FEDERAL COURT OF AUSTRALIA

ResMed Limited v Australian Manufacturing Workers’ Union [2015] FCA 360

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| Citation: | ResMed Limited v Australian Manufacturing Workers’ Union [2015] FCA 360 |
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| Parties: | **RESMED LIMITED (ACN 003 765 142) v AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION, KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (ACN 158 572 779) and FAIR WORK COMMISSION** |
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| File number: | NSD 511 of 2014 |
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| Judge: | **PERRY J** |
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| Date of judgment: | 20 April 2015 |
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| Catchwords: | **INDUSTRIAL LAW –**Where application for a majority support determination is made by employee organisation - Where application for judicial review of decision by Fair Work Commission that it has jurisdiction to entertain the application for a majority support determination – Whether application for a majority support determination made by an employee organisation under s 236 of the *Fair Work Act 2009* (Cth) valid only where all employees to be covered by proposed enterprise agreement are eligible for membership of the employee organisation – Where employee organisation was a bargaining representative for at least one employee to be covered by the proposed agreement – Where application made under s 236 by the employee organisation was valid**STATUTORY INTERPRETATION –** Whether application for majority support determination by an employee organisation under s 236 of the *Fair Work Act 2009* (Cth) valid only where all employees to be covered by proposed enterprise agreement are eligible for membership of the employee organisation – Where no textual support for restriction on capacity of employee organisation to apply for a majority support determination – Whether by making a s 236 application an employee organisation is “*representing*” the interests of the employees to be covered by the proposed agreement – Whether authorities considering the capacity of employee organisations to make claims so as to give rise to an “*industrial dispute*” within s 51(xxxv) of the Constitution are relevant to capacity of employee organisation to make a s 236 application for a proposed enterprise agreement covering employees not eligible for membership of the employee organisation – Where Part 2-4 of the *Fair Work Act 2009* (Cth) enacted in reliance upon corporations power in s 51(xx) of the Constitution – Whether restriction on capacity of employee organisations to make s 236 application consistent with statutory purpose of promoting agreements at the enterprise level and requirement that the group be “*fairly chosen*” |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA *Constitution* ss 51(xx), 51(xxxv)*Fair Work (Registered Organisations) Act 2009* (Cth) ss 18, 18B, 19*Fair Work Act 2009* (Cth) Part 2-4, ss 3, 12, 13, 14, 171, 172, 173, 174, 176, 181, 182, 185, 186, 228, 230, 236, 237, 238, 570  |
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| Cases cited: | *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2013] FWC 9725*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* [1925] HCA 7;(1925) 35 CLR 528 *CDJV Construction Pty Ltd v McCarthy* [2014] FWCFB 5726*Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 2206; (2012) 219 IR 139 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319*Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16; (2013) 250 CLR 523 *Federated Ironworkers’ Association of Australia v Commonwealth* [1951] HCA 71; (1951) 84 CLR 265*Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586; [2000] 2 All ER 109 *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297*Metal Trades Employers Association v Amalgamated Engineering Union* [1935] HCA 79;(1935) 54 CLR 387 *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2010] FWAFB 6519; (2010) 197 IR 294 *New South Wales v Commonwealth* (*Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 1*Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* [2014] FCAFC 70; (2014) 222 FCR 13 *R v Dunlop Rubber Australia Limited; ex parte Federated Miscellaneous Workers’ Union of Australia* [1957] HCA 19; (1957) 97 CLR 71*R v Williams; ex parte Australian Building and Construction Employees’ and Builders Laborers’ Federation*  [1982] HCA 68; (1982) 153 CLR 402*Re Finance Sector Union of Australia; ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 *Re Pacific Coal Pty Limited; ex parte Construction, Forestry, Mining and Energy Union* [2000] HCA 34; (2000) 203 CLR 346 *ResMed Limited v Australian Manufacturing Workers’ Union (AMWU)* [2014] FWCFB 2418*Seven Network (Operations) Ltd v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union* [2001] FCA 456; (2001) 109 FCR 378 *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 88 ALJR 473*The Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2014] FWCFB 3501*The Queen v Graziers’ Association of New South Wales* (1956) 96 CLR 317*Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 |
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| Date of hearing: | 1 and 5 August 2014 |
|  |  |
| Date of last submissions: | 24 November 2014 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Counsel for the Applicant: | Mr A Moses SC |
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| Counsel for the First Respondent: | Ms C Howell |
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| Solicitor for the First Respondent: | AMWU |
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| Counsel for the Second Respondent: | The Second Respondent entered a submitting appearance, save as to costs |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | NSD 511 of 2014 |

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| BETWEEN: | RESMED LIMITED (ACN 003 765 142)Applicant |
| AND: | AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION, KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION (ACN 158 572 779)First RespondentFAIR WORK COMMISSIONSecond Respondent |

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| JUDGE: | PERRY J |
| DATE OF ORDER: | 20 April 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The question of costs is reserved.

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

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| JUDGE: | PERRY J |
| DATE: | 20 April 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

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##### 1. THE ISSUES

1. The first respondent, the Automotive, Food Metals, Engineering, Printing and Kindred Industries Union (the **Union**), seeks to engage processes under the *Fair Work Act 2009* (Cth) (the **FW Act**) to facilitate the initiation of bargaining between the applicant, ResMed Limited (**ResMed**), and a group of its employees for a proposed enterprise agreement.
2. ResMed has neither initiated bargaining nor agreed to bargain. As a result, on 25 March 2013 the Union applied under s 236(1) of the FW Act to the Fair Work Commission (the **Commission**) for a determination that a majority of employees who will be covered by the proposed agreement want to bargain with ResMed. The validity of the Union’s application for the majority support determination was upheld by the Commission and by the Full Bench of the Commission (the **Full Bench**) on appeal.
3. ResMed challenges those decisions and contends that the Commission and the Full Bench ought to have found that the application for a majority support determination was invalid and that the Commission therefore lacked jurisdiction to deal with the application. This issue turns on the proper construction of s 236(1) of the FW Act and, in particular, whether the Union can apply for a majority support determination in circumstances where the proposed agreement would extend to employees who do not meet the Union’s eligibility rules.
4. If ResMed is correct in its construction of s 236 of the FW Act*,* the first respondent rightly accepts that the Commission would lack jurisdiction to consider the application for a majority support determination.
5. The second respondent, the Fair Work Commission, made a submitting appearance, save as to costs.

##### 2. BACKGROUND

1. The relevant facts can be summarised shortly.
2. ResMed is a Corporation established under the *Corporations Act 2001* (Cth) and is engaged in manufacturing products for people with sleep disordered breathing and other respiratory disorders. It has a product development and manufacturing facility at Bella Vista, north-west of Sydney, New South Wales.
3. On 25 March 2013, the Union filed an application for a majority support determination under s 236 of the FW Act (the **MSD application**). The application related to a single-enterprise agreement proposed by the Union which would cover some, but not all, of ResMed’s employees.
4. In paragraph 2.2 of the MSD application, the Union identified the following categories of employees as those who would be covered by the proposed agreement:

Employees of ResMed Limited who work at the Bella Vista site, who are covered by the *Manufacturing and Associated Industries and Occupations Award 2010* and who are engaged as:

1. Production Operators, Line Leaders or Line Coordinators in the Patient Interface work group; or
2. Production Operators, Line Leaders or Line Coordinators in the Ventilation work group; or
3. Production Operators, Line Leaders or Line Coordinators in the Machines work group; or
4. Warehouse Operators, Line Leaders or Line Coordinators in the Warehouse work group; or
5. an employee in the Manufacturing Equipment and Tooling Support (METS) work group who holds a trade certificate or equivalent, or who is undertaking an apprenticeship or traineeship, other than any team leader(s) and/or any employee who is engaged as a supervisor, manager or equivalent.

For the avoidance of doubt, any employee engaged as a team leader, supervisor, manager or equivalent will not be covered by the proposed enterprise agreement.

1. As the Commissioner stated at [5] in his decision on 19 December 2013 (the **first instance proceedings**), “*[i]n simple terms the proposed agreement would cover non leadership roles in the production, warehouse and tooling support areas at ResMed’s Bella Vista site.*”
2. In the MSD application, the Union stated that it sought to bargain for an enterprise agreement with ResMed in respect of the employees identified in paragraph 2.2 as a bargaining representative of employees within the meaning of s 176 of the FW Act. The Union also submitted among other things that the Commission will be satisfied of the requirement that the group has been fairly chosen (see below at [27]-[28]) and that the employees who would be covered by the proposed agreement are not currently covered by an enterprise agreement.
3. It was not in dispute in the Fair Work Commission or in these proceedings that the Union had at least one member in each of the five categories of employees. Nor was it in dispute that the categories of employees identified as those who would be covered by the proposed agreement included employees who were not eligible to be members of the Union.
4. The eligibility rule of the Union is contained in rule 1A(a) of the Union’s Rules:

RULES OF THE “AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION” KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS’ UNION (AMWU).

1 – NAME OBJECTS AND CONSTITUTION

The Union formed under these Rules (hereinafter called the “Union”) shall be named the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU). It shall be a registered Trade Union.

1A. Without in any way limiting or being limited by sub-rules 1B, 1C, 1D, 1E, 1F, 1G, 1H and 11 the Union shall consist of an unlimited number of persons who are employed or usually ***employed in or in connection with the following trades or calling*** or branches thereof:

(a) Smiths, ship smiths, angle iron smiths, drop-hammer smiths, spring smiths, oliver smiths, spring fitters, swaging machine operators, operators on smithing machines similar to swaging machines, nut and bolt makers, windmill erectors, motor, motor cycle and cycle mechanics, tuners and testers in motor industry, enamellers, typewriter mechanics, well-borers, scale-makers, metal safe makers, locksmiths, forge hammermen, forgemen, strikers, drop-hammer stampers, forging machine workers, forge, iron and brass furnace-men, ship’s plumbers, ***fitters,*** turners, grinders, whetstone grinders and glazers, sea-going engineers, shift engineers, roll turners, patternmakers, model makers, millwrights, mechanical draughtsmen, technical assistants, planners, borers, slotters, machine drillers, milling machine workers, shapers, ***machinists***, brass founders, brass finishers, brass smiths and operators of machines in connection with same, coppersmiths, armature winders, equipment examiners, and ***electrical engineers*** generally, radio workers, mechanical and scientific instrument makers and optical glassmakers, linotype mechanics, press mechanics, machine joiners employed in the construction of cotton, silk, flax, woollen or other machines, die sinkers, press tool makers and stampers, electroplaters, polishers, electroplate makers up, sheet metal spinners, ***assemblers***, skilled acetylene and electrical welders, aero mechanics, duralium workers, including forgers, fitters and all other aircraft workers who are employed on the fuselage or engine work, and ***all workers engaged in the engineering***, shipbuilding ***and kindred trades***. (emphasis added)

1. The Commissioner explained at [22] of his decision that the eligibility rule “*reflects the consequences of successive amalgamation of organisations with employees. The genesis of the rules originates from registration of The Amalgamated Society of Engineers 1905, said to be registered in the engineering industry.*”
2. On 19 December 2013, the Commissioner determined that the application for a majority support determination was a valid application under s 236 of the FW Act and that it had jurisdiction to deal with, and to make a determination in respect of, the application under s 237 of the FW Act (the **jurisdictional issues**): *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2013] FWC 9725. The Commissioner also rejected ResMed’s submission that none of the employees specified in the application were eligible to be members of the Union. Rather the Commissioner found that the employees in category (e) of paragraph 2.2 were eligible to be members of the Union but not employees in the other four categories. As a result, the Commissioner concluded that the Union was a bargaining representative for at least one employee to be covered by the proposed agreement (the **bargaining representative issue**).
3. ResMed appealed to the Full Bench on the jurisdictional issues by a notice of appeal filed on 6 January 2014. ResMed did not appeal the finding by the Commissioner that the Union’s rules had coverage of employees in category (e) or the consequential finding that the Union was a bargaining representative under the FW Act for at least one employee to be covered by the proposed agreement. However, ResMed contended that that did not suffice for a valid application. Rather, in its submission, it was necessary for ***all*** employees covered by the proposed agreement to be eligible for membership of the Union. The Union also appealed the findings that employees in categories (a) to (d) were not eligible to be its members. That appeal was heard and determined separately by the Full Bench of the Commission: *The Australian Manufacturing Workers’ Union (AMWU) v ResMed Limited* [2014] FWCFB 3501. Notwithstanding that that decision was given before the hearing of this application, applications for judicial review of that decision were separately instituted after judgment in this proceeding was reserved. This application concerns only the decision of the Commissioner and the Full Bench on the jurisdictional issues.
4. On 11 April 2014, the Full Bench of the Commission granted ResMed permission to appeal but dismissed the appeal: *ResMed Limited v Australian Manufacturing Workers’ Union (AMWU)* [2014] FWCFB 2418.

##### 3. THE LEGISLATIVE FRAMEWORK

1. The object of the FW Act is spelt out in s 3, namely:

… to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by: …

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness ***through an emphasis on*** ***enterprise–level*** ***collective bargaining*** underpinned by simple good faith bargaining obligations and clear rules governing industrial action; … (emphasis added)

1. The term “*enterprise*” is defined in s 12 to mean “*a business, activity, project or undertaking*”. Enterprise agreements are agreements about one or more of the matters referred to in s 172 including matters pertaining to the relationship between an employer and its employees who, or the employee organisation which, will be covered by the agreement. They may contain terms that are ancillary or supplementary to the National Employment Standards which are the minimum terms and conditions that apply to all national system employees.
2. Part 2-4 of the FW Act deals with the approval of enterprise agreements, including pre-approval steps and applications for the approval of the Commission. Part 2-4 applies to an employer, such as ResMed, which is a “*national system employer*” because it is a “*constitutional corporation”*, and to an employee who is a “*national system employee*” because she or he is employed by such a corporation: see s 170 defining “*employee*” and “*employer*” for the purposes of Part 2-4 as a “*national system employee*” and “*national system employer”* respectively as defined in ss 13 and 14. A “*constitutional corporation”*, in turn, is a corporation to which s 51(xx) of the Constitution applies, being the power to make laws with respect to corporations: see the definition of “*constitutional corporation*” in s 12 of the FW Act.
3. For reasons which will become apparent, it is important in construing Part 2-4 to bear firmly in mind that the Parliament has enacted these provisions in reliance upon s 51(xx) of the Constitution, and not upon s 51(xxxv) of the Constitution which confers power to make laws for “*conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”.* In this regard, in the *Work Choices Case* the majority agreed with Gaudron J in *Re Pacific Coal Pty Limited; ex parte Construction, Forestry, Mining and Energy Union* [2000] HCA 34; (2000) 203 CLR 346 at 375 [83] that the legislative power conferred by s 51(xx) “*extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations”*: *New South Wales v Commonwealth* *(Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 1 at [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). The majority also held that s 51(xxxv) does not contain a positive prohibition or restriction on other paragraphs of s 51: ibid at [221]-[222].
4. In line with s 3(f) of the FW Act, s 171 provides that the objects of Part 2-4 are (relevantly):
	* + 1. to provide a simple, flexible and fair framework that enables collective bargaining in good faith***, particularly at the enterprise level***, for enterprise agreements that deliver productivity benefits; and
			2. to enable the FWC to facilitate good faith bargaining and the making of ***enterprise*** agreements… (emphasis added)
5. Division 3 of Part 2-4 deals with the right of employees to be represented by a bargaining representative during bargaining for a proposed enterprise agreement and prescribes the persons who are bargaining representatives for such agreements. The bargaining representatives for a proposed enterprise agreement that is not a greenfields agreement are:
6. the employer(s) covered by the agreement or its appointed bargaining representative for the agreement (s 176(1)(a) and (d));
7. the employee organisation for those employees who it may legitimately represent under its eligibility rules and who are covered by the proposed agreement in relation to the work that will be performed under the agreement (save for employees who have revoked its status as such or appointed another bargaining representative) (s 176(1)(b) and (3)); and
8. any bargaining representatives appointed by particular employees, including where the employee appoints herself or himself, the employee (s 176(1)(c) and (4)).
9. An employee organisation is defined in s 12 to mean “*an organisation of employees*.” “*Organisation”* in turn is defined in s 12 to mean “*an organisation registered under”* the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FW(RO) Act**). Such an organisation can be registered only if it is a constitutional corporation or if some or all of its members are federal (relevantly, national) system employees (ss 18 and 18B, FW(RO) Act), and must exist for the purpose of furthering or protecting the interests of its members (s 19(1)(a)(ii), FW(RO) Act). There is no dispute that the AMWU is such an organisation. Nor is it in dispute that an employee organisation can be a bargaining representative only for those employees who it may legitimately represent under its rules. However, the fact that an employee organisation may represent an employee/member does not preclude that employee/member from instead representing herself or himself or from appointing another person to represent her or him.
10. An enterprise agreement may come about through a number of means, including where an employer requests under s 181(1) of the FW Act that the employees approve a proposed enterprise agreement by voting for the agreement and the pre-requisites for approval of the agreement have been met. Alternatively, and critically to this case, where an employer has not initiated bargaining or agreed to bargain, ss 236 and 237 provide a means whereby, on the application of a bargaining representative of an employee, the Commission can assess whether a majority of employees want to bargain.
11. What is proposed here is asingle–enterprise agreement which would not cover all of the employees of the ResMed. Section 236 provides in relation to a proposed single–enterprise agreement that:
12. A bargaining representative of an employee who will be covered by a proposed single–enterprise agreement may apply to the FWC for a determination (a ***majority support determination***) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.
13. The application must specify:
14. the employer, or employers, that will be covered by the agreement; and
15. the employees who will be covered by the agreement.
16. Where the proposed agreement will not cover all of the employees or employers covered by the agreement, the Commission must, in deciding whether the group of employees was fairly chosen for the purposes of s 237(2)(c), take into account whether the group is geographically, operationally or organisationally distinct (s 237(3A)).
17. As will be apparent, the requirement that the employees covered be “*fairly chosen*”, is a consistent theme throughout Part 2-4. Specifically, mechanisms are available under Part 2-4 at each stage of the process - from the application for a majority support determination application, to the end of the process where approval is sought for an agreement – so as to ensure that employees to be covered by the agreement are fairly chosen and that that continues to be the case (appreciating that the course of negotiations or other circumstances may cast a different complexion on whether the requirement is met). In turn, this requirement forms part of the means by which the object of the FW Act is implemented in line with s 3(e) of the FW Act by protecting against unfair treatment and discrimination.
18. Section 237(1) provides that the Commission must make a majority support determination in relation to a proposed single-enterprise agreement if an application for the determination has been made and the Commission is satisfied of the matters set out in (2) in relation to the agreement. The matters of which the Commission must be satisfied in subsection (2) are that:
19. a majority of the employees:

(i) who are employed by the employer or employers at a time determined by the FWC; and

(ii) who will be covered by the agreement;

want to bargain; and

1. the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining for the agreement; and
2. that the group of employees who will be covered by the agreement was fairly chosen; and
3. it is reasonable in all the circumstances to make the determination.
4. Foremost, therefore, among the matters of which the Commission must be satisfied in considering such an application is that a majority of the employees who are employed by the employer at a time determined by the Commission and who will be covered by the agreement want to bargain: *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 (***JJ Richards***) at 301 [8].
5. Irrespective of whether bargaining is instituted by a majority support determination or under s 181 by the employer, an employer who is covered by a proposed enterprise agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the agreement and is employed at the time of notification (s 173(1)(a)). In line with s 176(1)(b) of the FW Act, s 174(3) provides that the notice must explain that:
6. if the employee is a member of an employee organisation that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement; and
7. the employee does not appoint another person as his or her bargaining representative for the agreement;

the organisation will be the bargaining representative of the employee.

1. The FW Act then imposes good faith bargaining requirements with which a bargaining representative must comply in relation to a proposed enterprise agreement (s 228). This is enforceable by a bargaining order under s 230 where the Commission is satisfied that the good faith bargaining requirements are not being met or that the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the proposed agreement.
2. Furthermore, a bargaining representative may apply to the Commission for a scope order under s 238 if the representative is concerned that the bargaining is not proceeding efficiently or fairly and the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees or will cover employees that it is not appropriate for the agreement to cover. If satisfied that such an order is appropriate, the Commission may make a scope order specifying the employer and the employees who will be covered by the enterprise agreement (s 238(5)).
3. The FW Act assumes that the outcome of successful bargaining will be the making of an enterprise agreement (*JJ Richards* at 302 [15]). Such an agreement is “*made”* under s 182(1) of the FW Act in the case of a proposed single-enterprise agreement for an established enterprise when a majority of those employees who are covered by the agreement cast a valid vote to approve the agreement. A bargaining representative for the agreement must then apply to the Commission for approval of the agreement: s 185(1), FW Act. The Commission must approve the agreement under s 186(1) if the requirements set out in s 186 and 187 are met. Among other requirements, s 186(3) of the FW Act requires that “*[t]he FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.*”
4. In short, as Jessup J observed in *JJ Richards* at 306 [29]:

The Act provides a detailed, carefully structured, regulatory environment for the making of enterprise agreements, and for the maintenance of the integrity of the system of collective bargaining which conventionally leads to such agreements.

##### 4. CONSIDERATION

###### 4.1 ResMed’s submissions

1. The only express criterion for standing to apply for a majority support determination in s 236(1) is that the bargaining representative must be *“[a] bargaining representative of an employee who will be covered by a proposed single-enterprise agreement*”. There being no challenge to the Commissioner’s finding that employees in category (e) of clause 2.2 were eligible to be members of the Union and that the Union had at least one member in category (e), it would follow on a plain reading of s 236(1) of the FW Act that the Union had standing to make the application, as the Full Bench held.
2. However, ResMed contends that an employee organisation may propose an enterprise agreement for the purposes of a majority support determination only where the proposed single-enterprise agreement covers employees whose industrial interests it is entitled to represent, that is, it covers ***only*** those employees who satisfy its eligibility rules. It is not in dispute that the categories of employees identified as those who would be covered by the proposed agreement include employees who were not eligible to be members of the Union and therefore that this requirement would not be met, if ResMed’s construction is correct. Such an organisation cannot, in ResMed’s submission, use the mechanism under s 236 to require the employer to come to the bargaining table if the proposed agreement is one that would cover ***any*** employees who would fall outside its eligibility rules.
3. ResMed contends that this restriction flows from the fact that an employee organisation can act only as a representative of employees who are eligible to be members under its rules by virtue of the FW(RO) Act. In its submission, that Actoperates together with the FW Act as an integrated regime for regulation of workplace relations, including the role of employee organisations. The FW Act must, therefore, in its submission, be read harmoniously with that limitation upon the authority of an employee organisation to act. This construction is also said to be consistent with s 176(3) of the FW Act which provides that an employee organisation “*cannot be a bargaining representative of an employee unless the organisation is entitled to* ***represent the industrial interests*** *of the employee in relation to work that will be performed under the agreement*” (emphasis added). That phrase - “*represent the industrial interests*” - and variations of it are used extensively in the FW Act and derive, in ResMed’s submissions, from a line of authority holding that the eligibility rules of an employee organisation determine its right to represent the industrial interests of a group for the purposes of raising an “*industrial dispute*” as that term is interpreted in s 51(xxxv) of the Constitution. Thus at the heart of ResMed’s position lies the proposition that the Union, in engaging the process in s 236, can represent only the interests of the employees eligible for membership under its rules and therefore lacks standing, based upon this line of authority, to engage that process for any wider purpose, i.e., for a proposed agreement with coverage beyond those eligible for membership. As I later explain, this proposition effectively equates the position of an employee organisation in applying for a majority support determination for a proposed enterprise agreement, to the position of an employee organisation seeking to raise an industrial dispute by a log of claims under laws made under s 51(xxxv) of the Constitution.

###### 4.2 Construction of s 236(1), the FW Act

1. In my view, the construction for which ResMed contends must be rejected.

4.2.1 No support for ResMed’s construction in the text of s 236, FW Act

1. The first obstacle to ResMed’s construction is that it lacks support in the text of s 236 itself. Yet under established principles of statutory construction, *“[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention*”: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 (***Alcan***) at 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ). This is not to suggest, as their Honours also held at 47 [47], that the meaning of the text may not require “*consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy*”; see also *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16; (2013) 250 CLR 523 at [47] (the Court); and *Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* [2014] FCAFC 70; (2014) 222 FCR 13 at 30 [75] (the Court). Nor is it to suggest that a purposive construction may never permit of reading a provision as if it contained additional words (or omitted words) with the effect of expanding or confining its field of operation, as French CJ, Crennan and Bell JJ held in *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 88 ALJR 473 (***Taylor***) at 482-483 [37]. However, as their Honours continued in *Taylor* at 483 [38]:

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “*gaps disclosed in legislation*” or makes an insertion which is “*too big, or too much at variance with the language in fact used by the legislature*”. (citations omitted)

1. On this issue, their Honours found it unnecessary to decide whether Lord Diplock’s three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115 per Lord Nicholls of Birkenhead) were always, or even usually, necessary and sufficient, and explained at 483 [39] that:

This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that “*the modified construction is reasonably open having regard to the statutory scheme*” because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes… the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour’s further observation, ***“[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances***”. (citations omitted) (emphasis added)

1. Underpinning this approach is an appreciation of the proper limits of judicial power and considerations of fairness. As for example, Gaudron J has observed, this approach to construction is “*dictated by elementary considerations of fairness, for, after all, those who are subject to the law’s commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.*”: *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 340 (cited with approval in *Alcan* at 31 [4] (French CJ)).
2. I consider that the restriction for which ResMed contends on the capacity for an employee organisation to apply for a majority support determination under s 236(1) would amount to inserting an additional and substantive requirement that is “*too big, or too much at variance with the language in fact used by the legislature*”: *Taylor* at 483 [38].This view is reinforced by the detailed and carefully articulated system for enterprise bargaining in Part 2-4 of the FW Act, including as to the role of employee organisations in that process. This strongly suggests that there is little room for the introduction of additional requirements or conditions which may have been, but were not, enacted: see by analogy *JJ Richards* at 307 [30] (Jessup J) and [33] Tracey J.

4.2.2 Are the authorities considering the capacity of employee organisations to make claims so as to give rise to an “industrial dispute” within s 51(xxxv) of the Constitution relevant?

1. Nor do I consider that ResMed’s construction is supported by the line of authorities on which it relies to inform the scope of operation of an employee organisation under the FW Act, at least insofar as it relates to standing to apply for a majority support determination: cf. *CDJV Construction Pty Ltd v McCarthy* [2014] FWCFB 5726 at [36]-[40]. Those authorities concern the constitutional principle that associations of employees may be established, registered and incorporated in the exercise of the power in s 51(xxxv) so that classesof workers in an industry or group of industries may be represented in the formulation of demands so as to raise an “*industrial dispute”* and in the settlement of “*industrial disputes*”: *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* [1925] HCA 7;(1925) 35 CLR 528 (***Burwood***); *Federated Ironworkers’ Association of Australia v Commonwealth* [1951] HCA 71; (1951) 84 CLR 265 at 280 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).
2. ResMed relied particularly upon the High Court’s decision in *R v Dunlop Rubber Australia Limited; ex parte Federated Miscellaneous Workers’ Union of Australia* [1957] HCA 19; (1957) 97 CLR 71. In that case, the employee organisation had enlarged its eligibility rules so as to represent a group beyond the particular industry in, or in connection with, which it was registered. The question was whether the organisation was limited nonetheless to raising a dispute by delivering, or accepting delivery of, a log of claims to the purposes for which the organisation was originally registered. The Court answered that question in the negative*.*
3. Relevantly for the present purposes, the Court held at 80 that, as the alleged dispute consists essentially of the failure of the two sides to agree on the rates and conditions demanded of or by the organisation, the answer depended on the constitutional principle in *Burwood* to which I have referred, namely that:

…an organisation stands for or represents an industrial group so that by disagreeing with the representative or members of another industrial group the organisation may cause the condition to be fulfilled which is expressed in the words of s. 51(xxxv.) of the Constitution and on fulfilment of which the authority of the conciliation commissioner must rest.

1. The Court held at 81 that the basis of the decision in *Burwood* (that a demand by an organisation may relate to wages and conditions of its members ***if and when*** they are employed by the recipient employer) and in *Metal Trades Employers Association v Amalgamated Engineering Union* [1935] HCA 79;(1935) 54 CLR 387 (that a like dispute may be raised as to the wages and conditions which employers pay to non-members in the same industry) is that:

…the organisation making the demand does not act merely as an agent for its members. ***It acts in an independent capacity*** ***and it does so because it represents not definite or then ascertainable individuals*** ***but a group or class the actual membership of which is subject to constant change, a group or class formed by reference to an industrial relationship, usually depending upon an industry or calling***. (emphasis added)

1. As such, their Honours held that “*the sphere of action of the organisation must depend on the nature of the group or class*” (at 83). Specifically, their Honours explained at 84-85 that:

It seems implicit in the principle, in the forms in which it has been stated and restated, that you cannot have a body, whether incorporated or not, standing in the place of the industrial group or class and formulating demands in its interest unless that body occupies such a place ***because it is constituted for the purpose and is recognised as representing the group or class***. (emphasis added)

1. Thus, as Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ held in *R v Williams; ex parte Australian Building and Construction Employees’ and Builders Laborers’ Federation*  [1982] HCA 68; (1982) 153 CLR 402 in a passage at 408 on which ResMed placed particular reliance:

The eligibility provisions in the rules of the registered organization of employees serve the function of defining the general area or areas of industry or industrial pursuit from which members can legitimately be drawn ***and with which the organization can legitimately be concerned*** … Since such eligibility provisions constitute a reference point for courts, commissions, employers, employees and other organizations ***in determining or ascertaining an organization’s proper coverage and field of operation,*** they must be construed objectively… (emphasis added)

1. Thus, while a union could claim only on behalf of its members, present and future, it could not claim on behalf of persons who are not and could never become its members: *The Queen v Graziers’ Association of New South Wales* (1956) 96 CLR 317 at 323 (Dixon CJ, McTiernan and Kitto JJ); *Re Finance Sector Union of Australia; ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 at 361-362 (Mason CJ, Deane, Toohey and Gaudron JJ).
2. When properly understood in context, however, this line of authority does not support the construction for which ResMed contends. Ultimately, these decisions are concerned with determining the scope of an industrial dispute that may be raised for the purposes of s 51(xxxv) of the Constitution. However, the scope or coverage of the enterprise bargaining process created by Part 2-4 is not defined by any log of claims served by an industry organisation to raise and define the scope of an industrial dispute in fulfilment of the condition in s 51(xxxv) and any law made in reliance on that head of power. Nor did ResMed contend otherwise. Part 2-4 of the FW Act has moved away from the paradigm necessitated by reliance on s 51(xxxv), and its provisions create instead a process for reaching agreement ***at an enterprise level*** relying upon the power to make laws with respect to corporations in s 51(xx) of the Constitution: see at [20]-[21] above; see also by analogy *Seven Network (Operations) Ltd v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union* [2001] FCA 456; (2001) 109 FCR 378 at 394-395 [63]-[68] (Merkel J). Once this fundamental shift in approach is understood, there is no impediment to the Parliament making provision for an employee organisation to commence the process for a majority support determination, and thereby endeavour to bring the employer to the bargaining table, for an enterprise agreement which is not limited to employees who are eligible for membership of the organisation.

4.2.3 A consideration of contextual considerations does not support ResMed’s construction

1. Nor do I consider that the construction of s 236(1) for which ResMed contends otherwise receives support from a consideration of its context.
2. First, as the Full Bench found and the Union submits, ResMed’s submissions rest on the proposition that an ordinary reading of s 236(1):

…did violence to the established principle that employee organisations could only act in respect of present and future members eligible to join the organisation under its rules and therefore that it was necessary to read s.236(1) as if it contained the additional requirement referred to in order to ensure consistency with that principle. ***Those propositions were founded on the premise that*** ***when an employee organisation acting as a bargaining representative makes an application under s.236, it is acting in a representative capacity on behalf of not only those employees for whom it is a bargaining representative but also all other employees who would be covered by the proposed agreement***. (emphasis added)

1. In my view, the Full Bench was right to reject that premise. Absent a majority support determination, an employer may refuse to bargain or agree to bargain only subject to conditions as to the scope of the agreement: *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2010] FWAFB 6519; (2010) 197 IR 294 at 299 [16]. The purpose of s 236 is, therefore, to create a mechanism whereby an unwilling employer might be brought to the bargaining table without industrial action and subjected to a requirement to bargain in good faith: *JJ Richards* at 306 [28] Jessup J. At the point of making an application under s 236(1), the employee organisation is simply invoking a process: no conditions are negotiated and concluded, and no obligations are imposed on any potential parties to the proposed agreements. Obligations only arise should the Commission be satisfied that a majority of employees covered by the proposed agreement wish to bargain, that the group of employees is fairly chosen, and that the criteria in s 237 are otherwise met. Consistently with this, the capacity to invoke this process is conferred ***directly*** by s 236(1) upon the employee organisation by reason of it satisfying the standing requirement in that provision.
2. It follows, in my view, that the employee organisation is not acting in a representative capacity when it applies for a majority support determination. It is not acting on behalf of the members in any meaningful sense. It is, therefore, not to the point to submit, as does ResMed, that the scheme established by the FW Act and FW(RO) Act does not intend that employee organisations will be at liberty to represent employees not eligible for membership. Rather, when invoking the process in s 236, the employee organisation can be said to be acting in the furtherance of the interests of those eligible for membership or in their perceived interest in the exercise of a right conferred directly on it, irrespective of whether or not the proposed agreement would cover a broader group of employees.
3. Properly understood, therefore, this construction does not give rise to “*a ‘free for all’ in which employee organisations acting as bargaining representatives can* ***represent*** *any and all employees in the relevant enterprise in seeking an agreement provided they are able to represent at least one employee”* (emphasis added), as ResMed submits. With respect, that submission misconceives the nature of the mechanism created by s 236 for the reasons I have explained. In any event, even if in making such an application the Union were regarded as representing the industrial interests of its members, there is nothing (as the Union submits) in the legislative scheme which suggests that the Union must also be taken to be representing the interests of other employees. It does not follow in other words, from the mere affection of the interests of other employees that their interests are thereby represented by the Union.
4. Secondly and consistently with this, s 176 of the FW Act defines when an employee organisation is a bargaining representative of an employee. Satisfaction of the eligibility rules of the employee organisation is not sufficient. As is apparent from the earlier analysis, an employee organisation will not be the bargaining representative for a person who has revoked the status of the organisation as her or his bargaining representative, or has appointed another person (ss 176(1)(b) and (c) of the FW Act). Section 176(3) further limits the extent to which an employee organisation can represent the industrial interests of employee members providing that an employee organisation cannot be a bargaining representative of an employee unless it is entitled to represent the industrial interests of the employee “*in relation to work that will be performed under the agreement.”* As a consequence, while an employee organisation can be a bargaining representative only for employees who it may legitimately represent under its rules, this does not mean that it will in fact be a bargaining representative for all such employees. Yet the submissions for ResMed assume that it suffices in this context for an employee merely to satisfy the eligibility rules of the employee organisation in order for the employee organisation to “represent” her or him in an application under s 236, contrary to the manner in which the regime in Part 2-4 otherwise operates.
5. Thirdly, while an employee organisation may positively seek to persuade the Commission by evidence and submissions that there is a majority support for the bargaining process to commence, this is not a requirement. A majority of employees may indeed disagree and vote against the majority support determination resulting in a decision by the Commission not to make the determination. Given the possibility of such scenarios, it is artificial, as the Full Bench stated at [20], to characterise the employee organisation as representing or acting in the interests of all employees in seeking the commencement of bargaining. Conversely, there is considerable force in the proposition that, if the employee organisation is taken to be representing all employees in seeking the commencement of bargaining, it would be unnecessary for the Commission to be charged with the task of determining whether there is majority support for bargaining. As the Full Bench also pointed out at [20], if that construction were correct,*“[t]he fact of that representation would effectively answer the question posed by s.237(2)(a) and make further inquiry unnecessary.”*
6. Moreover and importantly, the restriction which ResMed seeks to imply would undermine the object of the FW Act to promote the making of agreements ***at the enterprise level*** that is, relevantly at the level of “*a business, activity, project, or undertaking”* (see the definition of “*enterprise”* in s 12). Instead, it would tend to tie the scope of enterprise agreements to what the Full Bench described as “*the often archaic, confusing and/or arbitrary eligibility rules of relevant employee organisations”* (at [28]). Yet, as the Full Court observed in *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 at [14], “*[o]n any view, the establishment of terms and conditions of employment by enterprise agreement is a central pillar of the regulatory regime established by the FW Act.”* Similarly, Jessup J observed in *JJ Richards* at 300 [5],“*[i]t is manifest that enterprise agreements are a significant, if not the predominant, means adopted by the Act for the establishment of terms and conditions of employment, and that collective bargaining, required to be in good faith, is a means by which such agreements come to be made.”.* By contrast, on ResMed’s construction, an application for a majority support determination made by an employee could require the commencement of such negotiations only with respect to a proposed agreement covering those employees who fall within the employee organisation’s eligibility rules. That restriction may mean that it is very difficult to achieve coverage of a group of employees at an enterprise level where the employee organisation seeks to initiate the process. It would also effectively preclude an employee organisation from making a s 236 application where the proposed agreement would extend beyond those employees whose interests it may represent. Such outcomes, as the Full Bench also found, are difficult to reconcile with the object of providing “*a simple, flexible and fair framework that enables collective bargaining in good faith… that deliver productivity benefits* ” (at [28]).
7. ResMed’s construction would also create a tension between the requirement that the group of employees covered by the proposed agreement be “*fairly chosen*”, on the one hand, and the capacity of an employee organisation to take steps to require an employer to negotiate a proposed agreement, notwithstanding the employer’s apparent reluctance to do so, on the other hand. In determining whether an agreement would cover a group of employees that is “*fairly chosen*” in circumstances where the proposed agreement would not cover all of the employees, it is apparent from s 186 of the FW Act that regard must be had to whether the group is geographically, operationally or organisationally distinct. Otherwise, those considerations which are relevant will vary from case to case: *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 2206; (2012) 219 IR 139 (***Cimeco***) at [21]. As Fair Work Australia further observed in *Cimeco* at [21]:

The word ‘fairly’ suggests that the selection of the group was not arbitrary or discriminatory. For example, selection based upon employee characteristics such as date of employment, age or gender would be unlikely to be fair. Similarly, selection based upon criteria which would have the effect of undermining collective bargaining or other legislative objectives would also be unlikely to be fair. It is also appropriate to have regard to the interests of the employer, such as enhancing productivity, and the interests of employees in determining whether the group of employees was fairly chosen.

1. However, nothing in the FW Act, suggests that the fact that a group of employees is defined by reference to the eligibility rules of an employee organisation means that the “*fairly chosen*” requirement will be met, nor that union eligibility rules are necessarily relevant to that question. ResMed’s construction therefore leaves open the possibility that an employee organisation may be wholly precluded from seeking a majority support determination because it cannot define a group which could satisfy the “*fairly chosen”* requirement.
2. Nor if ResMed’s construction were correct, could such a difficulty be cured by the making of a scope order under s 238 of the FW Act. Not only would that proposition ignore the requirement that the Commission must be satisfied ***before*** making a majority support determination that the group is “*fairly chosen”* but, in order to make a scope order, the Commission must be satisfied among other things that making the order will promote the fair and efficient conduct of bargaining and the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen (s 238(4)). As such, the same difficulties would arise. Such a construction cannot, therefore, be said to promote the object of the FW Act in s 3(e) of protecting against unfair treatment and discrimination, or of providing accessible and effective procedures to resolve grievances and disputes. Yet s 15AA of the *Acts Interpretation Act 1901* (Cth) provides that a construction which would best achieve the objects and purposes of the FW Act is to be preferred over a construction which does not.
3. Finally, I agree with the Full Bench that the construction for which ResMed contends would give rise to anomalous results for which there is no apparent reason or policy. As ResMed accepted, the restriction would apply only to those cases where the bargaining representative was an employee organisation. No such restriction would apply in a case where an employee was the bargaining representative. Thus, as the Full Bench explained at [28]:

…if an employee nominated himself or herself as his or her own bargaining representative but represented no other employee, that employee could apply for a majority support determination applicable to all employees to be covered by an enterprise agreement, but if the employee was represented by an employee organisation, the organisation could not make the same application if its eligibility rule did not cover all such employees.

##### 5. CONCLUSION

1. For these reasons, the application is dismissed. However, as the Union has raised the question of whether costs should be awarded under s 570(2)(a) of the FW Act, I have reserved the question of costs in order to afford the parties the opportunity to make submissions.

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| I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry. |

Associate:

Dated: 20 April 2015