Industrial Court
of New South Wales

Case Title:	New South Wales Fire Brigade Employees Union v Fire and Rescue New South Wales
Medium Neutral Citation:	[2012] NSWIRComm 50
Hearing Date(s):	6 December 2011, 9 May 2012
Decision Date:	21 June 2012
Jurisdiction:	Industrial Court of New South Wales
Before:	Haylen J
Decision:	(a) upon the proper construction of cl 6.4 of the Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008 and the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011 firefighters covered by the awards (or either of them) who actually worked on Easter Sunday 2011 are entitled to and shall be credited with the same number of hours of consolidated leave as those hours actually worked by them on that day; (b) upon the proper construction of cl 6.4 of the Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008 and the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award) 2011, Easter Sunday shall be treated as an "additional public holiday" for so long as Easter Sunday is declared a public holiday pursuant to the provisions of the Public Holidays Act 2010 or any successor legislation and firefighters who actually work on Easter Sunday shall be credited with the same number of hours of consolidated leave as those hours actually worked by them on that day.

Catchwords:	AWARD INTERPRETATION - Industrial Relations Act 1996 - s 154 - Application for declaration regarding award provision that "additional" public holidays attract consolidated leave - principles of award interpretation - history of award provision considered - earlier awards made when there were 10 public holidays observed - Banks and Bank Holidays Act 1912 allowed further days to be gazetted as public holidays - importance of legislative provisions when consent awards made - Public Holidays Act 2010 recognises Easter Sunday as a regular public holiday - Easter Sunday "an additional public holiday" for purposes of award provision - employees working on that day entitled to equivalent hours to those worked as consolidated leave - declarations made
Legislation Cited:	Acts Interpretation Act 1901 Banks and Bank Holidays Act 1912 Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011 Industrial Relations (Public Sector) Conditions of Employment Regulation 2011 Industrial Relations Act 1996 Public Holidays Act 2010 The Interpretation Act (1987) Workplace Relations Act 1996
Cases Cited:	Amcor Ltd v Construction, Forestry, Mining and Energy Union and ors (2005) 222 CLR 241 Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd (2002) 174 FLR1 Australian Nursing Federation v Royal Melbourne Hospital & ors [1995] IRCA 44; (1995) 58 IR 214 Australian Timber Workers Union v W Angliss and Co Pty Ltd (1924) 19 CAR 172 Australian Workers Union v Graziers Association (NSW) (1939) 40 CAR 494 Bryce and anor v Apperley (1998) 82 IR 448 Cabell v Markham 148 F 2d737 at 739 (1945) Cepus v Heggies Transport Pty Ltd (1993)

	52 IR 123 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 Clothing Trades Award (1950) 68 CAR 597 Club Employees (State) Award and other Awards, Re [2002] NSWIRComm 362 Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 Employers' Federation of New South Wales v Australian Liquor, Hospitality and Miscellaneous Workers' Union, (Miscellaneous Workers' Division, NSW) (1994) 87 IR 335 Geo A Bond and Co Ltd (in Liq) v McKenzie [1929] AR NSW 499 Helvering v Gregory 69F 2d 809 at 810-811 (1934) K & S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd (1985) 157 CLR 309 Mettoy Pension Trustee Ltd v Evans [1990] 1 WLR 1587 Parrett v Secretary, Department of Family and Community Services [2002] FCA 716 Re Steel Workers' Employees (BHP Co Ltd) and Iron and Steel Works Employees (A I & S Ltd - Port Kembla) Awards (No 1) [1962] AR (NSW) 334 Shop, Distributive and Allied Employees' Association v Woolworths Ltd [2012] FCA 540 Stevens v Bell unreported, Court of Appeal, UK, 20 May 2002 The City of Wanneroo v Holmes [1989] 30 IR 363 at 378 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 Zoological Parks Board of New South Wales v Australian Workers Union (2004) 135 IR 556
Texts Cited:	The Macquarie Dictionary
Category:	Principal judgment
Parties:	New South Wales Fire Brigade Employees' Union (Applicant) Fire and Rescue New South Wales (Respondent)

Representation

- Counsel: J Nolan of counsel (Applicant)
R Reitano of counsel (Respondent)

File number(s): IRC 1266 of 2011

Publication Restriction:

JUDGMENT

1 On its face, cl 6.4 of the *Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award* 2011 ("the award") appears to be an innocuous provision. A serious dispute, however, has arisen between the NSW Fire Brigade Employees Union ("the union") and the employer, Fire and Rescue New South Wales ("Fire and Rescue"), regarding the proper operation of the provision. The award was made by consent in March 2011. Clause 6 of that award dealt with rates of pay and allowances in detail with Pt C of the award setting out, in table form, the actual rates payable to specified classifications of firefighters. For present purposes it is sufficient to set out two provisions of cl 6 of the award:

> 6.2 The "rate of pay" is a composite rate which incorporates the basic wage, margin, loading, shift allowance and industry allowance previously prescribed separately in the *Fire Brigade Employees (State) Award* (as varied from time to time) published in the NSW Industrial Gazette on 28 June 1991.
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> ...
>
> 6.4 The "loading" referred to in sub-clause 6.2 is an amount, which is in compensation for the incidence, as a result of a normal roster arrangements, of work on weekends and public holidays. In cases where additional public holidays are gazetted, employees who actually work on such days, in the area covered by the public holiday, shall be credited with the same number of hours of consolidated leave as those hours actually worked on each such day. For the purposes of this clause additional public holidays shall not include local public holidays.

2 For a number of years prior to this 2011 consent award, a similar provision has applied. During the operation of previous awards there were ten gazetted or proclaimed regular public holidays. In December 2010 the New South Wales Government introduced a new *Public Holidays Act* 2010("the 2010 Act") that extended the number of regular public holidays to eleven per year by making Easter Sunday a public holiday for the first time. Under the 2010 Act public holidays were no longer proclaimed by notice in the Government Gazette but were now to be "declared" under the 2010 Act. While this summary is sufficient for present purposes, it will be necessary to consider the legislative history in more detail.

3 Shortly after the passing of the 2010 Act the union notified its members that there was now an entitlement to an additional public holiday under the 2010 Act that would result in extra consolidated leave arising for members rostered to work on that day. It was not until close to Easter in 2012 that it became apparent that Fire and Rescue did not agree with the union's approach and regarded cl 6.4 of the award as conferring no additional entitlements upon firefighters.

4 Following dispute proceedings in which the Commission was unable to resolve the issue, the union filed an Application for a Declaration pursuant to the provisions of s 154 of the *Industrial Relations Act* 1996 in the following terms:

> 1. A declaration that upon the proper construction of Clause 6.4 of the *Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award* 2008 and Crown Employees (*NSW Fire Brigades Permanent Firefighting Staff) Award* 2011 the reference to "in cases where additional public holidays are Gazetted..." includes a reference to the Easter Sunday public holiday in 2011 and subsequent years.
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> 2. In the alternative, an order varying the award that the loading referred in clause 6.2 of the *Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award* 2008 (and subsequent awards) be increased to take into account the fact that there are now 11 standard public holidays in NSW, rather than 10, as was the case when the loading was initially calculated.

5 In setting out the grounds and reasons the Application contained the following particulars:

1. Prior to 2011 there were 10 standard public holidays per annum, but the NSW Government's Public Holiday Act 2010 extended this to 11 per year by making Easter Sunday a public holiday for the first time. The respondent has refused to compensate firefighters in any way for the extra public holiday.

2. It follows that firefighters who worked on Easter Sunday 2011 will not be compensated for working this additional public holiday by way of the Award's wage rates and are therefore entitled to be credited with consolidated leave instead.

3. In the alternative, the loading referred to at clause 6.2 of the Award should be increased to take into account the fact that there are now 11 standard public holidays per annum, rather than 10 as was the case when the loading was calculated.

4. This has been the subject of a dispute notification currently before His Honour Justice Haylen (IRC No 11/708). The Union requests this application be allocated to His Honour Justice Haylen to allow both matters to be heard together.

5. The Union's view has been consistent from the announcement of Easter Sunday becoming a public holiday, as outlined in our notice dated 22 October 2010.

   "Additional gazetted holiday bonanza, Part 2

   In Sitrep 9/2010, the Union alerted members to a number of additional public holidays that have been gazetted over the upcoming Christmas/New Year period. Last week the NSW Premier also announced that Easter Sunday would become a state wide public holiday from 2011 onwards, resulting in extra consolidated leave for members rostered to work on that day."

   This position was not disputed by the respondent at any time prior to the making of the 2011 Award

6 The evidence for the union was given by way of an affidavit sworn by its senior industrial officer, Ms Gemma Lawrence. Ms Lawrence noted that, in late October 2010 and in late April 2011, the union had issued a notice to its members concerning the additional Easter Sunday public holiday and

the entitlements of members to that additional day under the terms of the award.

7 Ms Lawrence then traced the history of the award stating that the 1994 award appeared to be the first award to contain a provision for accruing consolidated leave when an additional public holiday was gazetted. In that award the relevant clauses were in the following terms:

> 7.2 The total weekly rate of pay is a composite rate which incorporates the adult basis wage, margin, loading, shift allowance and industry allowance previously prescribed separately in the *Fire Brigade Employees (State) Award* published 30 November 1988 and reprinted 28 June 1991 (263 I.G. 603), as varied.
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> ...
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> 7.4 The loading referred to in subclause 7.2 is an amount which is in compensation for the incidence, as a result of the normal roster arrangements, of work on weekends and public holidays. In cases where additional public holidays are gazetted, employees shall be credited with eight hours leave for each such day.

8 Ms Lawrence identified the 1991 award as the last award "to disaggregate the Rates of Pay in the award tables." Table 1 setting out Wages and Salaries provided for minimum weekly rates of pay for the classifications identified. Those rates were to be ascertained by adding to the basic wage from time-to-time effective, the margin, loading, shift allowance and industry allowance in respect of such classification. " Clause 3 Wages/Salary in sub-clause (iii) provided as follows:

> The loading prescribed by subclause (i) of this clause is an amount which has been awarded to compensate for the incidence of work at weekends and on public holidays according to the rosters of hours of work. Such loading is subject to alteration according to the rise or fall of the basic wage from time to time effective. The amount of any variation of the loading shall be calculated at 20 per cent of the rise or fall and shall be calculated to the nearest 5 cents.

9 The 2008 award, according to Ms Lawrence's searches, contained cl 6.2 and cl 6.4 in the same terms as now appears as cl 6.2 and cl 6.4 of the 2011 award. Ms Lawrence was not required for cross-examination and the history of the award was not challenged. No additional evidence was called by Fire and Rescue.

10 It will be observed from the terms of the Declaration sought by the union that par 1 seeks, in substance, a Declaration as to the true effect of cl 6.4 of the award while par 2, in the alternative, seeks an order varying the award to give effect to the fact that there are now 11 standard public holidays rather than 10 standard public holidays. The Declaration sought is made pursuant to s 154 of the 2010 Act and is before the Industrial Court. Apart from a passing reference to the Application for Variation, the evidence and argument for the parties was all directed to the Declaration sought in par 1 of the Application. This was undoubtedly in recognition of the fact that any variation to the award, if pressed, would need to be dealt with by the Industrial Commission exercising its arbitral jurisdiction. In any event, no evidence was directed to the issue of variation of the award and that remains an application that might eventually be dealt with by the Commission if the union presses it. In those circumstances the Court will confine itself to the Application for a Declaration as to the operation and effect of cl 6.4 of the award.

11 At the conclusion of the hearing on the Application for a Declaration the parties consented to further conciliation. Conciliation took place immediately after the conclusion of submissions on 6 December 2011 and concluded with the parties agreeing to confer further and to consider what options were available. Regrettably, it was not until 9 May 2011 that Fire and Rescue were able to report to the Court that a conciliated resolution was not possible.

SUBMISSIONS

12 The union's case referred to the history of the award and the fact that, in previous awards, a clause to similar effect to cl 6.4 of the 2011 award operated in circumstances where there were 10 public holidays. The introduction of the 2010 Act now provided for 11 standard public holidays.

13 Reference was made to the explanatory note to the 2010 Bill that, inter alia, stated that the object of the Bill was to replace the *Banks and Bank Holidays Act* 1912 ("the 1912 Act') with the 2010 Act providing for the following:

> (a) The public holidays that apply in the State (including provision for additional and substituted public holidays to be declared in any year for the whole or part of the State);
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> (b) employee entitlements on public holidays;
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> (c) the declaring of local event days to signify days of special significance to the local community.
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> For 2011, the declared standard public holidays will be the same as currently apply as under the *Banks and Bank Holidays Act* 1912 except that there will be a substitute day on the following Monday when Australia Day falls on a weekend (not just on Sunday as at present) and Easter Sunday will a public holiday.

14 Reference was made to the Minister's Second Reading Speech that contained the following statement:

> The fact that Easter Sunday is not currently a holiday may come as a surprise to many in the community who work in businesses that never operate on Sundays. The current public holiday law was passed in times before the liberalisation of Sunday trading when it was assumed that business would not be conducted on a Sunday. Apart from the requirement for general shops to remain closed on a Sunday that from time to time is also Christmas Day, Boxing Day, Anzac Day or at Easter, contemporary working patterns have resulted in Sundays routinely becoming ordinary working days in various industries, particularly the services sector, such as those providing public transport and emergency services, hospital staff and the like.

> In conducting her review, Professor Riley received many submissions on the impact on family life of the inability of some workers in the services sector to access the long break for Easter available to so many other workers. It is clear that the absence of public holiday status for Easter Sunday, and indeed an Anzac Day, a Christmas Day or a New Year's Day occurring on a Sunday, is an historical anomaly. The current legislation dictates that Sunday occurrences of named holidays are automatically substituted to the next available weekday, usually the Monday. In recognition of the importance of traditional family celebrations over the Christmas-New Year period, Christmas Day, Boxing Day and New Year's Day will, from 2012, be recognised as a holiday whenever coinciding with a Sunday. The customary practice of providing a subsequent weekday holiday for such occasions will be retained to ensure that all workers enjoy the benefit of a holiday on those occasions.

15 Following the introduction of the *Public Holidays Act* the union had, in October 2010, notified the members of the additional day's holiday and their entitlement to the extra day under the provisions of the award. It was noted that no issue was raised by Fire and Rescue to that claim made by the union. It was not until the Easter holidays approached that Fire and Rescue made it clear that, in their view, no additional public holiday was payable to firefighters because the award in cl 6.4 referred to additional holidays that were "gazetted." There had not been any gazettal of this additional day but under the new legislation there had been a declaration that there would now be 11 public holidays.

16 The union identified the applicable legal principles as those set out in the judgment of Madgwick J in the Federal Court in *Parrett v Secretary, Department of Family and Community Services* [2002] FCA 716. In those passages his Honour, in dealing with the provisions of the *Acts Interpretation Act* 1901, noted that the interpretation of an Act involved a construction that promoted the purpose or object underlining the Act and was to be preferred to a construction that would not promote that purpose or object. Regard to context preceded any finding of ambiguity. The purpose or object underlining the Act would usually be ascertained by consideration of the statute's context, "in the widest legitimate sense of that term."

17 The union submitted that the clear intention of the award had always been to recognise public holidays as they were established under the gazettal process that existed for decades until it was replaced by the declaration process in the 2010 Act. The words "declared" and "gazetted" were synonyms in this context. While the Government Gazette had "historically" been the official means for the circulation of proclamations, regulations, Government notices, private legal advertisements and other matters required to be published in the Gazette, the process whereby such proclamations etc have been made had since migrated to the Internet as recognised in s 44 of *The Interpretation Act* (1987). Section 44 provided that the Governor may, by regulation, require miscellaneous statutory instruments of a specified kind or class to be published on the New South Wales Legislation website instead of, or, in addition to the Gazette. Quite apart from this provision, cl 9 of Sch 3 of *The Interpretation Act* dealt with construction of references to publication in the Gazette where instruments were published on the New South Wales Legislation website. That clause applied to statutory rules and other instruments required to be published in the Gazette but were now required to be published instead on the New South Wales Legislation website. Thus, it was provided that, in any Act or instrument, a reference to the publication in the Gazette of a statutory rule or other instrument to which the clause applied included a reference to its publication on the New South Wales Legislation website instead of its publication in the Gazette. It was submitted that an award was such an instrument (*Club Employees (State) Award and other Awards, Re* [2002] NSWIRComm 362). It was further submitted that awards and agreements made under the equivalent Federal law had been accepted as "instruments" for the application of the interpretation legislation (*Australian Nursing Federation v Royal Melbourne Hospital & ors* [1995] IRCA 44; (1995) 58 IR 214 per Northrop J).

18 The effect of the award history and the application of the principles of interpretation required Fire and Rescue to treat public holidays "declared" under the 2010 Act in exactly the same way as if they were gazetted. The

award, therefore, was to be construed as entitling firefighters to an additional public holiday pursuant to the provisions of cl 6.4 of the award.

19 The response of Fire and Rescue was succinct. Both the 2008 and the 2011 awards contained cl 6.4 in identical terms. Both awards were made against a background of a legislative scheme for the regulation of public holidays. Both schemes envisaged "standard public holidays" and "additional public holidays." Clause 6.4 compensated all "standard public holidays" by way of a loading that was built into the rate of pay and "additional public holidays" by providing for additional consolidated leave. It was significant that both awards did not identify the number of standard public holidays that were compensated by the loading nor did they place a maximum number on the additional public holidays that could be the subject of additional consolidated leave.

20 It was then submitted that, when the union communicated in late October 2010 with its members about Easter Sunday being a public holiday, it was aware of the 2010 Act. When the new award was made in March 2011 the union therefore had to be aware that the 2010 Act referred to the terms "standard public holidays" and "additional public holidays" appearing in s 4 and s 5. Standard public holidays were prescribed by s 4 of the Act while additional public holidays under s 5 of the Act (as existed prior to the 2010 Act) were given effect to by ministerial order. The effect of this submission was that cl 6.4 operated in the same way by recognising standard public holidays and additional public holidays. The Easter Sunday was not an "additional public holiday" within the meaning of cl 6.4. It was now a standard public holiday and therefore already included within the holidays covered by cl 6.4.

21 The focus of the submission then turned to the 2011 award operating from June 2011 that included a 2.5 per cent increase in rates. It was pointed that, when that award was agreed to, the 2010 Act established identified standard public holidays and they were expressly listed in s 4 of the Act. There was nothing to suggest that the increase in the rates of pay

negotiated prior to the making of the award did not comprehend compensation for all of the standard public holidays listed in s 4 of the 2010 Act. It was submitted that there was no reason to presume that the rates of pay and the increases that were negotiated prior to the making of the award did not "comprehend the full reach of the loading referred to in cl 6.4 of the award" as well as the purpose for its existence as referred to in cl 6.4 and cl 6.2.

22 The approach of Fire and Rescue was said not to rest on any mere technicality but went to the "very heart of the making of the award." Nothing turned on the fact that the union had published to its members a newsletter containing incorrect information about the changes brought about by the introduction of the 2010 Act. The employer was entitled to negotiate on the basis that the union well knew and understood the consequences of the 2010 Act. Similarly, there was nothing in the *Interpretation Act* to assist the submissions for the union.

23 Two further points were raised by Fire and Rescue:

((i) there had bee no gazettal of Easter Sunday as a public holiday as required by the award;

(ii) no variation of the award was available without compliance with s 146C of the Industrial Relations Act and the Industrial Relations (Public Sector) Conditions of Employment Regulation 2011.

DELIBERATION

24 The principles applicable to the construction of statutes and other documents has always provided the basis for construing the terms of industrial instruments such as awards and agreements. Industrial tribunals and courts have recognised, however, that there are some aspects of the manner in which industrial instruments come about that requires some different considerations to be taken into account. It is, however,

appropriate to refer to some of the general principles of construction, especially applying to contractual documents. In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, Mason J, in his much quoted judgment, stated at 348:

> There is more to the construction of the words of written instruments than merely assigning to them their plain and ordinary meaning ...
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> This has led to a recognition that evidence of surrounding circumstances is admissible in aid of the construction of a contract.

At 352 his Honour continued:

> Evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, ... if the facts are notorious knowledge of them will be presumed.
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> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable.

25 Shortly afterwards in *K & S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd* (1985) 157 CLR 309, Mason J, at 315, stated:

> Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.

That approach of Mason J was adopted by the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 where the court stated:

> ... Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy

26 The importance of context and the need to place words and sentences in their context was dealt with by Learned Hand J in *Cabell v Markham* 148 F 2d737 at 739 (1945):

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indices of a mature and developed jurisprudence not to make a fortress out of the Dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

27 Earlier, in *Helvering v Gregory* 69F 2d 809 at 810-811 (1934), Justice Learned Hand said:

> The meaning of a sentence may be more than that of the separate words, as a melody is more than the notes and no degree of particularity can ever obviate recourse to the setting in which all appear and which collectively create.

28 In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179, the High Court stated:

> ... The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

29 In *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* (2002) 174 FLR1, Warren J (as her Honour then was) considered the appropriate approach to the task of construing a superannuation plan. Her Honour adopted English cases in concluding that the plan had to be given a "practical and purposive" interpretation rather than one which was "detached and literal": the trust deed "should be constructed to give reasonable and practical effect to the scheme."

30 In adopting this approach her Honour was guided, in particular, by two English authorities that, inter alia, propounded the following:

(i) In *Mettoy Pension Trustee Ltd v Evans* [1990] 1 WLR 1587 at 1610-1611, Warner J said:

> ... although there are no special rules governing the construction of pension scheme documents, the background facts or surrounding circumstances in the light of which those documents have to be construed—their 'matrix of fact' (to use the modern phrase coined by Lord Wilberforce) include four special factors. ... the beneficiaries under a pension scheme such as this are not volunteers. Their rights have contractual and commercial origins. They are derived from the contracts of employment of the members. The benefits provided under the scheme have been earned by the service of the members under those contracts and, where the scheme is contributory, pro tanto by their contributions. Secondly, as was common ground, pension scheme documents have to be construed in the light of the requirements of the Commissioners of Inland Revenue from time to time for their approval of a scheme and also of the statutory requirements from time to time in force for the issue of contracting-out certificates. ... Thirdly it was also common ground that the relevant background facts or surrounding circumstances included common practice from time to time in the field of pension schemes generally, as evinced in particular by the evidence of the actuaries and by textbooks written by practitioners in that field. Fourth, temporary and imprecise documents of the kind exemplified by the 1973 and 1976 memoranda and by the 1978 deed are brought into existence as a result of the practice of the Inland Revenue and of the Occupational Pensions Board, which is to recognise and give effect to such documents for statutory purposes, albeit to a limited extent. It would be inappropriate and indeed perverse to construe such documents so strictly as to undermine their effectiveness or their effectiveness for their purpose.

(ii) the English Court of Appeal in *Stevens v Bell* (unreported, Court of Appeal, UK, 20 May 2002, Arden LJ with whom Auld and Waller LJJ agreed) observed:

> There have been several reported cases about the interpretation of provisions of pension schemes in recent years. There are no special rules of construction but pension schemes have certain characteristics which tend to differentiate them from other analogous instruments. ...
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> ... a pension scheme should be construed so to give a reasonable and practical effect to the scheme. The administration of a pension fund is a complex matter and it seems to me that it would be crying for the moon to expect the draftsman to have legislated exhaustively for every eventuality. As Millett J said in *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505:
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> > [its] provisions should wherever possible be construed so as to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life.
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> In other words, it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one. Thus in the *National Grid* case, to which I refer below, where there was a choice of possible constructions, Lord Hoffmann held that the correct choice depended "upon the language of the scheme and the practical consequences of choosing one construction rather than the other." (see [2001] 1 WLR 864 at 887, paragraph 53).

Her Ladyship continued:

> Thirdly, in pension schemes, difficulties can arise where different provisions have been amended at different points in time. The effect is that the version of the scheme in issue may represent a "patchwork" of provisions: see per Robert Walker J in the *National Grid* case. Pension schemes are often subject to considerable amendment over time. The general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than as at the date of the original trust deed: see per Millett J in *Re Courage Group's Pension Schemes,* above, at 505 – 506. Likewise, the meaning of a clause in the scheme must be ascertained by examining the deed as it stood at the time the clause was first

> introduced. Thus, for instance, at the time clause 11 was introduced, neither clause 24 nor its predecessor formed part of the APS Trust Deed, so that clause is not to be taken into account in the interpretation of clause 11. (I should add that the appellants have recently made a complaint to the Pensions Omsbudsman about the introduction of clause 24. We are not concerned with that complaint.)
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> Fourthly, as with any other instrument, a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created.

31 In relation to industrial instruments and particularly awards, there are many authorities that propound the view that in such a context a strict and literal view has no place and regard has to be paid to the fact that the parties are often the authors of their arrangements and therefore such documents have to be treated accordingly. Many of those authorities were collected by the Full Bench in *Zoological Parks Board of New South Wales v Australian Workers Union* (2004) 135 IR 556. That decision recognised that it has long been accepted that the interpretation of an industrial instrument such as an award or an agreement while beginning with a consideration of the natural and ordinary meaning of its words (re *Clothing Trades Award* (1950) 68 CAR 597), nevertheless requires the words to be read as a whole and in context (*Australian Timber Workers Union v W Angliss and Co Pty Ltd* (1924) 19 CAR 172).

32 That approach could be seen in the judgment of French J (as he then was) in *The City of Wanneroo v Holmes* [1989] 30 IR 363 at 378-379 where his Honour noted that the words used in an industrial instrument must not "... be interpreted in a vacuum devoid from industrial realities", citing the famous passage from Street J in *Geo A Bond and Co Ltd (in Liq) v McKenzie* [1929] AR NSW 499-503. His Honour went on to state that it was, of course, no part of the court's task to assign a meaning in order that the award may provide what the court thinks is appropriate, citing *Australian Workers Union v Graziers Association (NSW)* (1939) 40 CAR 494. These expressions are consistent with what was said by the Full Court of the previous Industrial Court in *Cepus v Heggies Transport Pty*

Ltd (1993) 52 IR 123 and by the Commission in Court Session in *Bryce and anor v Apperley* (1998) 82 IR 448.

33 Of particular significance to the present case is the judgment of the High Court in *Amcor Ltd v Construction, Forestry, Mining and Energy Union and ors* (2005) 222 CLR 241, a case dealing with the meaning of the redundancy provisions contained within a certified agreement made under the provisions of the *Workplace Relations Act* 1996. The disputed issue before the court required consideration to be given to the special circumstances surrounding an industrial agreement crafted by the parties as opposed to an arbitrated award following upon the provision of reasons by an industrial tribunal. Because of its significance for the present case the following extracts are numerous.

(a) Per Gleeson CJ and McHugh J:

> 2. The resolution of the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose, and the nature of the particular reorganisation. There is nothing inherent in the idea of redundancy that justifies an expectation either that redundancy payments will, or that they will not, become payable in the event of a reconstruction, merger, or takeover. Similarly, there is nothing inherent in the nature of a corporate reconstruction that justifies an expectation either of continuity of a legal entity, or of succession, or of discontinuity. Thus, depending upon the legal regime under which it takes place, a merger between two companies might or might not put an end to the merging entities. The effects upon their pre-existing rights and obligations, and the question of succession to these rights and obligations, will require examination of the relevant legal (usually statutory) framework.
>
> 8. The question is whether, in those circumstances, it is correct to say that, within the meaning of cl 55.1.1 of the Australian Paper/Amcor Fibre Packaging Agreement 1997 (the agreement), the positions of the employees became redundant and they were retrenched. If so, they became entitled to redundancy payments as specified in the clause.
>
> 12. There is no logically stringent process of reasoning which requires a construction of cl 55.1.1 that favours either side. The problem arises because the agreement is expressed in general terms that do not distinguish between the different circumstances which might arise in different cases. There is nothing unusual, or

surprising, in that. In the industrial context, redundancy of position is not a concept of clearly defined and inflexible meaning. Whether cases of succession to a business following corporate restructuring are regarded as justifying an award of redundancy payments is dealt with "on the particular merits of the case rather than by way of broad prescription. Here, however, it is necessary to apply an agreement that contains a "broad prescription", and the task is to decide how that broad prescription operates in the particular circumstances

13. Having regard to the industrial purpose of the agreement, and the commercial and legislative context in which it applies, it seems to us that the appellants have the better of the argument. As Finkelstein J pointed out, if there had been no demerger, but Amcor had simply decided that Paper Australia should employ the paper employees directly, then, on the respondents' case, cl 55.1.1 would come into operation. That seems a very curious result, both industrially and commercially.

14. The argument for the respondents treats "position" as meaning "position in the employment of Amcor", so that any change by which another legal entity became the employer would mean that the positions became redundant, unless Amcor proposed to employ other people to take their place. This approach is too narrow, and allows insufficient flexibility to accommodate the commercial and industrial realities with which the general terms of cl 55.1.1 had to deal. On the other hand, if the words are given the meaning for which the appellants contend, that is to say, position in a business, they are more readily capable of sensible adaptation to the circumstances of particular cases. Redundancy of position is not a legal or industrial term of art, although there are many cases which examine the concept of redundancy, usually for the purpose of distinguishing it from other causes of retrenchment. In the present case, Amcor was originally the parent company of a group that carried on two kinds of business. The group was split up so that each business would in future be conducted separately. The businesses continued and the employees continued to do the same work, on the same terms and conditions, as before, and with their accrued entitlements preserved. Their new employer was the company that had owned and operated the particular business in which they worked before the split. In the circumstances, the positions did not become redundant.

(b) From the judgment of Gummow, Hayne & Haydon JJ:

30. Clause 55.1.1 must be read in context. It is necessary, therefore, to have regard not only to the text of cl 55.1.1, but also to a number of other matters: first, the other provisions made by cl 55; secondly, the text and operation of the Agreement both as a whole and by reference to other particular provisions made by it; and, thirdly, the legislative background against which the Agreement was made and in which it was to operate.

50. The expression "[s]hould a position become redundant and an employee subsequently be retrenched" can be construed properly only if due account is taken of each of the matters we have mentioned: the other provisions found in cl 55 and elsewhere in the Agreement, and the matters of legislative background to which we have referred.

(c) From the judgment of Kirby J:

64. Also set out in other reasons, or described there, are the provisions of the Act that constitute the legislative background against which the Agreement was made and certified. It was a background that would have been in the minds of both parties (Amcor and its agent on the one side and the Union on the other) who negotiated the Agreement and hammered out its terms. The legislative background is therefore part of the common knowledge attributable to the parties to the Agreement. So far as it is relevant, it would ordinarily be assumed that, in agreeing as they did, the parties intended the Agreement to take its place within the industrial setting created by the Act. .

65. To some extent, that industrial setting also incorporates not only the provisions of the Act dealing with the special problem of redundancy in employment under federal awards and certified agreements but also the consideration by courts and industrial tribunals during the past three decades of the issue of redundancy in employment. During that time, as is a matter of common knowledge, rapid advances of technology have presented instances of redundancy in employment (often through no particular fault of employers and no fault at all of employees) that called forth judicial, arbitral and legislative response. As explained elsewhere, some of these developments illustrated the difficulty of defining "redundancy" for the purpose of measures protecting the industrial privileges of those whose employment was affected by such change.

66. All of these are useful details of a background character. All are relevant in the construction of the Agreement's critical clause, the meaning of which is primarily in issue in these appeals (cl 55.1.1). In the interpretation of the *Constitution* and of legislation, Australian courts have passed beyond the age of the magnifying glass. No longer do courts (or industrial tribunals) seek to give meaning to contested language considered in isolation from the context in which the words are used and the purpose for which the words were apparently chosen. Nowadays, the same insistence on context, as well as text, permeates the approach to interpretation that is taken to legally binding agreements. Indeed, before this approach became normal in the courts, in the interpretation of contested instruments it was often the approach adopted for the construction of industrial texts. This was in keeping with an inclination of such tribunals towards practical, as distinct from purely verbal, constructions in that area of the law's operation.

...

70. Reflections of these submissions are recorded in the reasons of the primary judge in the present case, and are referred to in the reasons of Callinan J. However, in describing the out come (which he later upheld) as a possible "affront to commonsense", the primary judge was merely stating what he described as "one view. There was, however, another view, as his Honour ultimately explained. As the Federal Court has demonstrated in earlier decisions, it is undesirable to adopt a purely result-oriented approach to the interpretation of such industrial agreements. Ultimately, a court's duty under the *Constitution* is to give effect to the meaning of each such document as expressed in its words. This is true where the argument is an attempt by a union to secure a "better bargain" than that which was agreed upon and expressed in the instrument. However, a neutral application of legal principles requires that the same outcome should follow where the terms of the subject agreement are such as to result in a "worse bargain" for the employer than, in retrospect, the employer ought to have provided for, might have expected and even might have deserved in an industrial sense.

71. In superintending the interpretation of the agreement in question in the present case, this Court, as the repository of the general law, must keep in mind the dangers that can attend interpretations of written texts based only on intuition. What cuts one way on one occasion may cut the other on the next. All of this was considered by the Full Court. It is important that this Court should take the same considerations into account in discharging its function.

...

94. I do not say that the contextual considerations are overwhelming. However, certified agreements such as this commonly lack the precise drafting of legislation. As appears from a scrutiny of the provisions of the Agreement, it bears the common hallmarks of colloquial language and a measure of imprecision. Doubtless this is a result of the background of the drafters, the circumstances and possibly the urging of the preparation, the process of negotiation and the omission to hammer out every detail — including possibly because such an endeavour would endanger the accord necessary to consensus and certification by the Commission.

...

96. The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl

55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement[]. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court, of interpreting industrial instruments and especially certified agreements . I agree with the following passage in the reasons of Madgwick J in *Kucks v CSR Ltd*, where his Honour observed:

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. *And meanings which avoid inconvenience or injustice may reasonably be strained for*. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

(d) From the judgment of Callinan J:

> 131 An industrial agreement has a number of purposes, to settle disputes, to anticipate and make provision for the resolution of future disputes, to ensure fair and just treatment of both employer and employees, and generally to promote harmony in the workplace. It is with the third of these that cl 55 of the Agreement is particularly concerned. It is important to keep in mind therefore the desirability of a construction, if it is reasonably available, that will operate fairly towards both parties. In this connection it is not without significance that the primary judge adopted a construction which he thought to be not only arguably absurd, but also potentially unjust to the appellant.

34 Applying the principles derived from these cases, one of the important background or surrounding facts is the relevant legislation at the time that this provision first appeared in the award. Ms Lawrence's researches inform us that the first award with this type of provision was made in 1994 although there was a similar provision in the 1991 award. At that time, by a somewhat circuitous route, public holidays were indirectly set for the general community through the provisions of the Banks and Bank Holidays

Act. Under Pt 3 of the Act, Bank Holidays were dealt with and s 15 provided that the several days appearing in the Fourth Schedule to the Act were to be kept as "close holidays in all banks in New South Wales." They were to be referred to as Bank Holidays. Section 19 was headed "Appointment of Special Bank Holidays" and sub-section 1 provided as follows:

> (1) The Governor may, by proclamation published in the Gazette, appoint a special day or part of a special day to be observed as a public holiday or half-holiday throughout New South Wales.
>
> ...
>
> (3) The Minister may, by notice published in the Gazette, appoint a special day or part of a special day to be observed as a public holiday or half-holiday in any local government area, part of a local government area or other part of New South Wales.

Section 21 dealt with the interpretation of references in certain agreements to public holidays and provided:

> When in any industrial agreement, or in any agreement relating to work, made either before or after the commencement of this Act, reference is made to a public or bank holiday, such reference shall be deemed to relate to the day on which such holiday is publicly observed.

35 In 1991 and 1994 the Fourth Schedule of the Act in Pt 1 and Pt 2 specified ten such Bank Holidays. The days nominated included the 1 January, 26 January, Good Friday, Easter Monday, Anzac Day, Christmas Day etc. Easter Sunday was not specified. For the most part those holidays that were Bank Holidays were observed by force of the Act and the general community received their entitlement to observe such holidays via specific provisions appearing in their awards or agreements covering the terms of their employment. This approach to Bank Holidays was acknowledged by Barker J in *Shop, Distributive and Allied Employees' Association v Woolworths Ltd* [2012] FCA 540 at 33 where his Honour said:

> It should be mentioned that while the 1871 UK Act and the 1884 WA Act employed the expression "bank holiday", it was generally

understood at the time that the bank holidays proclaimed would be general public holidays.

A similar conclusion was reached by a Full Bench of the Industrial Court of New South Wales in *Employers' Federation of New South Wales v Australian Liquor, Hospitality and Miscellaneous Workers' Union, (Miscellaneous Workers' Division, NSW)* (1998) 87 IR 335 at 348 (the *Employers' Federation* case).

36 The *Public Holidays* Act was assented to on 29 November 2010. The new Act repealed the 1912 *Banks and Bank Holidays* Act. The savings and transitional provisions contained in Sch 1 in making such provisions referred to the "former Act" meaning the 1912 Act. Section 4 of the 2010 Act was headed, "Standard Public Holidays." That section "declared" that the listed 11 days would be public holidays for the whole State. Easter Sunday was included in that list.

37 The 2010 Act then made provision in s 5 for additional public holidays and s 6 for substituted public holidays. Those sections provide as follows:

5. Additional public holidays

(1) The Minister may by order published on the NSW legislation website declare a specified day or part-day in a particular year to be a public holiday. The order must be published at least seven days before the public holiday.

(2) The order can declare a public holiday for the whole State or for specified part of a State.

(3) The Minister may by order published on the NSW Legislation website cancel a public holiday declared under this section. The order must be published at least 7 days before the public holiday.

6 Substituted public holidays:

(1) The Minister may by order published on the NSW legislation website declare that a specified day or part-day in a particular year (the *substituted day*) is to be a public holiday in substitution for a specified day or part-day in that year (the *original day*) that would otherwise be a public holiday in a particular year.

(2) The substituted day is then a public holiday and the original day is not a public holiday.
(3) The order must be published at least 7 days before the earlier of the original day and the substituted day for the public holiday.

38 Sections 5 and 6 of the 2010 Act are similar but use different terms to those found in the provisions of s 19 and s 20 of the 1912 Act. The 2010 Act, however, used the term "additional public holidays" where previously s 19 of the 1912 Act referred to the "Appointment of special Bank Holidays" and the term "substituted public holidays" was used in the 2010 Act while s 20 of the former Act referred to a special case being made to veto a particular Bank Holiday and/or to appoint another day to be the Bank Holiday in place of the first nominated and gazetted day. In other words the nomenclature of the 1912 Act was not continued by the 2010 Act: this has consequences for the arguments pressed by Fire and Rescue.

39 There were no other background facts agreed upon by the parties nor was there evidence of any other background facts that led to the 1994 provision being introduced into the award and in its current form appearing in cl 6.4 of the 2011 award. However, during the course of the hearing the Court enquired whether there was some formula used for calculating the loading in relation to public holidays. Both parties responded by saying that they presumed that there was such a formula but neither had been able to find it or discover its terms.

40 With very little assistance from extrinsic material the task of construction begins with the words of cl 6.4 and the surrounding circumstances. The "loading" in the rate of pay was an amount that was "in compensation for the incidence as a result of normal roster arrangements, of work on weekends and public holidays." It is first to be noted that the loading was to be "compensation" for normal work roster arrangements on weekends and public holidays. The Macquarie Dictionary relevantly defines the word "compensation" as: something given or received as an equivalent for services, debt, loss, suffering, etc; indemnity. The use of the word

"compensation" therefore carries with it the notion of a scheme whereby a calculation was made of the incidence of weekend work and public holidays and instead of the employer having to calculate the payments, including penalties, for such work when it was peformed the employees would receive equivalent payments by way of the loading.

41 There is nothing in the material before the Court to suggest that payments for working on public holidays would be reduced or significantly reduced as part of some trade-off with the employer when the loading was introduced but clearly enough there was a benefit in payroll calculation to the employer if an across the board loading was payable rather than having to calculate what work was performed by employees on weekends and public holidays. Importantly, there could hardly be a calculation based on "normal roster arrangements" for days that had yet to be proclaimed as Public Holidays: the terms of the award addressed this very issue by reference to "additional" holidays.

42 According to the authorities, therefore, it is significant that, when the clause was introduced in the award in 1994, there were 10 regular public holidays and the capacity to gazette further public holidays: that is the broad legislative context in which the agreement was initially made. Industrial experience suggests that there had been some stability about the number of regular public holidays and apart from substituted days, the specified days appearing in the 1912 Act covered traditionally observed public holidays: nonetheless, the parties in agreeing to the terms of cl 6.4, made a provision that when additional public holidays were gazetted, employees actually working on such days, in the area covered by the public holiday, would be credited with the same number of hours of consolidated leave as those hours actually worked on each such day. At that time s 19 of the 1912 Act allowed the appointment of "Special" days to be observed as public holidays over and above the public holidays specified in Schedule 4: but the parties did not make the payment for further public holidays dependent upon them being "special" days (as

referred to in the 1912 Act) or refer to regular public holidays as "standard" public holidays as mentioned in the 2012 Act.

43 As already noted, when the 1994 award was made (and the awards made up to 2008) the 1912 Act did not refer in terms to "additional public holidays" but spoke of the "appointment of special bank holidays." The submissions for Fire and Rescue focused upon the terms "standard public holidays" and "additional public holidays" as dealt with in s 4 and s 5 of the 2010 Act. Shortly put, the argument for Fire and Rescue is that when cl 6.4 of the award speaks of "additional public holidays" gazetted that is to be taken (because of the provisions of the 2010 Act) as a reference to holidays additional to those that are declared a standard public holiday. That submission, however, is not sustainable once the history of the award provision is considered. In any event, contrary to the submissions for Fire and Rescue cl 6.4 does not refer to "standard public holidays."

44 The introduction of the term "additional" holidays in the 2010 Act, some six years after the 1994 award clause was inserted in the Award, cannot change the meaning of the word "additional" as appearing in the current cl 6.4 or govern its operation. That clause has had the same meaning since 1994 to the present time.

45 The history of the clause confirms this approach. In the 1994 award the clause covered public holidays and then stated:

> In cases where additional public holidays are gazetted, employees shall be credited with eight hours leave for each such day.

This provision, therefore, spelt out that any further public holiday attracted eight hours' leave whether that holiday was gazetted to apply statewide or on some more limited basis. At the time that the 1994 award was made the Commission had a well settled approach to awards dealing with public holidays.

In *Re Steel Workers' Employees (BHP Co Ltd) and Iron and Steel Works Employees (A I & S Ltd - Port Kembla) Awards (No 1) [1962] AR (NSW) 334,* the Full Bench stated:

> The present standard practice of the Commission is to provide that ten specified days, plus special days proclaimed as such on a State wide basis, shall be holidays.

That statement of longstanding practice was adopted by a Full Bench of the Industrial Court in the *Employers' Federation* case

46 The purpose of this clause in 1991 and 1994 was to compensate by way of a loading for the number of regular public holidays occurring each year. In both awards any additional public holiday was able to be compensated by granting credit for eight hours leave. As an ordinary English expression, Easter Sunday is an additional public holiday until it is no longer observed as such. Against this history cl 6.4 of the 2011 award is to be treated as a broad prescription: it would be a very curious result if a clearly additional holiday (Easter Sunday) was not to be recognised by the words of the clause. To adopt other expressions from *Amcor,* the approach of Fire and Rescue is too narrow and allows insufficient flexibility to accommodate the industrial realities with which the clause had to deal. The words of the clause are not to be interpreted in a vacuum devoid of these industrial realities. Further, the union's approach to the clause operates fairly to both the employer and the employees having regard to its industrial purpose. It involves no double dipping.

47 On any practical/industrial approach to the clause it cannot be assumed that the employees bargained away any extra holidays in 1994 when the number of public holidays were relatively well settled. Indeed, the words they used could not achieve that result. It accords both with common sense and industrial practice that the parties drafted this clause in the knowledge that at that time there were 10 Public Holidays recognised by the 1912 Act and further public holidays might be proclaimed. When that

occurred under the 2011 award employees actually working those days were to be credited with the hours they actually worked.

48 One last matter should be mentioned about this seven-line award clause and the focus of the proceedings on a few critical words within it. Quite apart from the close analysis hitherto conducted in reaching a conclusion as to the meaning of cl 6.4 of the award, the words chosen by the parties as representing their agreement are not ambiguous or controversial - once the history of the award is understood those words simply say what they mean. Any additional public holiday accrues a right to consolidated leave. From 2011 there was such an additional public holiday.

49 The further submission that the additional day of Easter Sunday was somehow bargained away in the negotiations for the 2011 award does not bear scrutiny. The parties came before the Commission and indicated the terms of their agreement. The transcript of those proceedings was placed before the Court and there is no concession to be found or reference to the bargaining off of the new public holiday, Easter Sunday, for the amounts agreed to as increases in the award rates anywhere in that transcript. In usual industrial practice before the Commission it might be expected that the parties would inform the Commission of any special trade-off made to support the increases granted or changes made to the proposed new award, thus allowing the Commission to make an assessment whether the proposed award met relevant guidelines. The absence of such an indication tells strongly against the arguments on this aspect put forward by Fire and Rescue.

50 It is to be noted that the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 was assented to on 17 June 2011 while the Industrial Relations (Public Sector Conditions of Employment) Regulation was promulgated on 22 June 2011. The Amendment Act and the Regulation, therefore, had no application to the March 2011 Firefighters Award when it was made. Notwithstanding this background, when the Court received a report on the discussions between the parties

regarding the application for a Declaration, Fire and Rescue relied on these new provisions as preventing a Declaration that firefighters were entitled to consolidated leave for work performed on Easter Sunday. This was a departure from the earlier written and oral submissions relied upon by Fire and Rescue: in any event the submission is misconceived. In making a Declaration, the Court is declaring existing rights between the parties and is not creating new rights. For many years the award recognised that work on additional public holidays attracted such leave. The leave so accrued is not, therefore, an increase in conditions to which the 2011 amendment and regulation applies.

51 To the extent that Fire and Rescue rely on the word "gazetted" appearing in cl 6.4 of the award and the fact that there has been no such gazettal, the submission descends into mere technicality and has no regard for the principles governing the interpretation of industrial instruments. Quite apart from the operation of the *Interpretation Act* relied upon by the union, the clause is to be construed by giving effect to the substance of the provision. The reference to a "gazetted" day may therefore be met by any official declaration made pursuant to the provisions of the 2010 Act: the gazettal of a further day is in no superior class of expressing governmental intention than the declaration of such a day.

52 Having regard to the above discussion, the Court determines that it is appropriate to make declarations pursuant to the provisions of s 154 of the Act in order to clarify the entitlement of firefighters under both awards to be credited with the same number of hours of consolidated leave as those hours actually worked on an Easter Sunday. As the argument developed it appears appropriate to make Declaration to similar effect but in different terms to that sought by the union. Should the parties wish to make further submissions as to the form of the Declarations, the parties should contact my Associate within seven days of the delivery of this judgment.

DECLARATION

53 The Court makes the following declarations:

(a) upon the proper construction of cl 6.4 of the Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008 and the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2011 firefighters covered by the awards (or either of them) who actually worked on Easter Sunday 2011 are entitled to and shall be credited with the same number of hours of consolidated leave as those hours actually worked by them on that day;

(b) upon the proper construction of cl 6.4 of the Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008 and the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award) 2011, Easter Sunday shall be treated as an "additional public holiday" for so long as Easter Sunday is declared a public holiday pursuant to the provisions of the Public Holidays Act 2010 or any successor legislation and firefighters who actually work on Easter Sunday shall be credited with the same number of hours of consolidated leave as those hours actually worked by them on that day.