at least, it found common ground with the applicant who argued that this meant there was a direct conflict with s 620(1A).

18 Secondly, it noted that whilst s 622(2) had not been brought into play in this case, it was altogether inconsistent with the proposition that the Expert Panel was required always to have seven members including at least three experts. Its very terms showed, so it was said, that Parliament contemplated that the Expert Panel could have on it only two experts and the President. This was said to be particularly compelling where, as here, the current Expert Panel now included the exact persons specified in s 622(2).

19 Thirdly, the respondent submitted that the Court ought to embrace the ordinary meaning of s 622(3) because otherwise the statute would become unworkable. If there were no further Expert Panel Members available to fill a casual vacancy the process would have to

stop until such time as the Governor-General appointed a further Expert Panel Member to the Commission. Further, since the Act only permitted there to be six Expert Panel Members on the Commission at any one time, it was entirely possible that such an appointment would not be able to be made at all in which case the process would have reached an insuperable impasse.

20 Fourthly, it was apparent from the legislative history attending s 622(2) that it was that provision which was intended to specify the quorum requirements for an Expert Panel and therefore it was that provision which was to be read as specifying the minimum membership requirements of an Expert Panel and not s 620(1A).

Consideration

21 The Court accepts the submissions of the applicant and the Minister that the provisions of the Act indicate that the requirements of s 620(1A) should not be outflanked by an interpretation of s 622(3) that permits derogation from the membership requirements it mandates. Several matters require this conclusion:

22 First, the language of s 620(1A) is couched in imperative terms. The Expert Panel 'must include' three Expert Panel Members and a presidential member as chair.

23 Secondly, although s 620(1A) does contemplate one departure from its terms it does so only in relation to the *number* of its members. So much appears from the words 'consists of 7 FWC Members (except as provided by section 622).' But it is only s 622(2) that permits a reduction in the number of members on a panel and only then when the President is already a member of that panel. By contrast the power in s 622(3) (with which this case is concerned) does not permit any change to the number of members on a panel. It arises when a casual vacancy occurs. After the power conferred by it has been exercised the vacancy ceases to exist, leaving the panel with its original compliment of seven members. It follows that the parenthetical excision in s 620(1A) cannot be referring to the power in s 622(3). This is important for it indicates a subordination of that provision to s 620(1A).

24 Thirdly, s 626 prohibits a person from holding office as both an Expert Panel Member and a regular member of the Commission. This is apt to suggest that their functions are not regarded by the Act as interchangeable.

25 Fourthly, the qualifications to be an Expert Panel Member are distinct from those for ordinary members of the Commission. Insofar as the expertise of the Expert Panel Members

dealing with the Default Superannuation List is concerned, these are specified (relevantly) in s 620(1A)(b) and s 627(4) to be finance, investment management and/or superannuation. No regular member of the Commission need have this expertise: see s 627(1)-(3).

26 Each of these four matters tends to suggest a need to interpret s 622(3) in a way that is consistent with s 620(1A). The Court would not accept that this conclusion is undermined because, as was argued, s 622(2) was a quorum provision specifying the minimum requirements necessary for an Expert Panel to discharge its functions. Section 622(2) cannot operate in that way: the Expert Panel is expressly contemplated by s 620(1A)(a) to be able to be convened with a presidential member *other* than the President in the chair. The specification in s 622(2)(a) that an Expert Panel can proceed with only two Expert Panel Members and the President cannot, therefore, be about its minimum compositional requirements for if it were the panel would be inquorate every time it was convened, as s 620(1A) expressly permits that it might be, without the President.

27 The Court reaches that conclusion notwithstanding its acceptance of the respondent's contention that as originally enacted s 622(2) was intended to be a quorum provision. In its original form, s 622 did not deal with the Expert Panel at all (this feature was not added to the legislation until more recently). It did, however, deal with another panel called the 'Minimum Wage Panel' in terms that are not dissimilar structurally to its current form. Relevantly, s 622 provided:

> (1) This section applies if:
>
> (a) an FWA Member (the unavailable member) forms part of a Full Bench or the Minimum Wage Panel in relation to a matter; and
>
> (b) the FWA Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
>
> (2) The Full Bench or the Minimum Wage Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Minimum Wage Panel consists of the following:
>
> (a) for the Minimum Wage Panel--the President and at least 3 Minimum Wage Panel Members;
>
> (b) for a Full Bench--at least 3 FWA Members, including at least one Deputy President.
>
> (3) Otherwise, the President must direct another FWA member to form part of the Full Bench or the Minimum Wage Panel. After the President does so, the Full Bench or the Minimum Wage Panel may

continue to deal with the matter without the unavailable member.

28 At the same time, s 620(1) specified the constitution of that panel. It was in these terms:

> (1) The Minimum Wage Panel constituted under this section consists of 7 FWA Members (except as provided by section 622), and must include:
>
> (a) the President; and
> (b) at least 3 Minimum Wage Panel Members.

29 It will be noted that, unlike the current form of s 620(1A)(a), the Minimum Wage Panel was required to have the President as a member and he was not empowered to appoint another presidential member in his place. The requirement in the former s 622(2) that that panel could continue with only the President and three Minimum Wage Panel Members, therefore, did indeed operate as a quorum provision because the President had to be a member of the panel. In the present situation, where the President does not have to be a member of the Expert Panel, the current form of s 622(2)(a) cannot operate the same way.

30 Whilst the Court accepts, therefore, that the former section was a provision specifying a quorum it cannot accept this characterisation in the case of the current provision. The impossibility of explaining why the Expert Panel would not be inquorate if the President did not initially take the chair precludes any other view of its operation.

31 That may raise a question of whether s 622(2)(a) reveals a drafting error. It is possible, in the Court's opinion, that the legislature overlooked adjusting the terms of s 622(1)(a) to refer to the presidential member presiding rather than the President. Certainly, the same deficiency does not appear in s 622(2)(b) which expressly contemplates a Full Bench continuing with three members one of whom must be a presidential member. On the other hand, the difference in language between s 622(2)(a) and (b) may show a deliberate decision on the part of the legislature to deal with the composition of the Expert Panel in a different way.

32 In some highly circumscribed situations a Court may disregard the language of a statute that is plainly in error: cf. *Cooper Brookes (Wollongong) Pty Ltd v Federal Commission of Taxation* (1981) 147 CLR 297. The precise metes and bounds of this doctrine are, perhaps, a little indistinct. Some authorities suggest it is necessary for the Court to recognize the nature of the drafter's error and to identify it as an error, a formulation which commended itself to Lord Esher MR in *Curtis v Stovin* (1889) 22 QBD 513 at 517. On the

other hand, there are statements in *Cooper Brookes* which suggest that the issue is, at heart, one merely of discerning correctly legislative intention: 'But there are cases' said Mason and Wilson JJ, 'in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute' (at 320). It may be that such statements may not altogether be easily reconciled with more recent statements in the High Court emphasizing the paramount nature of the text in the search for legislative intent: cf. *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257 at 268 [39]; *Thiess v Collector of Customs* (2014) 306 ALR 594 at 599 [22].

33 In any event, it is not necessary for this Court to chart the limits of this doctrine. Wherever the true threshold lies, the Court does not consider that it is in a position to say with any particular degree of confidence that an error has so plainly been made in the drafting of the provision that the literal words fail to give effect to some other demonstrably evident legislative intent.

34 In those circumstances, the Court sees no reason not to give effect to its conclusion that s 622(3) must be construed conformably with the compositional requirements of s 620(1A). Whilst the applicant submitted that the two provisions were directly inconsistent and that the Court should give primacy to the latter over the former (citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355) the Court does not share that view. Although in practical terms the result is no different, the Court accepts the submission of the Minister that the provisions are not directly inconsistent and that what is involved is rather the process of construing them in an harmonious fashion. In this case, that requires one to read s 622(3) as not extending to empower the President to appoint a fresh member to fill a casual vacancy in a way which is inconsistent with s 620(1A). To reach this conclusion it is merely necessary to read the expression 'FWC Member' not in accordance with the dictionary definition in s 12 (i.e., all members of the Commission regardless of class) but instead only as 'eligible FWC Member'. Although s 12 is not expressed to provide that the definitions which it contains apply unless the context otherwise requires that is, in fact, how s 12 is to be read: see *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 at 621; *Transport Accident Commission v Treloar* [1992] 1 VR 447 at 449-450 (FC); *Kelly v The Queen* (2004) 218 CLR 216 at 245 [84] and 253 [103] per McHugh J; *Anti-Doping Rule*

Violation Panel v XZTT (2013) 214 FCR 40 at 62-63 [89]-[91] and most recently *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [649].

35 The result is that the power in s 622(3) did not extend to permit the President to appoint an ordinary member of the Commission to fill a casual vacancy in one of the three mandatory Expert Panel Member positions. In making his direction that he should fill the casual vacancy himself it is evident that the President preceded on an erroneous - although understandable - reading of s 622(3). Consequently, he lacked the power to do so and the panel is not currently constituted as contemplated by s 620(1A).

36 Ultimately, it was not in dispute that if this were the Court's ultimate conclusion it should proceed to declare the direction to have been invalid. What there was a debate about, however, was whether the Court should also prevent the Expert Panel from further dealing with the matter at all.

37 The crux of the applicant's argument for an injunction was based on s 624 which provides that '[a] decision of the FWC is not invalid merely because it was made by a Full Bench, or the Expert Panel, constituted otherwise than as provided by this Division.' The consequence of this provision was that should the Commission proceed to deal with the matter despite the panel not being properly constituted, the applicant would be unable to obtain relief thereafter setting aside the decision. Section 624 would, in that circumstance, insulate the ultimate determination from errors going only to its composition.

38 The Court does not accept this submission for two reasons. First, the future circumstances that might arise are not known to this Court and it hesitates to issue an injunction which might embarrass the Commission in the discharge of its functions. In particular, whilst there is presently a vacancy on the Commission to which the Governor-General may appoint a new Expert Panel Member, the Court cannot exclude the future possibility that the Governor-General may not perform that function or, perhaps more plausibly, that the new member so appointed turns out to be unable to take part, for whatever reason, in the Expert Panel's deliberations. In that circumstance, there may be – the Court does not say there is – an issue as to whether the Expert Panel may be able nevertheless to proceed even if not properly constituted under the doctrine of necessity: cf. *Metropolitan Fire and Emergency Services Board v Churchill* (1998) 14 VAR 9. In this Court there was no occasion for any close analysis of this doctrine and no party substantively attempted it. It would be inappropriate to foreclose by injunction any future reliance by the President upon

that doctrine both because this Court has heard no substantive argument about the matter (simply because the facts which might generate such an argument have not yet occurred) and because it is quite possible that they might never arise.

39 Secondly, the Court otherwise apprehends no meaningful threat. Leaving aside the question of necessity, it is unthinkable that the Expert Panel would proceed to deal with the matter if not properly constituted. The effect of the Court's declaration is that the Expert Panel has been constituted contrary to the terms of the Act. The President of the Commission is a judge of this Court. It is not to be thought that his Honour would, absent some issue of necessity arising, cause an Expert Panel to proceed when this Court had declared it was not properly constituted.

Remaining Matters

40 The applicant also pursued two further arguments. First, whilst the President was empowered to appoint a member of the Commission to an Expert Panel under s 622(3) he could not exercise that power to appoint himself. This argument was premised on the word 'another FWC Member' in s 622(3) being construed to mean another member of FWC apart from the President. An alternative reading is that 'another FWC Member' means a member other than the member whose position has become vacant. The Court prefers this construction. To read s 622(3) in the manner urged by the applicant would serve no rational purpose particularly when the Act expressly contemplates that the President may chair an Expert Panel in s 620(1A)(a).

41 A second argument was the power in s 622(3) could only be used where there was a single casual vacancy and not where, as here, there were two. The textual foundation for this argument was the use in s 622(1) of the singular, i.e., because it in terms referred to a situation where 'the FWC Member becomes unavailable' rather than where 'FWC Members become unavailable'. The Court rejects this argument. Section 23 of the *Acts Interpretation Act 1901* (Cth) as at 25 June 2009 (see s 40A of the Act) required references to the singular to be read as including the plural unless the context required the contrary conclusion. The applicant argued that s 620(1A) supplied the necessary contrary context but the Court cannot accept that argument. There is no necessary inconsistency between the terms of s 620(1A) and those of s 622(3).

42 It was for these reasons the Court granted the relief that it did.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gilmour, Flick & Perram.

Associate:

Dated: 25 July 2014