Federal Court of Australia

Maersk Crewing Australia Pty Ltd v Construction, Forestry, Maritime,
Mining and Energy Union (No 2) [2020] FCA 1694

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 25 November 2020 |
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| Catchwords: | **INDUSTRIAL LAW** - application for declarations that Fair Work Commission lacked jurisdiction to make arbitral award - where dispute as to whether additional steward required on vessels - where FWC determined enterprise agreement required additional steward - where terms of enterprise agreement included dispute resolution procedure providing for arbitration by FWC if matter unresolved after steps complied with - whether failure to comply with step one of dispute resolution procedure - whether factual findings by FWC as to compliance with step one gave rise to issue estoppel - whether dispute resolved by earlier agreement between parties as to manning levels on vessels - where earlier agreement did not amend enterprise agreement - consideration of arbitral jurisdiction of FWC - application dismissed**INDUSTRIAL LAW** - cross-claim by union alleging failure to give effect to arbitral award was contravention of *Fair Work Act 2009* (Cth) - application allowed |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 186, 207, 595, 739, Part 2.4, Division 4 |
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| Cases cited: | *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Corke Instrument Engineering (Australia) Pty Ltd* [2005] FCA 799*Construction, Forestry, Maritime, Mining and Energy Union v Maersk Crewing Australia Pty Ltd* [2019] FWC 1745*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645*Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112; (2017) 251 FCR 1*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146; (2018) 264 FCR 342*Faghirzadeh v Rudolf Wolff (SA) Pty Ltd* [1977] 1 Lloyd's Rep 630*Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170; (2017) 257 FCR 442*Hanlon v Refined Sugar Services Pty Ltd* [2002] FCA 1395*Kucks v CSR Ltd* (1996) 66 IR 182*Kuligowski v Metrobus* [2004] HCA 34; (2004) 220 CLR 363*Linfox Australia Pty Ltd v Transport Workers Union of Australia* [2013] FCA 659; (2013) 213 FCR 234*Maersk Crewing Australia Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 595*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104*Newlands v Argyll General Insurance Co Ltd* (1959) 59 SR (NSW) 130*Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 2)* [2020] FCA 951*Ramsay v Menso* [2018] FCAFC 55; (2018) 260 FCR 506*Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* [2019] HCA 13*Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889*Ryan (Receiver & Manager of Homfray Carpets Australia Pty Ltd) v Textile Clothing & Footwear Union of Australia* [1996] 2 VR 235*Simplot Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union* [2020] FWCFB 5054*TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533*The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353*Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152*Trollope & Colls Limited v Atomic Power Constructions Limited* [1962] 3 All ER 1035; [1963] 1 WLR 333*WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 563 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 164 |
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| Date of last submissions: | 16 November 2020 (Applicant)20 November 2020 (First Respondent) |
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| Date of hearing: | 24-25 September 2020 |
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| Counsel for the Applicant: | Mr M Follett with Mr D Ternovski |
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| Solicitor for the Applicant: | Mills Oakley Lawyers |
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| Counsel for the First Respondent: | Mr MT Ritter SC |
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| Solicitor for the First Respondent: | The Maritime Union of Australia |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | WAD 608 of 2019 |
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| BETWEEN: | MAERSK CREWING AUSTRALIA PTY LTDApplicant |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONFirst RespondentFAIR WORK COMMISSIONSecond Respondent |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 25 NOVEMBER 2020 |

THE COURT ORDERS THAT:

1. The application by the applicant is dismissed.
2. There be no order as to costs of the application.
3. A hearing to determine any relief that should be granted on the cross‑claim shall be held on a date to be fixed.
4. The cross‑claim be listed for case management on a date to be fixed on application by the cross-claimant.

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

REASONS FOR JUDGMENT

COLVIN J:

1. These proceedings concern a dispute as to whether the crew for two vessels working off the coast of Western Australia should have included a steward (also described as a caterer) as an additional crew member. The vessels are the *Maersk Master*and the *Maersk Mariner*. They were operated by Maersk Crewing Australia Pty Ltd (**Maersk**).
2. From May 2018, employment of crew on the two vessels was governed by the terms of the *Maersk Crewing Australia Pty Ltd Offshore Oil and Gas Industry (Integrated Ratings, Cooks, Caterers and Seafarers) Enterprise Agreement 2018* (**EA**). Its terms included an agreed dispute resolution procedure which set out a number of steps to be followed in the event of a dispute. Ultimately, if those steps were followed but the matter remained unresolved, the EA provided for the Fair Work Commission (**FWC**) to arbitrate the dispute. The FWC has statutory authority to conduct a private arbitration in such circumstances: *Maersk Crewing Australia Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 595 at [3]‑[6] (**Interlocutory Decision**).
3. The Construction, Forestry, Maritime, Mining and Energy Union (**Union**) brought an application to the FWC to deal with the dispute concerning the additional steward. In its response to the application, Maersk disputed the claim that the vessels should be manned with an extra steward. In particular it said:

The Steward role was a trial on the M class vessels when the vessels were new to Australia to assist the crew for the first two weeks of each swing. It was removed as part of an agreement reached with the [Union] to add a fifth integrated Rating position earlier this year.

1. In addition to claiming that the dispute had been resolved by an earlier agreement, Maersk also claimed that step one in the agreed dispute resolution procedure had not been followed before the claim was brought before the FWC. It said that step one required an employee on each of the vessels, in the first instance, to discuss the matter with the Master of the vessel. It will be necessary in due course to consider the precise terms of the agreed dispute resolution procedure. At this point it is sufficient to note the broad nature of the particular claim made by Maersk.
2. In the FWC, Maersk also opposed the merits of the claim by the Union on the basis that the EA did not require a steward to be added as an additional crew member on the vessels.
3. The FWC determined that the EA required the additional steward: *Construction, Forestry, Maritime, Mining and Energy Union v Maersk Crewing Australia Pty Ltd* [2019] FWC 1745. In doing so, Deputy President Binet rejected the contentions raised by Maersk that were based on (a) the terms of the earlier agreement; and (b) the alleged failure to comply with step one in the dispute resolution process. As to the earlier agreement, the dispute the subject of the application was found to be a separate and different dispute to that raised by the application in the FWC: at [32]. As to step one in the dispute resolution procedure, the required procedure was found to have been followed: at [39]. In both instances, the Deputy President considered the evidence and contentions advanced by the parties.
4. The agreed procedure allowed for an appeal, with permission of the FWC. Maersk sought permission to appeal. It also sought a stay pending the hearing of the application by the Full Bench of the FWC. On the basis of an undertaking by Maersk to the FWC that, in the event that the appeal was wholly dismissed, it would pay to employees on each of the vessels a proportion of the salary that would otherwise have been paid to a steward, the operation of the decision of the Deputy President was stayed. Permission to appeal was refused by the Full Bench and the arbitral determination by the Deputy President was allowed to stand.
5. Maersk then brought an application in this Court claiming that the arbitral determination was made without jurisdiction by reason that step one in the required dispute resolution procedure had not been followed and there was a binding agreement that applied to the subject matter of the dispute concerning the additional steward. On that basis, despite the undertaking, it has not made any payment to employees and has not engaged the additional steward for each of the vessels.

## Issues for determination

1. The overall question in issue is whether the FWC had arbitral authority (or jurisdiction) to determine the dispute as to whether the manning levels on the two vessels required the addition of a steward to the crew for each vessel.
2. The Union concedes that if step one of the dispute resolution procedure was not followed then the FWC lacked jurisdiction. Therefore, as to that aspect of the application the sole question as between the parties is whether step one was followed. Its resolution requires a determination of the proper construction of the terms of the EA and whether, on the evidence, its terms have been met. In support of its case as to the factual issue whether the requirements of step one were met, the Union says that an estoppel arises by reason of factual findings by the FWC to the effect that step one had been complied with. Even if there is no estoppel, it says that on the evidence now before the Court that factual position has been established.
3. As to the separate reliance by Maersk on the earlier agreement, the Union claims that, on a proper construction of the agreement, its terms did not govern the subject matter of the dispute arbitrated before the FWC. The terms of the earlier agreement were wholly reduced to writing in the form of emails exchanged between Maersk and the Union. The Union says those terms did not prevent the making of a claim that the EA required the addition of a steward on each vessel. Maersk claims that the terms of the agreement were partly oral and partly written. It says that those agreed terms were to the effect that the manning level on the vessels would be five integrated ratings and one cook. An agreement in those terms is said to have necessarily accepted that there would not be a steward.
4. If, as Maersk maintains is the case, the terms agreed were partly oral and partly written then there is a confined factual dispute as to the content of the oral communications that occurred between the parties at the time of making the agreement. However, I note that in the course of oral submissions, senior counsel for the Union abandoned a claim that an estoppel arose by reason of the finding by the FWC to the effect that the dispute the subject of the application was a different dispute to that addressed by the earlier agreement.
5. Therefore, the parties are joined as to the nature and extent of the earlier agreement.
6. Finally, if an agreement was reached between the Union and Maersk in July 2018 concerning all manning on the vessel (as claimed by Maersk) there remains a legal question as to whether the existence of such an agreement could deprive the FWC of arbitral authority to consider a claim by the Union that there should be an additional steward in circumstances where the jurisdiction of the FWC was conferred by the EA. The nature of the declaratory relief sought required Maersk to demonstrate that the making of such an agreement of the kind alleged could deprive the FWC of the arbitral jurisdiction conferred by the EA.
7. The Union also brought a cross‑claim in which it alleged that the failure by Maersk to give effect to the arbitral award was a contravention of the *Fair Work Act 2009* (Cth). It sought declarations to that effect and orders for pecuniary penalties. It was agreed that if the contravention was established then the question of the relief that may be granted on the cross‑claim, particularly the question whether there should be pecuniary penalties and if so, in what amount, should be separately determined at a further hearing.

## Summary of outcome

1. For the following reasons, the claims by Maersk should not be accepted and its claim should be dismissed. On the cross‑claim, the Union has demonstrated that Maersk has failed to give effect to the arbitral award and its failure was a contravention of the *Fair Work Act*. The question of the relief that should be granted on the cross‑claim should be adjourned to a date to be fixed and a case management hearing should be convenedto list the hearing date and deal with any directions that should be made for the purposes of the adjourned hearing.

## Findings as to chronology of relevant events

1. As at March 2018, the two vessels were due to commence a term charter providing services off the coast of Western Australia. The *Maersk Master* was on its way to Western Australia from Mauritius. It was to operate with new crew. The *Maersk Mariner* had been operating in Australia for some time before March 2018.
2. On 9 March 2018, an email was sent to a Maersk email address and copied to Mr Gakis, an organiser with the Union. It said:

Dean

We the MUA crew of the Maersk Mariner, would like to request the addition of a steward to help combat the cleaning schedule of the accommodation onboard due to its sheer size and layout according to clause 52 sub section

The vessel is currently working a 24/7 on call schedule and this means extra hours are done at night.

The vessels where [sic] promised a steward while on hire. Currently we are on hire and have no steward.

We hereby start the process of the dispute resolution according to section 45 of the EBA.

We hereby await your response

Mariner MUA crew

1. The reference in the email to Dean is to Mr Hardman, one of two Masters of the *Maersk Mariner*, each working a different rotation on board the vessel. I note that, in the evidence, the terms Master and Captain appear to be used interchangeably. I will use the term Master for consistency.
2. The references in the email to sections are to provisions in the industrial instrument with Maersk at the time (the EA not being concluded until two months later in May 2018). There is no evidence of a response to that email being sent by Maersk to the employees. Ms Nottle, the Human Resources manager for Maersk, gave evidence that the issue was raised by the Master and it was resolved on board. Ms Nottle said there were minutes of a meeting that it was resolved on board so, in her view, the matter was closed. However, when cross‑examined Ms Nottle also gave evidence that there were no communications with crew members after the issue concerning the steward was raised in March. Asked whether she was aware of any communications with crew members to that effect she said 'There are none at all'.
3. Mr Kearney, the Managing Director of Maersk, gave evidence that the 9 March email was forwarded to him. When cross‑examined he said that he addressed it directly with Mr Hardman at the time and it was resolved. He agreed that he did not communicate with employees about the issue. However, in his affidavit evidence he deposed to the following matters:

I did not have much (if anything) to do with the matter raised in the 9 March 2018 email. My understanding from Captain Hardman was that the claim was based on the proposition that the *Maersk Mariner* was large enough to require an additional full‑time steward as part of the ordinary operational crew complement, not merely a part‑time steward split across the two Vessels over a 5 week swing.

I do not know what become [sic] of the request in the 9 March 2018 email. That issue was not subsequently brought to my attention again, until its subject matter arose in the context of the manning dispute in May/June 2018.

1. Therefore, the accounts given by Ms Nottle and Mr Kearney are contradictory and are unsupported by contemporaneous documentation. Neither of them gave evidence of the terms in which the matters raised in the 9 March email were said to have been resolved. There is ample evidence from other witnesses to the effect that the issue in relation to the steward was the subject of ongoing discussions between crew members (see below). In those circumstances, I do not accept their evidence to the effect that the matters raised by the 9 March email were resolved at about that time.
2. On 13 March 2018, an email was sent to Mr Kearney from Mr Green who was, at that time, on board the *Maersk Master* on its way to Western Australia from Mauritius. The Master of the vessel at the time was Mr Rasmussen. Mr Green was on the vessel to undertake a handover, in the expectation that he would be the Master of the vessel when it commenced its operations in Western Australia. The email said that the cook had raised with Mr Green whether there could be a steward on board once the vessel commenced operations in Western Australia.
3. Mr Green (who has been deployed as a Master of the *Maersk Master* since March 2018) deposed that no crew member had come to him to request or raise an issue about an additional steward. However, he also deposed that in May 2018 'there was some mention by crew members of the issue of an additional steward having been brought upon on the *Maersk Mariner* … it was mentioned in general, informal discussions in the mess room'. After that he heard the crew mentioning the topic on other occasions but that no request or demand in relation to an extra steward was made directly to him as Master.
4. After he had deposed to those matters, the email sent by him to Mr Kearney dated 13 March 2018 was brought to his attention. It said:

I have been asked by the cook Michael Ooyendyk if we can get a steward onboard when vessel arrives in Australia. Michael state's [sic], 'Mariner has one and he had spoken to DKE in the past and he agreed that steward should be in the manning'

I'm not aware if the Mariner does in fact carry a steward or some agreement has been reached outside the EBA, could I get some guidance as to MSS position with this?

1. Mr Kearney responded to the email in the following terms:

At present we do not have a steward on Maersk Mariner however we are evaluating how we will best handle this here for the upcoming term charters for both vessels.

There are also some considerations based on how the EBA may look, so I will revert when we have a better position in that regard.

1. Plainly, Mr Green had been mistaken in his earlier affidavit evidence. By way of explanation he said that he was not the Master of the Maersk Master on 13 March 2018. He said that he had been on the vessel for the purpose of a handover, but the Master at the time had been Mr Rasmussen. He said that the email address he had used to send the email whilst on the vessel had not been the email address of the Master. I do not accept that these matters would lead to the factual conclusion that the issue of the steward had not been raised with the Master of the vessel. Plainly, an issue had been raised on the vessel with Mr Green. It concerned the future manning of the vessel when it would be undertaking its planned operations in Western Australia. At that time Mr Green was to be one of the Masters of the vessel. Having regard to the evidence of Mr Green, he was either acting on behalf of Mr Rasmussen or he was acting on the basis that he was the person to be responsible as Master of the vessel upon its imminent commencement of operations in Australia. The technicality of the distinctions raised by Mr Green to explain his earlier evidence lack merit.
2. Mr Bojesen was deployed as Master of the *Maersk Master* from 1 November 2018, having worked on the vessel as Chief Officer from August 2018. He deposed to having heard general discussions that the issue of an additional steward was part of the enterprise bargaining negotiations in 2018 (which on the timeline must have been before August 2018). He also deposed to the issue being raised with him on multiple occasions from mid to late November 2018 after he became Master.
3. Mr Bojesen was also deployed in the *Maersk Mariner* between August and November 2017. He deposed to there being a part-time steward on the vessel during that time 'for a part of a swing on an irregular basis'.
4. Mr Paskin was a Master of the *Maersk Mariner* during the relevant period. He deposed that at no time from August 2017 to March 2019 did any crew member 'either directly or through any appointed representative, raise with me any request, demand or dispute about wanting an additional steward'. However, his evidence did not address the 9 March email sent by the crew.
5. On the evidence, it appears that around and after March 2018 a part‑time steward was sometimes deployed on the vessels. Those arrangements seem to have been in place until July 2018 when manning levels were discussed (see below). Also, on the evidence, it was the view of relevant officers of Maersk that the additional part‑time steward was only required on occasions. Its position was that a full‑time steward on each of the vessels was not required. However, Maersk did not point to any evidence to the effect that the issue had been addressed with the employees on the vessel or the Union. Rather, it took that stance notwithstanding the matters raised in the March emails.
6. To the extent that there is a divergence in testimony, I find that the issue of the additional steward was raised in March by the crew on each of the two vessels. In each case it was raised with the Master of the vessel by email. I find that thereafter there was no communication with the Union or crew members about that issue or its resolution. Maersk took the view that the occasional arrangements for a part‑time steward were sufficient. However, crew members continued to be concerned about the lack of an additional steward and that was a matter known at least to Mr Green as a Master of one of the vessels. In short, the issue remained unresolved with employees on the two vessels.
7. Mr Knight deposed that he worked for Maersk on various vessels between 2008 and 2018. His evidence was that he worked two swings as a cook on the *Maersk Mariner* and from mid‑June 2018 until the time of affirming his affidavit was engaged to work on the *Maersk Master*. He said that on board the *Maersk Mariner* he had numerous discussions with the crew and the Master of the vessel about the need for an additional steward. His evidence was that on joining the *Maersk Master* he specifically raised the issue of the need for an additional steward with the Master, Mr Hasler. His evidence was that Mr Hasler agreed but the matter never went any further. Maersk says that any discussions that Mr Knight had whilst on the *Maersk Mariner* must have preceded the EA. That is because Mr Paskin says he had no such discussion and Mr Hardman, the Master who was on the other swings for the vessel, finished his swing on 15 May 2018 and when he was next on board Mr Knight had moved to the *Maersk Master*. However, there is no evidence to contradict the account given by Mr Knight.
8. The EA was approved by the FWC on 17 May 2018. The EA covers the Union.
9. Mr Knight deposed that in about July 2018 he asked Mr Gakis, the organiser from the Union, to place the issue on the agenda for the upcoming consultative committee meetings with Maersk. Mr Knight was not cross‑examined and his evidence is accepted.
10. On 16 July 2018, Mr Kearney met with Mr Cain, the Assistant Branch Secretary of the Union. The meeting occurred at a time when a number of applications were before the FWC concerning various disputes that had arisen. One of those disputes concerned the number of integrated ratings required for the two vessels. There was no application before the FWC in which a steward was sought to be added to the manning for the vessels. The relevant application concerned only a claim that there should be an additional integrated rating on each vessel.
11. Mr Kearney agreed that at the meeting on 16 July 2018 there was no discussion about the preconditions for an additional steward on the vessels, at least 'not explicitly'. Mr Kearney described the discussions as being 'around the final crewing for the vessel and an agreement on where the manning was to sit going forward'. He said that was the subject matter of an agreement reached between Maersk and the Union at the time.
12. It is common ground that at the time of those discussions there was a part-time steward deployed from time to time on the vessels and the discussion at the meeting was to the effect that if there was an additional integrated rating then there should be no continuation of the part‑time steward. It is also common ground that the agreement that was discussed to resolve the dispute was that the manning for the vessels going forward would be five integrated ratings and a cook.
13. Mr Kearney assented to the proposition that it was discussed at the meeting on 16 July 2018 that the agreement reached would be formalised by emails and that is in fact what happened.
14. Mr Kearney also gave evidence that, during the meeting, Mr Cain had said that he did not give a stuff about the steward.
15. After the meeting, Mr Kearney spoke to Ms Nottle. In re‑examination on the basis that Maersk sought to present evidence of a prior consistent statement, Mr Kearney gave the following evidence:

Sorry? Did you say anything to Ms Nottle about stewards?---I did.

And what did you say to her about that?---The part-time steward would be removed and there would be no more stewards going forward. There would only be five ratings and a cook, which is referenced in my mail to Danny.

All right. And do you recall saying anything to Ms Nottle about what Mr Cain said to you about the issue of stewards?---About, 'I don't give a stuff about the stewards'? Pardon my French.

And do you recall saying that to Ms Nottle?---If it wasn't those exact words. The fact that there wasn't - the ..... union representative, didn't really care about the steward issue. What was involved into the union was that the rating issue and this whole rating, taken to compliment the five, was settled and that was what they wanted to see.

1. Ms Nottle gave evidence that was broadly consistent with the account given by Mr Kearney as to the conversation they had after the meeting that Mr Kearney had with Mr Cain on 16 July 2018.
2. Mr Cain deposed as follows to what occurred at the meeting:

I recall meeting with Dave Kearney, Managing Director of the Applicant (**Kearney**) at the Left Bank on 16 July 2018. This meeting was organised by Kearney in response to a protest that had been initiated by the CFMMEU at the offices of the Applicant due to the poor relationship we had with them at that time and the number of ongoing disputes between them and the CFMMEU.

At that meeting we discussed the outstanding disputes in the Fair Work Commission including disputes around the crewing of the M-class vessels with an additional integrated rating and disputes around the income protection provider to be used to provide income protection to Maersk employees. Also discussed was the right of entry dispute filed by Maersk which had also been dealt with by the Fair Work Commission.

I reached agreement with Kearney that a part-time steward that had been deployed on the M-Class vessels would be removed and the additional IR we had claimed would be deployed in the steward's place. This agreement was not in settlement of any claim for an additional steward to be deployed on the M-class vessels. I could not have settled any claim for an additional steward as I was unaware of the claim for the additional steward as this had not been drawn to my attention at that stage. I deny the claim made by Kearney in his affidavit of 10 July 2020 at paragraph [29(c)] that there would be 'no further stewards'.

1. Maersk was told by the Union that Mr Cain would not be available to attend for cross‑examination. He provided information about his health as a reason for not doing so. Maersk did not oppose the affidavit of Mr Cain being received into evidence but maintained that the fact that he was not available to be cross‑examined was a matter to be taken into account when it came to the weight to be afforded the matters stated in his affidavit. I accept that submission. In doing so, I take account of the matters raised to explain Mr Cain's circumstances. However, the fact remains that the evidence is not able to be tested by cross‑examination.
2. In the result, there is little difference between the competing accounts, save for the remark attributed to Mr Cain that he did not give a stuff about the steward. Taking account of all the evidence, I find that at the meeting on 16 July 2018 Mr Cain did make the remark attributed to him. It is supported by the evidence to the effect that the conversation was recounted to Ms Nottle immediately after it occurred. It is also consistent with Mr Cain's own evidence that he reached an agreement with Maersk on the basis that the part‑time steward would be removed and that an additional integrated rating 'would be deployed in the steward's place'. There is no suggestion from Mr Cain that the manning levels might be subject to later revision of a kind that might include a steward.
3. All accounts of the meeting were to the effect that the arrangements in relation to the part-time steward were to come to an end and there would be an additional integrated rating.
4. A few days after the meeting, Mr Kearney sent an email to Mr Cain in the following terms:

Reference discussions offsite Monday afternoon and earlier this morning we need to hit reset on the relationship and keep things to a local level, where they should also be managed.

As mentioned Monday the manning issue is critical for the union. We think we can come to an understanding on that provided we can agree, on ensuring that all matters are wrapped up now, so we can move on.

Aside from ruling a line under the current open matters, the main thing from our perspective is to have an understanding that the union and MSS A/S will deal with any future issues that might arise in a proper way. The undertaking about professional behaviour is important to us to establish trust and we do also acknowledge the union is taking that step, Monday was an example of this.

But it's also important to follow the agreed dispute resolution procedure, including dealing directly with local management, on workplace issues. We agreed with the union when we signed the current agreement on how agreement disputes should be resolved. Using other means - particularly attacking the reputation of the company or local managers doesn't help either party.

If we can have a close out document showing we have agreed to finally resolve the following:

* Dispute resolution processes;
* The manning issue, including the union's FWC application;
* Right of entry issues, including Maersk's right of entry application.

The income protection issue, including the union's FWC application, I understand has now been resolved.

In relation to vessel standards and PPE, I hadn't realised any of that was a current issue. We follow the regulations and any additional client requirements. However, provided requests are reasonable and it does result in an absence of disputes about the vessels, then we'll take a reasonable approach. Again, I think we can come to an understanding.

If you can come back agreeing to the above we can move forward and communicate this to the employees.

1. It is to be noted that the email from Mr Kearney referenced 'the manning issue', including the FWC application. As has been noted the application dealt with the claim for an additional integrated rating, but made no claim about the steward.
2. Mr Cain responded by email that same day in the following terms:

Thanks for your email.

As discussed on Monday, we agree that it is in both parties interest to start afresh and we look forward to doing so and solidifying that approach in the upcoming meeting between myself, yourself, Melaine and George.

You are absolutely correct in saying that the manning issue is one of great importance to our organisation and the resolution of that dispute will go a long way to ensuring a cooperative future.

If Maersk are agreeable to the manning of 5IRs as indicated in your email and as discussed, we agree to action the below immediately;

Discontinue Income Protection dispute

Discontinue Manning dispute

Withdraw any right of entry dispute applications/prosecutions against Maersk

Engage in a proper disputes process for the other matters raised

We look forward to seeing the manning levels increase on the vessels to reflect this agreement.

This is a positive first step in rebuilding our relationship.

From here I will provide some dates and times after speaking with George to arrange a time to get together and start the new relationship with MSS.

1. It is to be noted that at two points the email from Mr Cain referenced back to the discussions at the earlier meeting. Mr Cain also adopted the terminology of describing 'the manning issue' as being of great importance. He referred to discontinuing the manning dispute.
2. The next day on 19 July 2018, Mr Kearney sent an email in the following terms to Mr Cain:

Thanks for your mail. I appreciate the commitment shown by you this week on behalf of the CFMMEU to a more positive, cooperative and professional relationship and I provide you the same commitment on behalf of Maersk Supply Service.

We believe that workplace issues and disputes that may arise are best resolved at a local level, through the agreed processes, and without publishing comments or materials that disparage either party or their representatives. Please confirm that moving forward from today CFMMEU agrees, and will follow the agreed disputes procedure in the current 2018 enterprise agreement in respect of any issue falling under the agreement and, for any other issues, deal with local Maersk management, and in a professional way, ensuring that communications are consistent with behaviours expected in applicable policies.

To start afresh, based on your email and our discussion, I confirm by reply the following commitments:

1. Maersk will discontinue Fair Work Commission dispute application RE2018/763 in the next few days and implement the following manning arrangements with no further retrospective claims to arise:

a) During any period in which the vessel is contracted to perform work in Australia under the current EA, Maersk Supply Service will implement the following minimum manning levels on our M Class Vessels:

a. Five Integrated Ratings and one Cook (one of the Integrated Ratings may be a Junior Integrated Rating or Provisional Integrated Rating).

b. This being effected today on Maersk Master (Full Crew Change) and planned for Maersk Mariner Tuesday 24th July (Full Crew Change)

2. The CFMMEU will discontinue the Fair Work Commission dispute applications C2018/3287 and C2018/3836 in the next few days and take no further action (e.g. applications/prosecutions) on those issues or the issues referred to in the CFMMEU's correspondence to Maersk dated 4 July 2018 regarding right of entry during the week of 2 July 2018.

Please confirm that my understanding of our agreement is correct, and I confirm myself and Melaine [Nottle] are available Monday afternoon for the meeting with yourself and George, if we can firm up a suitable time before weeks close here.

1. Again it is to be noted that the matters recorded in the email were introduced on the basis that they were 'based on your email and our discussion'. The email described the discontinuance of the claim in which the additional integrated rating had been sought and says that 'the following manning arrangements with no further retrospective claims' will apply. It is significant that the email is cast in terms of manning arrangements in general and is not confined to an agreement about the additional integrated rating. However, the use of the terminology 'retrospective claims' suggests an implicit recognition that future circumstances may mean that different manning may be appropriate. The manning of a vessel depends not only upon its size, but also upon the tasks that the crew is being called upon to perform.
2. As to the manning issue, the email described the minimum manning levels to be introduced on the vessel specifying those levels as 'Five Integrated Ratings and one Cook'. The EA described minimum manning levels in various circumstances. It was those minimum levels that were required to be maintained in order to conform to the requirements of the EA. Therefore, under the EA, the minimum levels were the enforceable levels. The use of the word minimum in that context did not admit of the possibility that there may be some future attempt to insist on the addition of another employee, being the steward. Irrespective of what had been said in the earlier meeting, the emails themselves recorded an agreement to the effect that the minimum manning levels would be the five integrated ratings and the cook and no other employee.
3. It is to be noted that the commitment described in the email also emphasised the expectation of Maersk that the disputes procedure under the EA would be followed in respect of any future disputes.
4. Thereafter, proceedings in the FWC in which a claim had been made for an additional integrated rating were discontinued. Mr Kearney agreed that the claim that was discontinued was a different dispute from a dispute involving whether cl 27.5(b) of the EA requires an additional steward.
5. On or about 9 August 2018, Mr Gakis helped prepare an agenda for a meeting between the Union and Maersk. The agenda included the following item:

**Manning for vessels**

Employees feel that the vessel is undermanned with not having a Steward on board full time. There is more than enough work to justify the position considering the size and layout of the vessels.

1. The agenda was sent to Ms Nottle. On 16 August 2018, Mr Gakis sent an email seeking to have a meeting with Ms Nottle and others to discuss 'some of the more pressing matters' in the agenda.
2. On 22 August 2018, Ms Nottle spoke to Mr Gakis by telephone. She was working in Denmark at the time. She expressed surprise and disappointment that the issue of the steward had been raised when an agreement on the manning for the vessels had been reached in the last month. She referred to the fact that the temporary part-time steward had been removed to provide for a fifth integrated rating and the matter had been discussed between Mr Kearney and Mr Cain at the time. Mr Gakis said that he was only bringing forward a claim 'from the guys' and he did not know what had been discussed between Mr Kearney and Mr Cain. Ms Nottle said she would arrange a meeting when she returned 'between the four of us to clear this up'.
3. Ms Nottle then sent an email to Mr Kearney in the following terms:

I am in discussion with CFMMEU, relaying our surprise about this claim given the agreement that we made to resolve the past disputes. Suggested that George speak to Danny. Seems that Danny is now having a case of amnesia (!)

I re-read the mails and they don't explicitly refer to the steward but this was part of your verbal discussions so we need to nip this in the bud. I suggested we have a meeting next week, only day available would be Monday...would you be free to come down with me for a coffee meeting Monday morning down in Freo to close this out?

1. Mr Kearney sent the following response:

Monday morning is no problems-should we do it first thing and get it out of the way?

You're very right it was verbal that we would pull what we were doing with the Steward in lieu of the additional rating-however there is no req. to have a steward it is just a nice … attempt to have alignment with SIEM at a guess.

1. On 27 August 2018, there was a meeting at the Gesha Cafe in Fremantle. Mr Gakis and Mr Cain were at the meeting for the Union. Ms Nottle attended with Mr Kearney. There is a dispute as to certain aspects of what occurred at the coffee shop meeting.
2. It is common ground that at the coffee shop meeting Mr Gakis raised the issue of an additional steward on the two vessels. Ms Nottle's evidence was that the meeting was the first opportunity to discuss why the claim of an additional steward had appeared for the first time on the agenda 'one month after making the settlement agreement'.
3. The evidence of Ms Nottle was to the effect that the issue of the additional steward was being raised for the first time by the agenda that had been circulated prior to the meeting. Also, she was not aware at that time of any claim that there should be a full-time steward on the two vessels. Her evidence was that before the meeting she had spoken to the two Masters who were then signed‑on for work on the vessels, Mr Paskin and Mr Green. It was her evidence that they told her that the issue of the additional steward had not been raised with them by their crews. Her hearsay evidence in that regard does not assist in resolving whether that was the case. There is other direct evidence as to whether those communications occurred as between the employees and the Masters of the vessels. However, it is evidence as to Ms Nottle's understanding of the position when she was at the coffee shop meeting.
4. Mr Kearney was asked about whether the issue of an additional steward had been raised by the employees with the Masters (which, in context, was a reference to the Masters of the two vessels). Mr Kearney agreed that an issue in relation to a steward had been raised. He said that it had been raised 'in isolation'. However, that question was not directed to what Mr Kearney knew at the time of the meeting.
5. Ms Nottle and Mr Kearney gave evidence that at the meeting at the Gesha Cafe they expressed surprise about the steward issue being raised. On the account of Ms Nottle she asked why, if the additional steward was truly an issue, it was not raised by Mr Cain when he listed all the matters in dispute in writing to Mr Kearney in the course of reaching the settlement in July. It was also her evidence that she also asked how it was coming up when the dispute resolution procedure in the EA had not been followed by raising the issue with the Masters of the vessels. Her evidence was that she did not recall the fact of the 9 March email at the time of the meeting. She said that she had not heard about any further request for a steward until the agenda was circulated for the consultative committee.
6. Mr Kearney and Ms Nottle accepted that Mr Gakis said at the meeting that he had been appointed to raise the issue of the additional steward. Mr Kearney agreed that Mr Gakis emphasised that the issue that had been previously settled was about the integrated rating, not about the steward.
7. On the affidavit evidence, there is a contest about whether Mr Gakis said that the issue about the steward had been raised during the bargaining process for the EA. Ms Nottle said that did not happen. However, when cross-examined, Ms Nottle accepted that Mr Gakis may have said that the issue of the additional steward had been raised in the earlier bargaining process and she thought she had covered that in her affidavit. It is not necessary to resolve that factual issue. It is common ground that the issue was raised at the coffee shop meeting and there is no specific evidence about how the matter was said to have been raised in the bargaining process that is advanced by the Union as to the issue whether the dispute resolution process was followed. The Union relies on other evidence to support its case that step one of that process was followed.
8. Mr Cain and Mr Gakis both denied that Ms Nottle said words to the effect that the dispute resolution procedure had not been followed. It was put to Mr Kearney that neither he nor Ms Nottle said that the dispute resolution procedure had not been complied with in relation to the claim for an additional steward. Mr Kearney could not recall whether that was the case. When cross‑examined, Ms Nottle said that she did not say in terms that step one of the dispute resolution procedure had not been followed, but she did say that it was a matter that needed to be discussed on board with the Master of the vessel.
9. It was common ground that Mr Gakis said that Maersk should go away and consider its position in relation to the additional steward.
10. Having regard to the contents of contemporaneous emails exchanged between Ms Nottle and Mr Kearney before the coffee shop meeting, the oral evidence of Ms Nottle and Mr Kearney under cross-examination, the emails that were sent after the meeting and the passage of time since the events occurred, I find as follows concerning the events at the meeting:
	1. Mr Gakis raised the issue of an additional steward;
	2. Mr Gakis said that he had been appointed by the crew of the vessels to raise the issue of an additional steward;
	3. Ms Nottle and Mr Kearney expressed disappointment and surprise that the issue was being raised given the settlement that had been reached about manning issues the previous month;
	4. Mr Gakis and Mr Cain maintained that the issue whether there should be a steward was a separate matter that had been raised before the agenda for the meeting had been circulated;
	5. Mr Gakis said that the earlier agreement concerned the integrated rating and not the steward and Ms Nottle and Mr Kearney disputed that position;
	6. at the time of the meeting, Ms Nottle and Mr Kearney were not consciously aware of the March emails concerning the steward on board the vessels;
	7. Ms Nottle said that the steward issue should be raised by the employees with the Masters on the vessels;
	8. Ms Nottle did not say in terms that the dispute settlement procedure under the EA had not been followed; and
	9. Mr Gakis said that Maersk should go away and consider its position in relation to the additional steward.
11. On 12 September 2018, Mr Gakis sent an email to Ms Nottle and others which, relevantly for present purposes, was in the following terms:

Hi Melaine,

Tried calling but I believe that you are on overseas.

I was following up on the discussion that we had on the morning of the 27th August regarding the Stewards position. Does Maersk have a position in relation to the claim by the guys?

1. Mr Gakis sent further follow up emails on 26 September, 3 October and 8 October 2018.
2. On 8 October 2018, Mr Gakis updated his members in the following terms:

Members,

This message is so you are all aware that your issues are not forgotten specifically with the Steward. I have been trying to get a hold Maersk management now for approx. 5 weeks and am continuing to try to reach them for some answers.

Melaine [Nottle] has been away on leave for part of this period, but I have tried to reach out since she returned. I will continue to try to resolve the matter in the coming days otherwise I will file with the Fair Work Commission.

1. On 9 October 2018, Ms Nottle responded to Mr Gakis in the following terms:

Getting back to you on your outstanding queries:

Possible dates for CC meeting below. Let me know which date suits best and we can get new booking in the calendar.

[list of possible meeting dates]

Manning claim/Steward at all times: this claim is not accepted. An additional IR was recently added to the manning and the company considers this sufficient. Yes M-class size and layout is different, but these vessels also have added technology to make tasks more efficient. If the crew find an issue with the distribution of their tasks they are reminded to raise their concerns with their captain.

1. Mr Gakis responded immediately stating 'We are not happy with the response regarding the Steward and will be considering our options. Will revert back once we discuss amongst ourselves'.
2. On 30 October 2018, Mr Gakis sent a long email to Ms Nottle. It began 'Further to our discussions about the need to engage a steward on the Maersk anchor handlers, I have set out below the extenuating circumstances which warrant manning levels that exceed the minimum prescribed in the Enterprise Agreement'. The email then set out reasons for the position adopted by the Union.
3. Then on 5 November 2018, Mr Cain, the Assistant Branch Secretary for the Union sent the following email to Ms Nottle and others:

We have not received a response to the below email justifying the position of Caterer on the vessels.

Are you able to respond by COB tomorrow?

If we do not receive a response we will take this as the final step in the DRP as being complete and will lodge the appropriate paperwork to have the matter heard.

If you have any objections to this or believe that the DRP requirements have not been met, let us know asap as we are seeking a timely resolution

1. Ms Nottle responded by email the same day saying:

The short answer is the Company does not accept your claim to add a Steward. The agreed manning is described already by the EA, this is what the employees and Union agreed to as part of the bargaining. We appreciate you [sic] list of reasons, but don't accept there is operational requirement for the position to be added.

Would suggest if employees are concerned about OHS risk, fatigue management and rest hour deviation they raise this immediately with their Captain for re-distribution, re-prioritisation and management of job tasks.

1. There is no indication in these email exchanges that Ms Nottle was of the view that the issue concerning the steward had been resolved by the earlier agreement in relation to manning levels or that the dispute resolution process had not been followed. Rather, her response directed attention to the terms of the EA which sets out manning levels. In that regard, it is to be noted that the EA specifies manning levels based upon the classification of vessels. Ms Nottle's evidence was to the effect that she did not include these matters in her email because she and Mr Kearney had made those points in the meeting at the Gesha Cafe.
2. The Union then filed an application in the FWC asking the Commission to deal with a dispute under the EA in accordance with the dispute settlement procedure. In the application the dispute was described in the following terms:

1. The Respondent [Maersk] employs employees pursuant to the terms of the [EA] ('the Agreement');

2. The Applicant is covered by the terms of the Agreement;

3. The Respondent currently operates two vessels, the Maersk Mariner and the Maersk Master which have been and are currently engaged to support Quadrant Energy's Phoenix South and Van Gogh drilling campaign;

4. The vessels are manned pursuant to Schedule 2 and clause 27.5 of the Agreement;

5. Given the nature of the vessels above, and considering the factors set out at clause 27.5(b) of the Agreement, the Applicant contends that the vessel should be manned with an extra steward;

6. The Respondent rejects this claim by the Applicant and, as a result, the parties are in dispute over the matter.

1. In its response, Maersk re‑stated each of the paragraphs in the application and responded to each paragraph as follows:

The Respondent has addressed the Applicant's claims individually:

l. [see above]

This is not disputed by the Respondent.

2. [see above]

This is not disputed by the Respondent.

3. [see above]

This is not disputed by the Respondent.

4. [see above]

The Respondent agrees that clause 27.5 of the Agreement applies to the vessels, however the applicable vessel schedule is Schedule 1.

5. [see above]

This is disputed by the Respondent.

The Respondent notes that there was no claim made for a Steward during bargaining this year of the current enterprise agreement (approved on 17 May 2018).

The Steward role was a trial on the M class vessels when the vessels were new to Australia to assist the crew for the first two weeks of each swing. It was removed as part of an agreement reached with the Applicant to add a fifth Integrated Rating position earlier this year.

6. [see above]

This is not disputed by the Respondent.

1. In the result, as has been noted, the claim by the Union was upheld by the FWC. It did so by considering the merits of the claim by reference to the manning levels as specified in the EA.
2. Neither Mr Hardman nor Mr Hasler gave evidence. There was evidence explaining that they were no longer employees of Maersk and unsuccessful attempts had been made to contact them for the purpose of ascertaining what they knew and providing evidence. I find that their absence was relevantly explained by Maersk and no particular inference should be drawn from the fact that they did not give evidence.

## The proper construction of step one of the dispute resolution provision

1. Clause 10 of the EA provided as follows:

10.1 When an industrial dispute arises, including a matter arising under this Agreement or the NES, this clause sets out the procedure to resolve the dispute.

**Step 1:**

Where a matter arises when the Employee(s) are on board a Vessel, the matter will in the first instance be discussed between the Employee(s) and the Master.

Where a matter arises when the Employee(s) are not on board a Vessel, the matter will in the first instance be discussed between the Employee(s) and the Employer's nominated representative.

If the matter remains unresolved:

**Step 2:**

The matter will be referred for discussion between the Employee, the Employee's Union delegate or other nominated representative and the Master and/or Employer

If the matter remains unresolved:

**Step 3:**

The matter will be referred for discussion between the appropriate Federal or Branch Union Official or other nominated representative and the Employer's Human Resources or Industrial Relations Manager.

If the matter remains unresolved:

**Step 4:**

In the event that the preceding steps have failed to resolve the matter and/or dispute, any person bound/covered by this Agreement or nominated other representative may refer the dispute to the FWC for conciliation and/or arbitration pursuant to Section 739 and Section 595 of the Fair Work Act.

…

10.4 The parties to the dispute agree to be bound by a decision made by the FWC in accordance with this clause, but note that a decision of a single member of the FWC can be appealed to a Full Bench of the FWC.

10.5 An Employee who is party to the dispute or the Employer may appoint another person, organisation or association to accompany and/or represent them for the purposes of the procedures in this clause.

1. The principles to be applied in construing the terms of an enterprise agreement were summarised in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 563 at [197]. Those principles require consideration to be given to the practical character of an enterprise agreement and the circumstances of employment within the industry to which it applies.
2. The terms of a procedure for resolving disputes should not themselves be construed in a manner that turns them into an instrument for generating disputes as to whether the procedure itself has been followed. Such provisions must be construed having regard to their evident purpose as providing a mechanism by which to encourage discussion and resolution. They should be interpreted 'practically and with an eye to common sense' having regard to the context in which they will be applied so that they can be implemented 'in a clear way on a day‑to‑day basis at work sites': *Ramsay v Menso* [2018] FCAFC 55; (2018) 260 FCR 506 at [39] (Dowsett and Collier JJ), applying *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470 at [15]. See also, *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J); and *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813 at [57] (French J).
3. Clause 10 begins by referring to what is to occur '[w]hen an industrial dispute arises, including a matter arising under this Agreement or the NES'. The language used expands the definition of dispute to include a matter arising under the EA. Therefore, the procedure as thereafter outlined is not to be confined to a dispute properly so‑called. It provides for what is to occur whenever 'an industrial dispute … including a matter' arises.
4. Although used in an enterprise agreement, the term 'matter' indicates issues of the kind that arise in the constitutional discourse as to that term, namely what is meant by the use of that term to describe the ambit of jurisdiction or authority to decide. It is a term that identifies a controversy independently of the claims that may be made in respect of or arising out of that controversy. It points to an authority to quell controversies that might arise which fall within the description 'industrial dispute', including those under the EA or the NES. There need not be an identifiable claim in order for there to be a matter arising.
5. The scope of a matter is determined by the nature of its factual and legal subject, not the fact of a claim or dispute. The use of the terminology to the effect that a dispute includes a matter, expands the operation of the clause to embrace the field of controversy that may be indicated by a question, claim or a request.
6. In the language that follows in cl 10, the first step requires a discussion. If the employees are on board the vessel, then the discussion must be with the Master of the vessel. If they are not then the discussion must be with the employer's nominated representative. If 'the matter remains unresolved' then step two is to be followed which requires a discussion between the employee, the employee's Union delegate or other representative and the Master or Maersk or both. If the matter remains unresolved it is further escalated by step three to more senior representatives. Then, step four provides that if 'the preceding steps have failed to resolve **the matter and/or dispute**' (emphasis added) there may be conciliation or arbitration. It is not until step four that the terminology of dispute is used within the language of the four steps. Up until then the term 'matter' is used.
7. As has been noted, the clause must be read so as to operate in a practical way. In my view it envisages that a dispute (which will be crystalized if the matter reaches stage four) will be preceded by steps one, two and three. At the time those steps are followed there may be, but need not be a fully-fledged dispute. Rather, the procedure as outlined is to be followed whenever 'a matter' arises. Under steps one, two and three the matter is to be discussed with a view to reaching a resolution in the form of common ground or a common understanding as to the matter.
8. As part of that procedure it is to be expected that the parties will engage in discussions with a view to articulating whether they do actually disagree and if so, the extent to which they do so. However, steps one, two and three need not be preceded by a dispute. It is possible that the process may begin with a claim that has been prepared in detail and that is pressed with vigour. Equally, it is possible that it may begin with a question or an inquiry. It is not the case that the dispute resolution procedure is confined to what is to occur if the parties are already in a dispute. Nor does it contemplate the articulation of a point of dispute in the form of a claim and response at each step in the process.
9. However, there will not be a dispute for the purposes of step four unless the discussions contemplated by steps one, two and three have been followed. There will not be a dispute to be brought to conciliation or arbitration unless the preceding procedure has been followed.
10. In the above context, the requirement of step one is that there be a discussion between the identified people when a matter arises concerning the EA which may take the form of a demand, but may also take the form of a question, an inquiry or a request. The EA does not specify the mode of communication for the discussion. In particular, it does not require a face to face meeting. A discussion requires communication between the parties. If the discussion commences with an email which produces no response then the discussion has been brought to an end by the party who does not respond. However, it does not mean that there has been no discussion by the party who sent the email. Rather, in that event, the party who sought to instigate the discussion has met the requirement. The party who fails to respond has not.
11. Having regard to the character of cl 10 as enunciating a practical dispute resolution procedure designed to encourage consensual resolution of issues as to the matters arising under the EA, from the perspective of the party who has raised a matter for discussion but meets a blank wall, the matter is unresolved and that party may move to step two. However, from the perspective of the party who does not respond, the possibility of resolution is still an open question until it engages in discussion. Therefore, for that party the matter has not reached a point where it may instigate step two.
12. It could hardly be the case that, for the employees or the Union acting on their behalf, the process languishes at step one unless and until the Master communicates in some way with the employees. If, as occurred in this case, Maersk simply proceeds on the basis that the issue has been resolved without communicating with the employees then the employees may proceed to step two on the basis that, for them, they have participated in discussion (by presenting the issue and not receiving a response) and the matter remains unresolved. They have complied with step one and may move to step two. Maersk could not be heard to say that by reason of its own failure to respond that the discussion required by step one has not occurred. Such an interpretation of cl 10 would lead to a stalemate where the dispute could not proceed beyond step one.
13. Submissions were advanced for Maersk to the effect that the reasoning by Flick J in *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 2)* [2020] FCA 951 at [70] was of relevance to the construction of cl 10 of the EA. In that case, the dispute resolution procedures under the two relevant enterprise agreements were both expressed in terms that presupposed the existence of a dispute. In one case the clause began: 'In the event of a dispute arising in the workplace about matters arising under this agreement or in relation to the National Employment Standards, the procedure to resolve the matter will be as follows'. In the other case it began: 'If there is a dispute relating to any matter arising under this Agreement or in relation to the NES, the following dispute resolution procedure will be followed'. Both provisions then used the terminology 'dispute' in the steps to be followed.
14. In contrast, as has been noted, cl 10 of the EA refers to a dispute, 'including a matter arising under [the EA or the NES]'.
15. In dealing with an argument advanced for Qantas and Jetstar that there had to be a properly articulated dispute that was being consciously addressed in any meeting said to form part of the steps required by the dispute resolution provisions, Flick J concluded at [70] that:

Notwithstanding a more generally expressed conclusion that the relevant clauses are to be construed with some degree of informality and flexibility, the submission advanced on behalf of Qantas and Jetstar that there needed to be some minimum content to these provisions is accepted. That minimum content, it is concluded, is that there needed to be an occasion on which those participating in the meetings had to know that there were opposing views being expressed and that those opposing views needed to be resolved. It is not necessary, with respect, for those participating in the meeting or discussion to know that they were participating in a meeting which formed part of a dispute resolution procedure. To fall within cl 6 of the *Qantas Agreement* or cl 20 of the *Jetstar Agreement*, there needed to be the raising by an employee or a group of employees of an '*opposing view*' to that of their employer and that view had to be raised at a meeting (however flexibly that term is to be construed) at which it was known or could reasonably be inferred that each of the '*opposing*' sides knew that there was a dispute in need of resolution.

1. As can be seen, the issue before his Honour concerned whether the requirement for a meeting or discussion *in respect of a manifested dispute* had been satisfied. The question was whether there had been an engagement about such a dispute.
2. For reasons I have given, in my view, cl 10 did not require the parties to have joined issue in a crystalized dispute at the point at which step one was being followed. Further, unlike the case in respect of the Qantas Agreement, cl 10 did not require a meeting. It required only that there be a discussion. In my view, in practical terms given the use and availability of technology, a discussion could be by exchange of emails. It could be commenced by sending an email and, from the perspective of the party raising the issue, it could be concluded by a failure to respond or engage with the matters raised by the email.
3. It may be accepted that there could be no discussion unless the matter for discussion was identified. If a party was seeking to refer a dispute to conciliation or arbitration on the basis that step four had been reached then the party needed to be able to demonstrate that the subject matter of that dispute had been raised as a matter for discussion at step one. Therefore, applying the approach of Flick J to the present context there needed to be an awareness on the part of those participating in the discussion of the relevant matter at step one (whether there should be a steward on each of the vessels) that the topic for discussion was the matter subsequently sought to be referred to the FWC. However, this was not a case where there needed to be an existing dispute before step one, nor a case where there needed to be a meeting. Further, Maersk could not by its inaction bring about the factual position that there was no discussion by the Union and therefore an inability on the part of the Union to proceed to step two.

## Compliance with step one

1. On the evidence, the matter of whether there should be a steward on each of the vessels was raised with the Master of each vessel. It was first raised by the March emails. The discussion required by step one was commenced by those emails. The discussion concluded when each Master chose not to respond to the emails. By those actions step one was met.
2. Further, on the basis of the evidence of Mr Knight, he discussed the issue of the additional steward with the Master of each of the vessels. By those actions step one was also met.
3. An alternative claim was advanced for the Union that step one was met when the issue was placed on the agenda in August 2018 and subsequently discussed. It was submitted that Mr Knight requested the issue to be raised in that way and that could occur under cl 10 because step one contemplated that matters may be raised by a representative. There are two difficulties with that alternative. First, I do not accept that this was an instance where the employees were not on board the vessel. The employees raising the issue in the March emails were on board the vessels. Mr Knight was on boardwhen he raised the same concern. Second, although cl 10.5 provides that an employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of the procedures in cl 10, that does not allow for a process by which the employee is not present as part of step one. Therefore, the action of placing the matter on the agenda for the consultative committee and then discussing the issue at the Gesha Cafe did not meet the requirements of step one.
4. For Maersk it was submitted that the matters relied upon by the Union could not meet step one because the EA came into operation on 24 May 2018. Therefore, so it was submitted, the procedure required under the EA had to commence after that date because the dispute taken to the FWC concerned rights under the EA, not the earlier enterprise agreement that it superseded. Reliance was placed upon a series of decisions culminating in the views expressed in *Simplot Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union* [2020] FWCFB 5054. In *Simplot* a Full Bench of the FWC found that the Commission has no jurisdiction to deal with a dispute under a disputes procedure in an enterprise agreement that has ceased to operate: at [18]. It is not necessary for present purposes to consider whether that conclusion is correct. Assuming it to be so, it does not address the issue at hand.
5. In the present case, factual events occurred before the EA came into operation. Those factual events included the taking of steps in relation to a matter that arose under the previous enterprise agreement and continued to be a matter that was germane under the EA when it replaced the previous enterprise agreement. The question is whether, when the EA requires that step one be taken, that it requires that step to be taken, in fact, during the currency of the operation of the EA. The EA itself imposes no such requirement in terms.
6. There is no common law principle that a contract cannot in any circumstances have retrospective effect: *Trollope & Colls Limited v Atomic Power Constructions Limited* [1962] 3 All ER 1035; [1963] 1 WLR 333 at 339‑340; and *Newlands v Argyll General Insurance Co Ltd* (1959) 59 SR (NSW) 130. So, the whole of a contract may govern the activities of the parties before the contract was concluded if so expressed. In this instance, the question is not contractual, it is statutory. Further, it does not concern whether the EA as a whole might be given retrospective effect, but rather whether events that occurred before the EA was given statutory effect may have significance for the way the EA operates, once it takes effect.
7. It may be expected that, in the ordinary course, the terms of a dispute that had arisen under a previous enterprise agreement might be resolved as part of the negotiation and statutory approval of the new EA. However, it is also possible that the parties may treat an issue that remains in dispute as a matter to be resolved by an adjudication to be made as to the meaning and application of the ongoing terms of the EA. Where, as here, the same issue arises under both enterprise agreements and the issue is ongoing at the time that the parties enter into the new enterprise agreement, no purpose would be served by requiring the parties to go back to square one. It is so impractical and unreasonable that it is a construction that should only be reached if the language admitted of no other possibility, particularly when regard is had to the evident purpose of the dispute resolution mechanism in efficiently and fairly resolving disputes as to matters governed by the enterprise agreements.
8. Here, the Union did not claim that the FWC should deal with a dispute under the former enterprise agreement. Rather, it sought to have a dispute as to a matter arising under the EA resolved during the currency of the EA. As a matter of fact it was an issue that was raised and unresolved before the parties entered into the EA. In those circumstances, in my view, the requirement for step one to be met could be satisfied by matters that occurred before the EA came into operation, provided the matter was one which concerned an aspect governed by the EA when it came into operate effect. In short, the requirements of cl 10 of the EA may be met by steps that were taken before it came into operation.

## Alleged issue estoppel as to compliance with step one

1. In the decision on the merits of the claim brought by the Union, Deputy President Binet found that she was satisfied that the parties had complied with the dispute resolution procedure under cl 10. In making that finding, the evidence of Mr Knight was accepted: at [36]‑[39]. The Union claimed that the factual findings by the FWC gave rise to an issue estoppel. An issue estoppel may arise where a tribunal has jurisdiction to decide finally a question arising between parties: *Kuligowski v Metrobus* [2004] HCA 34; (2004) 220 CLR 363 at [22], approving the views of Gibbs J in *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453.
2. In the course of making the Interlocutory Decision, I summarised the nature of the arbitral jurisdiction of the FWC in the following terms at [4]‑[6]:

Any enterprise agreement must be approved by the FWC before it is binding. In order for it to be approved, amongst other things, the FWC must be satisfied that the agreement provides a procedure that requires or allows the FWC or an independent person 'to settle disputes … about any matters arising under the agreement': s 186(6). Therefore, every approved enterprise agreement is required to contain an independent dispute resolution mechanism that governs 'any matters arising under the agreement'.

If an enterprise agreement, as approved, requires or allows the FWC to settle disputes and an application is made to the FWC in respect of a dispute then it acts as a private arbitrator under the authority conferred by the terms of the enterprise agreement ... Absent any statutory provision conferring further private arbitration power, the FWC has no larger authority than the authority to act as a private arbitrator conferred by the enterprise agreement.

Further, the nature and extent of the arbitral appointments that the FWC may undertake are also confined by the extent of the statutory authority to act as arbitrator conferred on the FWC by the Act. Whereas a natural person can accept an appointment to resolve any dispute, the FWC can only do so for the purpose of performance of its statutory functions. In that regard, s 595(1) provides expressly that the FWC may deal with a dispute only if it is expressly authorised to do so under the Act. In particular, it may deal with a dispute by arbitration only if expressly authorised to do so under or in accordance with the Act: s 595(3).

(citations omitted)

1. Under step four of cl 10 of the EA, the private arbitral jurisdiction conferred on the FWC arose: 'In the event that the preceding steps have failed to resolve the matter and/or dispute'. Therefore, unless the first three steps had been followed there was no jurisdiction. The FWC had no arbitral authority to determine the limits of its own jurisdiction: see Interlocutory Decision at [34]. Therefore, a factual finding as to a matter that goes to whether the FWC had jurisdiction could not give rise to an issue estoppel for the purposes of proceedings, like those currently before the Court, in which the jurisdiction of the FWC was in issue. It lacks the requisite finality. It follows the contention that there was an issue estoppel as to whether step one had been met should not be accepted.

## The case based on the earlier agreement

1. The remainder of the case advanced by Maersk depended upon a claim that the terms of the earlier agreement reached between Maersk and the Union in July 2018 finally determined the manning levels on the two vessels. This position merged two distinct propositions. First, it was the earlier agreement and not the EA that governed the manning levels. Second, the arbitral jurisdiction of the FWC was confined to the adjudication of a dispute under the EA and it did not extend to being able to determine the rights of the parties under the earlier agreement.
2. In my view, for reasons which follow, even if there had been an agreement of the kind alleged by Maersk, the FWC still had jurisdiction to determine the manning levels on the two vessels. The making of the earlier agreement the subject of the meeting and emails in July 2018 did not alter or affect the arbitral jurisdiction of the FWC under the EA. Nor did it replace or vary the statutory obligation imposed upon Maersk to give effect to the terms of the EA as the instrument governing the employment conditions for those working on the two vessels. There could be no variation to the scope of the provision conferring the arbitral jurisdiction or the terms of the EA itself without the approval of the FWC. An enterprise agreement must be approved by the FWC after scrutinising the circumstances in which it was made: Part 2.4, Division 4 of the *Fair Work Act*. Thereafter, a variation of the EA has no effect unless approved by the FWC: s 207(3). These matters are fundamental to the character of an enterprise agreement under the *Fair Work Act*. It is not a creature of contract, it is a creature of statute that operates according to the legislative provisions which determine its nature and effect, including the manner of its creation and variation.
3. No doubt it was possible to create by way of contract or deed other rights touching or concerning rights of particular persons conferred by the EA and to do so without varying the EA. Without being exhaustive, those rights might take the form of an agreed compromise of accrued entitlements under the terms of the EA or an agreement not to sue to enforce those rights or that the terms of a covenant may be raised in bar to any claim by the party to rights under the EA. Agreements of that character may be made by a union on behalf of its members to the extent that it could be shown to have authority to do so as agent. The Union itself may agree not to do certain things, including, so it would seem, agreeing in terms not to take action to pursue a particular type of claim under an enterprise agreement such as the EA. However, consensual rights of that character would not alter the terms of the EA (or their statutory effect). Relevantly for present purposes they would not alter the provisions of the EA as to whether a steward was required on a particular vessel or the agreement that the FWC would have the private arbitral authority to resolve any industrial dispute arising under the EA or the NES.
4. Therefore, if the required steps were followed and, in the language of cl 10 (which relevantly mirrors the language of s 186(6) of the *Fair Work Act*), an industrial dispute arose that had not been resolved, the dispute as to that matter could be referred to the FWC for arbitration.
5. In this case the matter that arose and was referred to the FWC concerned whether there should be an additional steward on each of the vessels. It was a claim as to what the EA required. It was not a claim about the scope of what had been agreed in July 2018. It was a claim made on the implicit basis that it was the EA and not the earlier agreement that governed the manning levels. As matters developed, one answer that Maersk raised in response to the claim by the Union about the steward was that the manning on the vessels had been resolved between the Union and Maersk by a previous agreement.
6. However, even if that were so, the FWC retained its statutorily conferred private arbitral authority because its source was the EA. It was not the case that no matter could arise under the EA about a steward. The EA continued to provide for manning levels that included provisions as to stewards. The terms of any agreement made between the Union and Maersk in July 2018 that were not carried into effect by way of variation of the EA, could not alter the statutorily conferred entitlements as to manning levels under the approved EA and could not deprive the FWC of the full extent of its arbitral jurisdiction conferred by the *Fair Work Act* by its approval of the dispute resolution mechanism in the EA.
7. An enterprise agreement is a statutory artefact by which employers and employees may become bound to the observance of the terms of an instrument by force of legislation: *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 at [88]‑[90]. Its formation, performance and enforceability are governed by the *Fair Work Act*. Accordingly, its requirements continue to apply and must be given effect, unless and until its terms are varied in accordance with the statutory procedures.
8. Where, as here, a claim is made of the existence of an agreement that is said to govern the ongoing conditions of employment of employees covered by the terms of an enterprise agreement such that no claim can be made to give effect to the terms of the enterprise agreement then there must be due regard to the manner in which the statutory provisions that give the enterprise agreement its force apply.
9. In *Ryan (Receiver & Manager of Homfray Carpets Australia Pty Ltd) v Textile Clothing & Footwear Union of Australia* [1996] 2 VR 235, the Court considered a claim by employees that they were entitled to redundancy payments determined in accordance with agreements reached between their union and their employer. The agreements had not been certified or registered under applicable legislation. The registered collective agreements that were applicable provided for less favourable terms of redundancy than the awards. The dispute arose at a time when the employer was in receivership and was statutorily required to pay entitlements conferred under an industrial agreement. It was concluded that the relevant statutory requirement was to pay entitlements that were due under an agreement that gave rise to binding legal obligations: at 257‑258 (Hayne JA, Brooking and Tadgell JJA agreeing). The question that then arose was whether the agreements that had been reached, but not included in an award, were legally enforceable. Hayne JA posed the question for adjudication in the following terms (at 264):

In those circumstances it is clear that the unions concerned and the employer intended to make an arrangement that would be binding. But binding in what sense and upon whom? Although it is clear that the parties intended by their signature to the documents to record something that was serious and significant, as opposed to something trifling, are they to be taken in the circumstances of this case as intending to reach an agreement enforceable at law or intending to reach an agreement that would or might have significance in the future industrial relations between the parties but not be enforceable by resort to the courts?

1. His Honour analysed the difficulties for the proposition that the agreements made concerning redundancy entitlements were legally enforceable. They canvassed issues as to the authority of the union to make an agreement for each of the employees, the uncertainty as to the content of any agreement that might have been made by the union as to what would be done in the future and whether any consideration could have been said to have moved from one party to another such as to make the agreement enforceable. His Honour then considered the significance of the fact that the agreements could have been made enforceable by their registration under statutory provisions that were applicable at the time. In that regard, his Honour observed (at 272):

The fact that the parties did not register the agreements may owe much to judgments which they then made about what was or was not to their advantage and may very well not have taken to account the possibility that the employer may fall upon such hard times that an external administrator (a receiver or a liquidator) may be appointed. But that does not mean that the expectations of enforceability which the parties (be they the unions and the employer or the employees and the employer) may have had are to be understood as expectations of enforceability in the courts. Nor does it mean that the expectations (however large they may have been) are properly classed as legitimate expectations of enforceability otherwise than by industrial means of persuasion when there was available to the parties a readily accessible means of ensuring enforceability which they did not adopt.

1. His Honour summarised the position in the following terms (at 273):

In my opinion the true analysis of what was said and done in relation to [the employer] is that the arrangement that was struck was struck between union and employer and, the union having provided no consideration for the employer's promise no contract was made. Because the union gave no consideration for the promise of the employer, the parties did not make a bargain of the kind that could be enforced in a court and in my view their conduct is to be taken as demonstrating that they did not intend to do so.

1. Tadgell JA agreed with the analysis by Hayne JA (at 251) and Brooking JA expressed substantial agreement (at 251).
2. The analysis undertaken in *Ryan v Textile Clothing & Footwear Union of Australia* has since been applied to conclude that the terms of an agreement that has not been registered or approved in accordance with statutory requirements that must be met in order for it to affect the terms of employment of employees more generally do not affect those rights unless it can be shown that the individual terms of employment of particular employees incorporated the agreed terms: *Hanlon v Refined Sugar Services Pty Ltd* [2002] FCA 1395 at [24] (Emmett J); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Corke Instrument Engineering (Australia) Pty Ltd* [2005] FCA 799 at [9] (Finkelstein J); and *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 at [7] (Lindgren J), [127] (Mansfield J). No such claim was made by Maersk in the present case.
3. The reasoning in *Ryan v Textile Clothing & Footwear Union of Australia* illustrates the importance of identifying with care what is occurring in the case of industrial 'agreements' and the extent to which dealings with a union may result in changes to the terms of employment of all employees covered by the agreement. In the particular context of the *Fair Work Act*, the conditions of employment afforded by an enterprise agreement must be met by an employer. They cannot be diminished by an agreement between a union and an employer.
4. In this case, the application of the dispute resolution procedure in cl 10 of the EA to any industrial dispute arising under the EA and the attendant arbitral jurisdiction of the FWC was not brought to an end by the making of any earlier agreement in July 2018. It was not altered or adjusted. No type of dispute was removed from its operation. An inter parties agreement could not alter or limit that jurisdiction as conferred by statute unless the agreement was approved by the FWC as a variation of the EA. At best it could give rise to a private right which might support a claim to injunctive relief preventing the Union or some party who was said to be bound by the agreement made by the Union on its behalf from commencing proceedings in the FWC contrary to an agreed term or covenant that it would not do so. However, no claim of that kind was advanced by Maersk in the present case. Further, even if the agreement reached in July 2018 could be shown to have that character, any such claim raised at this stage after the matter had been dealt with by the FWC and leave to appeal had been refused would face obvious difficulties. To the extent that private rights might be a reason why the statutory arbitral authority might not be able to be invoked by particular parties, they are not rights which can be held in reserve by a party otherwise actively participating in the arbitral process.
5. Therefore, the FWC could validly enter upon the arbitration of a dispute raised by the Union as to whether there should be an additional steward on each of the two vessels. The manning levels that were to be considered and adjudicated by the FWC were those provided for in the EA. Irrespective of the terms of any agreement enforceable as a matter of contract, the EA continued to have statutory force as to the terms and conditions of employment. A party was entitled to bring a claim based upon those entitlements and to do so by the statutory mechanism provided for the determination of that claim.

## The nature and extent of cl 10 of the EA

1. Even if, contrary to the above reasoning, Maersk and the Union could make an agreement concerning the manning levels that applied to the two vessels and Maersk succeeds in its claim that an agreement of that kind was concluded, there remains an issue about the scope of cl 10 of the EA. The issue is whether a dispute as to the nature and extent of such an agreement would itself fall within the scope of the arbitral jurisdiction conferred by the EA. For the following reasons, even in those circumstances the FWC still had jurisdiction to determine the dispute in the present case.
2. Clause 10 of the EA confers a private arbitral jurisdiction when an industrial dispute arises between those bound by the EA. The use of the term 'matter' in the words 'including a matter arising under [the EA] or the NES', indicates an intention to describe the nature and extent of the controversy that may be quelled by the arbitral procedure. The jurisdiction of the FWC as arbitrator does not depend upon whether there is a valid claim under the EA. It depends upon whether there is a bona fide controversy as to an industrial matter as between those bound by the EA. A dispute about whether there has been a prior agreement reached which, if demonstrated to have been reached, would govern the controversy in a manner that would depart from the terms of the EA (which would otherwise apply) is itself such a controversy. Significantly, in such a case, one side of the argument is that the EA applies to govern the industrial dispute. That aspect makes plain that it is an industrial dispute that concerns the subject matter addressed by the EA.
3. In construing an arbitral clause, the presumed or imputed intention of parties who submit disputes to arbitration for commercial reasons is that they ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to be determined by the same arbitral tribunal: *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533 at [16] (French CJ and Gageler J). See also *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170; (2017) 257 FCR 442 at [193] (Allsop CJ, Besanko and O'Callaghan JJ), but noting the comment on appeal *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* [2019] HCA 13 at [25] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
4. Here, the defined relationship in respect of which arbitral authority is conferred on the FWC is the industrial relationship between those parties governed by the EA. To that may be added the fact, as has been explained, that under the terms of the *Fair Work Act* an enterprise agreement must have a dispute resolution mechanism in order for the agreement to be approved by the FWC and thereby have operative effect on all those covered by its terms (many of whom will have had no input into its content). It is to be expected that a dispute resolution clause approved as part of such a process will confer authority as to all industrial disputes concerning the subject matter governed by the enterprise agreement (in this case the manning levels).
5. As has been noted, it was the position of the Union that the dispute was one that was to be resolved by reference to the terms of the EA. There are impractical consequences, as this case illustrates, if the scope of the arbitral authority depends upon which side of the controversy is right. Those consequences, being inconsistent with the presumed or imputed intention in conferring arbitral authority on the FWC, support the conclusion that a dispute as to the nature and extent of the agreement made in July 2018 was within the arbitral authority of the FWC.
6. In circumstances where there was no suggestion that a dispute as to the nature and extent of the agreement reached in July 2018 (made after the EA) would not be referred to the FWC for arbitration if the steps set out in cl 10 were followed, in my view, the arbitral authority of the FWC includes the claim raised by Maersk as to what was agreed in July 2018. There is some support for that conclusion in the form of reasoning adopted in *Faghirzadeh v Rudolf Wolff (SA) Pty Ltd* [1977] 1 Lloyd's Rep 630 at 642. However, as the cases emphasise, the issue is to be resolved by the proper construction of the clause in the particular instance according to contractual principles and therefore the result in one case does not indicate the result in another and I refer to that approach by way of illustration rather than to support the correct interpretation in this case. Therefore, the significant point here is that the nature of the dispute about manning levels under the EA is an industrial dispute for the purposes of cl 10.
7. For those reasons, even on the assumption that there was an earlier agreement in the terms alleged by Maersk with the consequence that the manning levels for the two vessels were to be determined on an ongoing basis by reference to the agreement made in July (and not the EA), the FWC did not exceed its jurisdiction.
8. So, even if the conditions of employment described in the EA could be varied by an agreement that was not a formal variation of the EA, the arbitral jurisdiction of the FWC which continued to be conferred by the EA, extended to quelling those aspects of an industrial dispute that concerned the nature and extent of an agreement that dealt with the same subject matter as the EA.
9. To accept the claim advanced by Maersk would be to give the agreement reached by the parties in July 2018 binding effect in circumscribing the arbitral jurisdiction of the FWC. The requirement for approval addresses the particular circumstances that pertain to industrial agreements that were identified in *Ryan v Textile Clothing & Footwear Union of Australia*. It is a manifestation of the character of an enterprise agreement as a statutory artefact as described in *Toyota Motor Corporation Australia Ltd v Marmara*. Itis the means by which dealings between a union and an employer must establish an arbitral mechanism that must be in existence where the conditions of employment are governed by an enterprise agreement.
10. Therefore, irrespective of (a) the terms of the agreement reached in July 2018 between Maersk and the Union; and (b) whether those terms might be construed by this Court as operating to govern the manning levels on the two vessels irrespective of the manning levels required by the EA, the FWC had arbitral authority to determine an industrial dispute as to the nature and extent of the agreement made in July as to whether there should be an additional steward on each of the two vessels.

## Further observations on the limits of the arbitral jurisdiction of the FWC

1. The nature and extent of the arbitral jurisdiction of the FWC was recently considered by Flick J in *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (No 2)*. It is a jurisdiction that cannot extend beyond the ambit of the dispute that has been the subject of the cl 10 procedure: at [103]. It is a power of private arbitration: *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; (2001) 203 CLR 645 at [31]. Therefore, in shorthand terms it might be said that the nature and extent of the disputes the FWC can resolve depends upon the agreement of the parties to be bound by the determination of the FWC, an observation which explains passages such as those to be found in *Duggan v Metropolitan Fire and Emergency Services Board* [2017] FCAFC 112; (2017) 251 FCR 1 at [58].
2. However, the legislative scheme confers consensual (private) arbitral power to resolve disputes of the kind governed by a dispute resolution procedure in an approved enterprise agreement where the parties to the dispute are parties to whom the agreement applies. Those parties are not confined to those who agree in the usual contractual sense of that terminology. The statutory mechanism means that an employee taking up employment in a position that is covered by an enterprise agreement confers consensual arbitral authority by the procedures established by the *Fair Work Act*. Those procedures include the need for approval by the FWC. By that means the arbitral authority extends to those who did not themselves agree (in a strict contractual sense) to the terms of the enterprise agreement (or its dispute resolution procedure).
3. Therefore, the power is a private arbitral power, but the manner in which it may be conferred is regulated by the statute.
4. As a result, the authority of the FWC to accept private arbitral appointments is limited by the scope of the statutory provisions that confer authority on the FWC to accept private arbitral appointments. The FWC cannot accept arbitral appointments outside the ambit of the statute. By the terms of s 186(6) of the *Fair Work Act*, the FWC can accept arbitral appointments to settle disputes 'about any matters arising under' the relevant enterprise agreement and by the terms of s 595(3) the FWC may only deal with a dispute by arbitration if expressly authorised to do so under or in accordance with the Act. A purported appointment that conferred broader authority than that conferred by an enterprise agreement (as approved by the FWC) could not be accepted by the FWC and a decision made in the purported performance of such an appointment would exceed the statutorily conferred private arbitral jurisdiction of the FWC.
5. Further, a party who agrees to refer an arbitration to the FWC takes that body as it finds it: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123; (2015) 235 FCR 305 at [57]. One aspect of the FWC's statutory character is that an enterprise agreement which confers arbitral authority can only be varied if approved by the FWC. Therefore, a party who submits to arbitration by the FWC should be taken to understand that any change to the submission to that consensual process will require the approval of the FWC.
6. Finally, by reason that the nature of the power being exercised by the FWC in cases where the enterprise agreement confers an arbitral power on the FWC is a private arbitral power, issues arise as to the extent to which judicial review is available: see the observations in *ALS Industrial Australia Pty Ltd* at [85] and *Duggan* at [44]‑[50].
7. Nevertheless, a private arbitrator who exceeds the arbitral authority conferred by the agreement of the parties makes no binding decision. In such a case the arbitrator exceeds the private authority. In that sense, the decision may be said to be beyond jurisdiction.
8. The extent to which the exercise of a private arbitral power by the FWC may be challenged by reference to similar grounds of review that were available at common law to review the decisions of private arbitrators before the introduction of legislation limiting the extent of such jurisdiction need not be considered. Any such consideration would need to bring to account the express statutory requirement that the nature of the decision that the FWC was required to make was one that was not inconsistent with the EA: s 739(5). However, it may be observed that the existence of that provision does not necessarily mean that the arbitral jurisdiction of the FWC is confined to a decision that, in the view of a Court, accords with the requirements of the EA. A construction to that effect may undermine in a fundamental way the conferral of arbitral authority upon the FWC to quell a dispute under the EA. It may be said to fail to reflect the evident intention that the FWC could deal with the dispute as a private arbitrator clothed with the authority normally extended to a private arbitrator: see the reasoning of Rares J in *Linfox Australia Pty Ltd v Transport Workers Union of Australia* [2013] FCA 659; (2013) 213 FCR 234 at [33]. On that basis it may be said that provided the FWC undertook the arbitral task by reference to the terms of the EA and it conformed to the limits of what is required to discharge that arbitral function then it conformed to the requirement of s 739(5).

## The position of the Union

1. The Union maintained that the agreement reached in July 2018 was enforceable on the basis that the construction for which it contended conformed to the requirements of the EA and left open a future claim as to manning levels of the kind that had been brought by the Union in the FWC. Its position was that if the agreement made in July 2018 sought to deal with manning levels into the future then, in that circumstance, the agreement was unenforceable because it would contravene the terms of the EA (as subsequently adjudicated by the FWC). In short, it maintained that there was an ability to settle a dispute in a way that meant that the FWC would not have jurisdiction, but only if the agreed terms of settlement conformed to the requirements of the EA. It maintained that the terms of the agreement made in July 2018 contended for by Maersk would not conform to the EA because the additional steward was required by the EA.
2. This form of submission invited the Court to adjudicate what was required under the EA in relation to manning levels in order to determine the scope of the jurisdiction of the FWC. In other words, it produced an approach where the arbitral jurisdiction of the FWC would depend upon this Court's view as to the nature and extent of the agreement made in July 2018.
3. The Union's approach fails to recognise that the jurisdiction of the FWC under cl 10 is determined by the nature and extent of a defined controversy, namely when an industrial dispute arises. The FWC's arbitral jurisdiction does not depend upon the outcome of the dispute. It depends upon whether the particular dispute falls within the nature of disputes that the parties agreed to submit to arbitration. In this case, the dispute resolution clause in the EA (as approved by the FWC) determined the extent of that authority. It extended to include that part of the dispute that concerned the nature and extent of the agreement made in July 2018 and its significance for the rights of the parties which were required to be determined by the application of the EA. The FWC had the relevant arbitral authority to decide the dispute even where it decided the dispute in favour of the Union.
4. For those reasons, the submissions of the Union as to the extent to which the July agreement was binding in a manner that might deprive the FWC of jurisdiction should not be accepted.

## Other contentions raised by Maersk

1. It was submitted for Maersk that the resolution reached between Maersk and the Union in July 2018 had the consequence that there could not be a legally cognisable dispute concerning the manning levels on the two vessels at least in the absence of some changed circumstance. It was conceded that the agreement reached between Maersk and the Union did not vary the EA or the jurisdiction of the FWC to resolve a dispute. Rather, it was said that it established the position that there was in fact no dispute because the dispute had been resolved by way of agreement. Therefore, so it was submitted, there was no dispute that could be brought before the FWC as a private arbitrator.
2. These submissions fail to reflect the significance of the concession that the resolution reached in July 2018 did not vary or alter the terms of the EA. It was the existence of a dispute about how those terms (which continued to have statutory force) were to be applied that gave rise to the subject matter that was within the private arbitral jurisdiction conferred by cl 10 of the EA. Therefore, the FWC had a jurisdiction that could be invoked if there was a dispute as to how the EA should be applied. In short, even if there was a legally binding agreement of the kind alleged by Maersk it did not mean that there could be an industrial dispute about matters covered by the EA in respect of which the FWC lacked arbitral jurisdiction.
3. The statutory character of the EA meant that the making of an agreement between Maersk and the Union about manning levels did not mean that the manning levels in the EA did not continue to apply or that there could no longer be a dispute about them. It could only create private contractual rights as between Maersk and the Union. Those rights would never be sufficient to take away the arbitral jurisdiction of the FWC (being the nature of the claim made by Maersk in these proceedings). Unlike the usual position in a private arbitration where the parties to an arbitration agreement could resolve their dispute and thereby bring the consensual arbitral authority to an end, the parties lacked that authority in relation to the arbitral authority conferred on the FWC by cl 10 of the EA. All the more so when Maersk and the Union were not all of the parties who had rights under the EA.
4. Reliance was placed upon the decision in *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245 where it was held that this Court has no jurisdiction to grant declaratory relief as to the proper construction of a term of an enterprise agreement where a dispute concerning its application had been resolved by an arbitral determination by the FWC: at [67], [106] (Bromberg J). The decision was affirmed on appeal: *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146; (2018) 264 FCR 342 at [92] (Rares and Barker JJ), see also [125]‑[133] (Flick J). However, that case concerned a very different point, namely the effect of a within jurisdiction arbitral determination on the ability to raise a claim in this Court.
5. It was said that the *Fair Work Act* should be construed in a manner that would exclude from the private arbitral jurisdiction of the FWC any claims that had been settled or resolved by private agreement. There are a number of reasons why that submission should not be accepted. First, it is not founded on the language of the Act. Secondly, the Act requires that an enterprise agreement contains an arbitral mechanism that applies where there is a dispute as to a matter that arises under the enterprise agreement. The enterprise agreement is a statutory artefact whereby an agreement made in accordance with the provisions of the legislation confers rights and obligations on those who were not consensual parties to the agreement. It would undermine the fundamental nature of an enterprise agreement if its terms could be varied by a private agreement that did not conform to the legislative requirements. Thirdly, there is a mechanism by which an agreement as to the way an enterprise agreement will apply may be given effect, namely by application to vary the enterprise agreement. Fourthly, as has already been observed, it is possible to make a consensual agreement that is enforceable according to ordinary contractual principles. There is also the possibility of making an agreement with a union as to the steps it might take in relation to the enforcement of an enterprise agreement. If those agreements are enforceable as a matter of contract law then relief may be sought on that basis as against those who are parties to the agreement. That did not occur here. Instead Maersk participated in the private arbitral process and made no attempt to restrain the Union from bringing the claim before the FWC on the basis of a contention to the effect that it had agreed not to make any such claim.
6. Finally, it was said that the manning levels agreed in July 2018 were consistent with the benchmark provided for by the EA and a departure from the benchmark was only to be considered if there was a 'disagreement'. It was submitted that there could be no disagreement because of the agreement that had been reached between Maersk and the Union. The claim to that effect depends upon a contention as to what the EA required. If an agreement was made in July 2018 about manning levels that did not lead to a variation of the EA then it did not deprive the FWC of its arbitral jurisdiction. If there was then a disagreement about whether there should be a departure from the benchmark it would be an industrial dispute that could be referred to arbitration. That is what has occurred. The dispute has gone to arbitration and has been quelled by the exercise of arbitral authority by the FWC.

## The nature and extent of the July 2018 agreement

1. Given the conclusion I have reached concerning the jurisdiction of the FWC, it is not necessary to decide what was agreed between the parties as part of the earlier agreement. However, as the issue was fully argued, it is appropriate that I briefly state my views as to what was agreed.
2. First, I would find that the parties intended the terms of their agreement to be confined to the written terms of the email dated 19 July 2018 from Mr Kearney to Mr Cain. The email was sent following a request from Mr Kearney for a 'close out document' showing what had been agreed. Mr Cain's email in response was expressed in summary terms. It stated that if Maersk was agreeable to the manning of five integrated ratings then the Union agreed to a list of action that included 'Discontinue Manning dispute'. It led to a reply from Mr Kearney setting out 'the following commitments'. The email stated with precision what was to be agreed. It dealt with manning arrangements 'with no further retrospective claims'. It was, in the context of what had gone before, a 'close out document'. There is no indication in the final emails that the 'commitments' that had been agreed were to be found in the earlier oral discussions. Nor is there evidence that there were oral discussions to that effect. On the evidence, it was meant and intended to capture what had been agreed without regard to earlier discussions.
3. Secondly, I would receive the evidence that was submitted concerning the preceding oral discussion as evidence of the surrounding context, but not as evidence of what was agreed or of the parties' actual intentions, aspirations or expectations as to how the agreement would operate. I would accept that there is ambiguity in the terms of the final email as to whether it was intended to apply to future claims that there should be an increase in manning levels, particularly the addition of an a steward. The parties may be taken to have known the matters that led to the making of the agreement, particularly the existence of a dispute about the manning levels concerning whether there should be an additional integrated rating. There may be regard to the fact that Mr Cain expressed the view that he did not give a stuff about the steward on the basis that it is an instance where the evidence shows that any possibility of a particular provision including stewards in the manning levels had been rejected. I would not receive the evidence that Maersk had said that it would apply savings from not deploying a steward on a part-time basis to meet part of the cost of the additional rating. In my view, that evidence is, in substance, evidence of the intentions, aspirations or expectations of Maersk. The fact that it was communicated as part of the negotiations does not mean that the language that the parties joined in adopting as the expression of their agreement would have that consequence. In reaching these conclusions, I give effect to the principles stated in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [46]‑[52].
4. Thirdly, I would construe the written terms of the agreement as recorded in the email as dealing with minimum manning levels on the vessels, in the circumstances that pertained at the time. It covered all claims that related to previous circumstances. It also agreed the manning on an ongoing basis. Necessarily implicit in the language used in the final email to close out the agreement was that it stated in full the relevant manning for the vessels for employees represented by the Union, namely five integrated ratings and one cook. The parties advanced arguments as to the extent to which that could be the case given that circumstances may change. However, the claim by the Union that there should be an additional steward was not based upon any claim that there had been a material change. It may well be the case that it was implicit in the agreed terms that they only pertained for so long as there was no material change in the nature of the work that the vessel was undertaking. However, it is not necessary to resolve the question. It is sufficient to observe that a construction of that kind would deal with the arguments advanced by the Union to the effect that there would be problems if there could be no future increase or change to manning in any circumstances.
5. Finally, as to the aspects of the affidavit evidence on which I reserved as to their admissibility:
6. as to the affidavit of Ms Nottle received as exhibit 2, I receive the evidence in paragraphs 11, 13 and 15 as being relevant to the question whether the issue of an additional steward had been raised in any way prior to the reference to the issue in the agenda for the August meeting, but not as evidence of what was agreed in July 2018;
7. as to the affidavit evidence of Mr Kearney received as exhibit 5, I uphold the objection to paragraph 27 as evidence of the intentions of the parties as to the content of the agreement. I receive the evidence in paragraph 28 concerning the remark attributed to Mr Cain. I receive the evidence in paragraph 37 as being relevant to the question whether the issue of an additional steward had been raised in any way prior to the reference to the issue in the agenda for the August meeting, but not as evidence of what was agreed in July 2018; and
8. as to the affidavit evidence of Mr Kearney received as exhibit 9, I uphold the objection to paragraph 3 as evidence of the intentions of the parties as to the content of the agreement.

## Conclusion

1. It follows that the claim by Maersk should be dismissed. It was the position of each of the parties that each party should bear its own costs irrespective of the outcome on that application. Therefore, there should be no order as to costs of the application.
2. On the cross‑claim, for the reasons given, liability has been established and it is appropriate for there to be a further hearing to determine the relief that should be granted. I will make orders to convene a case management hearing to consider the future conduct of the cross‑claim.

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| I certify that the preceding one hundred and sixty-four (164) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 25 November 2020