ENTERPRISE AGREEMENTS AND CONTRACTS: CONVERGENT AND DIVERGENT APPROACHES TO INTERPRETATION

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Abstract

The interpretation of enterprise agreements ('agreements'), imbued with statutory force by Commonwealth and State legislation, has received little scholarly attention and is not a prime focus of labour law texts.[1] This situation is anomalous, given that agreements and their interpretation constitute a core component of the labour law regulatory regime. The following paper will attempt to ameliorate this situation by contrasting the approaches of courts and tribunals to the interpretation of agreements with the approaches of courts to the interpretation of contracts. In doing so it will be argued that the common law of contract has exercised a significant influence on the interpretation of agreements, but that several important differences in interpretative approach exist. Such distinctions will be explained as stemming from the public nature of agreements and the fact that they fall to be construed in line with the *Acts Interpretation Act 1901* (Cth), as compared to the private and primarily commercial character of contracts.

The paper will focus principally on enterprise agreements made and registered under the *Fair Work Act* 2009 (Cth). Subsequent to the majority High Court decision in *WorkChoices*,[2] and the transfer of residual industrial relations power over private

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1 Cf Andrew Stewart, *Stewarts Guide to Employment Law,* (2011), p 170, where Professor Stewart describes the approach to the interpretation of agreements and awards as involving consideration of the context in which the agreement was made, the 'industrial realities of the situation' and necessity to avoid a 'literal' or 'pedantic' approach.

2 (2006) 229 CLR 1.

sector employees by all States (with the exception of Western Australia) to the Commonwealth in late 2009,[3] enterprise agreements made under the *Fair Work Act* constitute the vast majority of agreements made by employers and employees. The paper will nonetheless refer to State legislative provisions and jurisprudence where appropriate.

The paper will initially outline the nature of agreements. It will then discuss the similarity in approach to the interpretation of agreements and contractual instruments, in the principal focus by legal decision makers on the text of the instrument and the plain and ordinary meaning of words. Pursuant to this, it will contend that provisions in both instruments are to be interpreted in light of surrounding provisions and the instrument as a whole. The paper will then expose that agreements, although not legislative instruments, must be interpreted in accordance with the *Acts Interpretation Act*. It is the rules applicable to the interpretation of statutes, not the rules of contractual interpretation, that apply to agreements.[4] It will be argued that adoption of an approach to the interpretation of agreements consistent with the approach to the interpretation of commercial contracts, including in recent decisions of a Full Court of the Federal Court[5] and a Full Bench of Fair Work Australia,[6] is erroneous. Next, the paper will examine the consequences of the application of the *Acts Interpretation Act* in the imperative to interpret agreements in light of their objects and purpose. Finally the circumstances in which evidence of surrounding circumstances can be used as

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3 See: *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 3, *Fair Work (Commonwealth Powers) Act 2009* (Vic), *Fair Work (Commonwealth Powers) Act 2009* (Qld), *Fair Work (Commonwealth Powers) Act 2009* (SA) and *Industrial Relations (Commonwealth Powers) Act 2009* (Tas); see also the discussions on the implications of the referral of private sector industrial relations power in: Andrew Lynch, 'The Fair Work Act and the referrals powers: keeping the states in the game' (2011) 24, *Australia Journal of Labour Law,* 1 and Rosemary Owens, 'Unfinished constitutional business: building a national system to regulate work' (2009) 22, *Australian Journal of Labour Law,* 258.

4 See: *Acts Interpretation Act 1901* (Cth) s 46(1)(a) (*AIA*).

5 *Shop Distributers and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67, [17]-[18] (*SDA v Woolworths*)

6 *Australian and International Pilots Association v Qantas Airways Limited and Jetconnect Limited* [2011] FWAFB 3706, [73]-[74] per Boulton J and Hampton C (Drake SDP not dissenting as to construction principles) (*International Pilots Association*).

an aid to the interpretation of agreements and contracts will be assessed. The High Court's recent pronouncement on the admissibility of such evidence in the context of contractual interpretation will be canvassed,[7] and the paper will argue that contrary to prevailing jurisprudence, an ambiguity or absurdity must be identified before extrinsic material can be admitted to assist the interpretation of agreements.

I AGREEMENTS GENERALLY

Industrial instruments in the Commonwealth and state jurisdictions are predominantly awards and agreements. Awards are instruments made by tribunals via an arbitral process,[8] and, since 2008, by a quasi-arbitral process known as award modernisation carried out by the Australian Industrial Relations Commission and (more recently) Fair Work Australia in the Commonwealth industrial sphere.[9] Awards delineate minimum terms and conditions of employment for employees performing work in particular industries.[10] Agreements are bargains concluded by industrial parties – employers and employees and their nominated trade union representatives,[11] or employers and employees[12]

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7 *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 (*Western Export Services*).

8 See for example: *Industrial Relations Act 1996* (NSW) ss 10-28 ('*NSWIRA*'), *Industrial Relations Act 1999* (Qld) ss 123-140A ('*QLDIRA*'), *Fair Work Act 1994* (SA) ss 90-99 ('*SAIRA*'), *Industrial Relations Act 1979* (WA) ss36A-40B ('*WAIRA*'), and *Industrial Relations Act 1984* (Tas) ss 32-45 ('*TASIRA*').

9 See: *Fair Work Act 2009* (Cth) pt 2-3 ('*FWA*'), *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth). For an overview of the award modernisation process see: Chris Molnar, 'The cushioning effect' (2008) 82, *Law Institute Journal*, 34 and Carolyn Sutherland, 'First steps forward (with fairness): a preliminary examination of the transition legislation' (2008), 21, *Australian Journal of Labour Law*, 137.

10 See, *FWA* part 2-3; *NSWIRA* ss10-28; *Industrial Relations Act 1999* (QLD) ss 123-140A; *Fair Work Act 1994* (SA), ss 90-99; *Industrial Relations Act 1979* (WA) ss36A-40B; and *Industrial Relations Act 1984* (TAS) ss 32-45.

11 See for instance: *FWA* ss 172, 185.

12 Ibid s172.

– that are generally enterprise or business specific,[13] but may in certain circumstances cover multiple enterprises.[14]

Agreements, in the context of the current federal industrial relations regime, are intended to operate above minimum conditions mandated by awards and must be first approved by Fair Work Australia as leaving employees better off overall than under an applicable modern award.[15] This is not ineluctably the case, as demonstrated by the Howard government's neo-liberal inspired *WorkChoices* legislation.[16] *WorkChoices* allowed statutory individual contracts and enterprise agreements to be made between employers and employees that removed award conditions.[17] Such agreements merely had to contain terms and conditions of employment equivalent to or above five minimum statutorily prescribed conditions.[18]

Awards and agreements are not, in and of themselves, 'laws', but when made are given the force of laws of the Commonwealth or States.[19] Agreements are given statutory force by a registration process prescribed by legislation,[20] and are enforceable in Chapter III courts in the Commonwealth jurisdiction[21] or by industrial courts and industrial

13 Ibid s172.

14 Ibid s172(3).

15 Ibid ss 186, 193.

16 *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth). See, Leigh Johns, 'Safety net entitlements under WorkChoices' (2006) 80, *Law Institute Journal*, 36, and Matt Thistlewaite, 'WorkChoices: the end of the fair go at work' (2006) 15 *Human Rights Dialogue*, 20.

17 Ibid.

18 Ibid.

19 See: *Ex Parte McLean* 43 CLR 472, 479 per Isaacs CJ and Starke J; *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410, 425 per Brennan CJ, Dawson and Toohey JJ; and *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*, [2006] FCA 813, [51] (*City of Wanneroo*).

20 *FWA* part 2-4.

21 *FWA* part 4-1. Note that *FWA* s 545(3) allows parties to elect to bring proceedings for the recovery of moneys owed under industrial instruments and for the imposition of civil remedy provisions which may apply by failure to pay such amounts in 'eligible State or Territory courts'. Such courts are defined by *FWA* s 12 to include a District, County or Local Court, a magistrates court, the Industrial Relations Court of South Australia, the Industrial Court of New South Wales and any State or Territory Court prescribed by the regulations.

magistrates courts in state jurisdictions.[22]

Awards and agreements are related to contracts of employment as they presuppose the existence of a contract of employment and relationship of employment.[23] Agreements, distinctly from awards, may be categorised as analogous to contracts as they are arrangements entered into by private parties, albeit within a particular statutory framework.[24]

II THE 'PLAIN AND ORDINARY' AND 'NATURAL' MEANING OF WORDS

In construing agreements, industrial tribunals and courts have emphasised that regard must be had – first and foremost – to the 'plain and ordinary meaning' and/or 'natural meaning' of the actual words used.[25] A primary focus on the text of the agreement has been justified by certain policy imperatives. Courts and tribunals have averred that a textual analysis is essential as employers and employees have to know the terms and conditions under which they work,[26] that ordinary meaning should prevail, where possible, as employers are subject to pecuniary penalties under industrial legislation if they breach terms of

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22 See, *NSWIRA* Ch 7; *QLDIRA*, ss 292 and 399 (which provide jurisdiction for magistrates to hear and decide proceedings pertaining to claims for non-payment of wages); *SAIRA* ss 179-186 (which provide jurisdiction for industrial magistrates to determine claims for non-payment of wages); *WAIRA* Pt 3; and *TASIRA* pt 3 div 3.

23 See: G J Tolhurst, 'Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment', (1992) *ALJ* 66, 705 p 706; *Gapes v Commercial Bank of Australia* (1980) 41 FLR 27; *Re Coachmakers &c, Rail (State) Award* (1983) 5 IR 455.

24 *Automotive Food, Metals, Engineering, Printing & Kindred Industries Union v Skilled Engineering Ltd* [2003] FCA 260, (at [12]) (*AFMEPKIU v Skilled Engineering*).

25 See, *Re Clothing Trades Award* (1950) 68 CAR 597; *Bryce v Apperley* (1998) 82 IR 448, 452; *Royal Melbourne Institute of Technology v National Tertiary Education Industry Union* (2011) 203 IR 294 (*Royal Melbourne Institute Case*); *Transport Workers' Union of New South Wales v Toll Transport Pty Limited trading as AutoLogistics* [2011] NSWIRComm 1050, [20] (*TWU v Autologistics)*.

26 *Construction, Forestry, Mining and Energy Union Western Australian Branch v Civil Construction Pty Ltd* [2010] FWA 3649, [74].

agreements,[27] and because the purpose of agreements is to maintain and enhance industrial harmony.[28]

Carter and Peden have explained that the phrases 'plain and ordinary meaning', or 'natural meaning' have been mobilised by courts and tribunals, in the context of the interpretation of contracts, in relation to different functions in the interpretative process.[29] These terms are utilised when courts construe the linguistic meaning of words, ascertain the legal effect of words, and apply the contract to the facts.[30] 'Linguistic meaning' is assessed by reference to the relevant touchstone of interpretation, which is usually 'the community at large', or, perhaps, the industry in which the parties to the instrument operate.[31] What the 'linguistic meaning' of a provision in a contract (or an agreement) is, may not necessarily correspond with the legal meaning ultimately ascribed to the provision by a court or tribunal.[32]

In *Norwest Beef Industries*,[33]Justice Olney insisted that if tribunals and courts moved away from a primary focus on the 'plain and ordinary' linguistic meaning of industrial agreements, industrial anarchy would ensue as employees, employers and unions would continually ventilate alternate understandings of provisions in agreements.[34] Such an approach is in line with what has been described as the general object of industrial legislation – to provide a cooperative framework for industrial relations that facilitates harmony and avoids industrial disputation.[35]

The stress on the primacy of the plain and ordinary meaning of the

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27 See for instance: *City of Wanneroo v Holmes* [1989] FCA 369, 380, *City of Wanneroo* [2006] FCA] 813, [57].

28 *Norwest Beef Industries v Australian Meat Industry Employees Union*, (1984) 12 IR 314, 331 (Olney J) (*Norwest Beef Industries)*.

29 See, J W Carter and Elisabeth Peden, 'The 'Natural Meaning' of Contracts' (2005) 21, *Journal of Contract Law*, 277, 277 (*Natural Meaning of Contracts*); and J W Carter, 'Commercial Construction and Contract Doctrine' (2009) 24, *Journal of Contract Law*, 83, 83 (*Commercial Construction*).

30 *Natural Meaning of Contracts*, above n 29, 277.

31 Ibid 278

32 Ibid 279-280.

33 *Norwest Beef Industries* (1984) 12 IR 314.

34 Ibid. at 331.

35 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, 273 per Kirby J, and 283 per Callinan J (*AMCOR v CFMEU*).

text of agreements was laid bare in the case of *Eraring Energy,*[36] when a Full Bench of the Industrial Relations Commission of New South Wales overturned a decision at first instance that focused too heavily on extrinsic materials (in assessing whether employees fell within a particular classification under an agreement) and failed to have sufficient recourse to the ordinary meaning of the words of the instrument.[37]

In the *Royal Melbourne Institute Case,*[38] the issue for determination was the meaning of the word 'roster'. Justice Lander of the Federal Court consulted the Macquarie Dictionary to ascertain the 'ordinary' meaning of this word.[39] His Honour, after analysing the agreement, held that 'roster' bore its natural meaning. This can be seen to be an example of the ultimate legal meaning ascribed to a word correlating with its linguistic meaning. Thus, when interpreting agreements, primacy will generally be given to the 'linguistic' meaning of the words, to enhance certainty for industrial parties.

A principal focus on the text of an agreement is in line with the common law approach to the interpretation of contracts.[40] The focus on the expressed intention of the parties, evinced by the text of their contract and the plain and ordinary meaning of the words therein contained, has been held to be critical, but for other policy reasons. The philosophy of freedom of contract[41] mandates that the integrity of the bargain between the parties be honoured.[42] The prevailing objective theory of contract also accords with a principal focus on the text of the parties' bargain.[43] Pragmatically, a focus on 'ordinary' meaning enhances commercial certainty, while also circumscribing the amount of evidence to be adduced before a court, so as to decrease the length and complexity of

36 *Eraring Energy v Construction, Forestry, Mining and Energy Union (NSW)* [2005] NSWIRComm 13 [2005] NSWIRComm 13, [72].

37 Ibid.

38 *Royal Melbourne Institute Case* (2011) 203 IR 294.

39 Ibid [84].

40 *McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liquidation)* [2011] NSWCA 315 [17] Bathurst CJ (Macfarlan JA and Sackville AJA agreeing on this point) (*McGrath v Sturesteps*).

41 Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p.101.

42 J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia*,(5th ed., 2007) pp. 9-15.

43 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, [33]-[36]; *Royal Botanic Gardens & Domain Trust v South Sydney Council* (2002) 186 ALR 289, [99]-[103] per Kirby J (*Royal Botanic Gardens*).

litigation.[44] Hence the processes of interpretation of agreements and contracts share a primary focus on text, but such a focus is undergirded by alternate policy considerations.

III CONTEXT: INTERNAL TEXTUAL CONSIDERATIONS

More is involved, however, in construing words in agreements than simply assigning them their 'plain and ordinary meaning'. Words must be interpreted in context, namely, in light of surrounding and relevant clauses, and in respect of the agreement as a whole.[45]

At issue in *Kucks v CSR Ltd*,[46] was whether a shift-worker was entitled to be paid long service leave at a rate in line with the shift loadings he received, or at an ordinary time rate. This question turned on the meaning of 'ordinary pay' in a clause pertaining to long service leave.[47] The meaning of 'ordinary pay' could not be distilled from the 'plain and ordinary' meaning of the clause alone, but once recourse was had to the context in which the term was used, namely the use of 'ordinary pay' and 'allowances' in other clauses of the instrument, it emerged that 'ordinary pay' referred to the ordinary time rate and that this was in accordance with the purposes of the agreement – deduced from an analysis of its terms – to provide only certain long service leave benefits.[48]

A further illustration of a contextual analysis is the case of *CFMEU v BHP Coal.*[49] Justice Logan of the Federal Court was asked to consider the meaning of 'roster'. The case concerned whether the employer, BHP Coal Pty Ltd, could introduce a roster change for a particular class of employees, to which the employees did not consent. His Honour said that Justice Lander's conclusion in the *Royal Melbourne Institute Case*, that 'roster' bore its linguistic meaning in the agreement there under consideration, was not determinative of the word's meaning in

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44 J J Spigelman, *From Text to Context: Contemporary Contractual Interpretation*, (2007) 81, Australian Law Journal, 322 (*From text to context*).

45 *Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Delta Electricity* [2003] NSWIRComm 135, [44].

46 (1996) 66 IR 182.

47 Ibid 185.

48 Ibid 187.

49 *Shop Distributers and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 (*BHP Coal Case*).

the instrument at hand.[50] His Honour said that the clause had to be read in context. Adoption of linguistic meaning of the word paved the way, in Justice Logan's view, for managerial unilateralism. His Honour said that reading the clause in isolation would 'offend basic principle',[51] and pointed out that provisions in the agreement which allowed BHP to act unilaterally explicitly provided for this. Such a contextual assessment was held to provide a 'compelling reason' why the clause did not allow BHP to unilaterally alter the employee's starting and finishing times.[52]

Gleaning the meaning of contractual provisions is similarly occasioned by consideration of the instrument as a whole.[53] Clauses in contracts are not considered in isolation, but in light of other relevant clauses.[54] The distinguishing feature of this interpretive rule between agreements and contracts is that agreements are often said to be interpreted by force of the principles of statutory interpretation.[55] This public law rationale finds it concomitant in private law contract jurisprudence, which prescribes a consideration of contractual provisions in light of the contract as a whole.[56]

IV AGREEMENTS AND THE *ACTS INTERPRETATION ACT*

With certain exceptions,[57] courts and tribunals have typically not interpreted agreements in light of the principles applicable to the interpretation of statutes,[58] or have employed a 'hybrid' approach, mobilising rules from both contractual and statutory interpretation.[59]

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50 Ibid [17].

51 Ibid [19].

52 Ibid. [21].

53 See, *Riltang Pty Ltd v L Pty Ltd* [2004] NSWSC 977; *Welker & Ors v Rinehart & Anor* [2011] NSWSC 1238 [48]; *Walton v Illawarra* [2011] NSWSC 1188, [86].

54 *Chamber Colliery Ltd v Twyerould* [1915] 1 Ch 268.

55 *TWU NSW Branch v Toll Transport Pty Ltd trading as Toll Liquid Distribution* [2006] NSWIRComm 123, [24] (*TWU v Toll*); *AMACSU v Railcorp NSW* [2011] FWA 8476, [33]; *National Union of Workers v Coles Group Supply Chain Pty Ltd* [2011] FWA 4233, [38].

56 See, *Hospital Products v United States Surgical Corporation* (1984) 55 ALR 417, 429 per Gibbs CJ, and 452 per Mason J.

57 *City of Wanneroo* [2006] FCA 813.

58 *Oceanic Coal Australia Pty Ltd v Parker* (2010) 198 IR 455, (*Oceanic Coal*).

59 See, *Kucks v CSR Ltd* (1996) 66 IR 182, (*Kucks v CSR*), and *Short v Hercus*

This has resulted, as the remaining sections of the paper will illustrate, in the adoption of inconsistent interpretative approaches, and the incorrect consideration of extrinsic evidence in circumstances where no ambiguity in the language or absurdity in the operation of an agreement is identified.

In the federal sphere, modern awards and agreements are prima facie legislative instruments within the meaning of the *Legislative Instruments Act 2001* (Cth), being instruments 'of a legislative character', 'made in the exercise of a power delegated by the Parliament'.[60] Section 5(2) of that Act provides a non-exhaustive definition of a legislative instrument, specifying that an instrument will be taken to be of a legislative character if it: determines the law or alters the content of the law, rather than applying the law to a particular case; and has the direct or indirect effect of affecting a privilege or interest, imposing or creating a right, or varying or removing an obligation or right.[61] As awards and agreements are instruments made or approved pursuant to legislation by a tribunal (Fair Work Australia) that is a repository of power delegated by Parliament, and have the effect of determining the rights and obligations of employers, employees and trade unions,[62] they might appear to qualify as 'legislative instruments'.[63] However, item 18 of s 7(1) of the *Legislative Instruments Act* declares Fair Work Instruments to not be legislative instruments. Fair Work instruments are defined by s 12 of the *Fair Work Act* to include modern awards, enterprise agreements, workplace determinations and fair work orders. Additionally, item 19 of s 7(1) declares transitional instruments and certain preserved State instruments under the *Fair Work (Transitional*

(1993) 40 FCR 511 (*Short v Hercus*).

60 *Legislative Instruments Act 2003* (Cth), s 5(1).

61 It should also be observed that s 5(3) provides that an instrument that is registered is taken, by virtue of its registration, to be a legislative instrument. This section applies, however, only to instruments registered under the *Legislative Instruments Act.* It is therefore inapplicable to agreements that registered under the *Fair Work Act.*

62 On the characterisation of awards as the outcome of an arbitral process and the nature of the arbitral process as an administrative/legislative process see, *Waterside Workers' Federation of Australia v J. W. Alexander Ltd* (1918) 25 CLR 434, 463 per Isaacs and Rich JJ, and *The Queen v Kirby and Others; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

63 *Kenoss Contractors Pty Ltd v Warren* (2005) 147 IR 390, 397, (*Kenoss v Warren*).

Provisions and Consequential Amendments) Act 2009 (Cth) to not be legislative instruments. These instruments include collective agreements made under or given continuing operation by the former *Workplace Relations Act* 1996 (Cth).[64]

In *City of Wannerro v AMACSU*,[65] Justice French analysed the *Local Government Officers (Western Australia) Award* 1999, which was an award made by the former Australian Industrial Relations Commission pursuant to the *Workplace Relations Act*, and a 2001 agreement registered under that Act, in determining whether an employee fell within a particular award classification.[66] His Honour noted that by operation of s 7(1) of the *Legislative Instruments Act* as it then stood, awards and agreements made under the *Workplace Relations Act* were not legislative instruments.[67]

Justice French concluded that such instruments nevertheless fell within s 46 of the *Acts Interpretation Act.* That section relevantly provides that if a provision confers on an authority the power to make an instrument that is not a legislative instrument under the *Legislative Instruments Act*, then, unless a contrary intention appears, the *Acts Interpretation Act* applies to the instrument as if it were an Act.[68]

Justice French explained, in relation to awards and agreements made under the *Workplace Relations Act*, that:

> An award [or an agreement] is an instrument made by an authority, in this case the Australian Industrial Relations Commission, and so attracts the application of the *Acts Interpretation Act* for the purposes of its interpretation.[69]

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64 *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth), sch 3.

65 *City of Wanneroo*[2006] FCA 813.

66 Ibid [18], [31].

67 Ibid [52].

68 *Acts Interpretation Act*, s 46(1)(a). Note that s 46(1)(b) provides that expressions used in an instrument have the same meaning as in enabling legislation and s 46(1)(c) determines that instruments are to be read and construed subject to enabling legislation so as not to exceed the power of the authority which made them. Section 46(2) allows instruments to be read down or for provisions in instruments to be severed akin to s 15A of that Act. See *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 92-94 per Dixon J).

69 *City of Wanneroo* [2006] FCA 813, [52].

The *Fair Work Act* does not deal expressly with the interpretation of modern awards and agreements, and evinces no express intention that the *Acts Interpretation Act* not apply to the interpretation of agreements. Furthermore, after the referral of industrial relations power by the States in 2009, s 40A was inserted into the Act and expressly provides that the *Acts Interpretation Act* applies to the Act,[70] though specifically the *Acts Interpretation Act* as in force as at 25 June 2009, without regard to later amendments. It is submitted, that as the *Fair Work Act* evinces no 'contrary intention' that agreements fall outside the *Acts Interpretation Act* and, by virtue of the inclusion of s 40A in the Act, and in accordance with Justice French's analysis, agreements must be interpreted in accordance with the *Acts Interpretation Act* and not in line with the precepts of contractual interpretation.

A similar situation has been held to prevail in regards to undertakings made under the former *Trade Practices Act 1974* (Cth) in *Toll Holdings v ACCC*.[71] In that case, Justice Gray of the Federal Court dismissed both the appellant's and respondent's submission that an undertaking by Toll Holdings, registered under s 87B of the Act, not to share management or employees with a certain company, ought be construed in the same manner as a commercial contract. In an analysis, which is germane to the situation of agreements, Justice Gray said:

> Undertakings given pursuant to s 87B of the Trade Practices Act are given statutory force and effect by that section. They are properly to be regarded as statutory instruments… The words of an undertaking are to be construed by reference to the principles of construction of a legislative document, and not be reference to the principles of construction of a private contract.[72]

Thus enterprise agreements, whether made under the *Fair Work Act* or the *Workplace Relations Act*, must be interpreted as statutes in accordance with the *Acts Interpretation Act.*

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[70] Ian Latham, 'Interpreting the Fair Work Act: Some principles', (2011) 2 *Workplace Law Review*, 95.

[71] *Toll Holdings Ltd and Another v Australian Competition and Consumer Commission* 256 ALR 631, (*Toll v ACCC*).

[72] Ibid [17].

V OBJECTS AND PURPOSE: AGREEMENTS AS BENEFICIAL LEGISLATION

Section 15AA of the *Acts Interpretation Act* prescribes that a construction of legislation shall be preferred if it promotes the underlying purpose and object of the legislation, to one that does not. Thus, a purposive approach to the interpretation of agreements is mandated.[73] This interpretative injunction has had two identifiable consequences: characterisation of agreements as a species of beneficial legislation designed to confer benefits on employees; and avoidance of constructions apt to cause inconvenience or lead to industrial disharmony.

It has been held that awards and agreements are instruments created for the benefit of a class of workers – employees – deemed by the legislature to be vulnerable and in need of protection from the rigidities of the common law.[74] Agreements have therefore been identified as a class of beneficial and remedial legislation.[75] They are beneficial as they confer minimum terms and conditions of employment on employees which are enforceable in non-technical and informal jurisdictions.[76] As a result of this characterisation, an interpretive warrant to construe agreements beneficially for employees, subject to the language used and interpretations that are fairly open on the words, has been adopted.[77]

The consequence of such a characterisation has been a topic of judicial debate. One school of thought suggests that this characterisation has the effect of prescribing that a construction of a clause that operates advantageously to employees be preferred, to one that removes or qualifies a beneficial condition of employment.[78] An alternative view is that it demands an application of the maxim of statutory interpretation *ut res magis valeat quam pereat* (in order that the thing might have

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73 *Mills v Meeking* (1990) 169 CLR 214, 235 per Dawson J.

74 *State Rail Authority Firefighters' Award* 2001 [2002] NSWIRComm 159, [22], (*Firefighters' Award*).

75 *TWU, v Toll* [2006] NSWIRComm 123, [24].

76 Note that Fair Work Australia is not bound by rules of evidence as per *FWA* s 591. Furthermore, if a plaintiff elects to bring proceedings against an employer for underpayment of agreement entitlements as a 'small claim' under *FWA* s 548, the court is not bound by the rules of evidence and may act in an informal manner and without regard to legal forms and technicalities.

77 *TWU, v Toll* [2006] NSWIRComm 123, [25].

78 Ibid.

effect than it be destroyed).[79] This maxim has been mobilised to support interpretations of agreements that maintain their application to employees, to the extent that the language of an agreement may 'even be strained'.[80] In my submission, there is no great difference between these two approaches. They both direct an interpretation of agreements, as far as possible, for the benefit of employees; with one focusing on construing provisions as advantageously as possible and the other limiting employers' ability to artificially extricate employees from an agreement.

An application of a beneficial interpretation of an agreement, in light of its object and purpose to benefit employees, was showcased in a case involving an attempt by an employer to assert that certain employees fell outside an industrial instrument, because their duties had been slightly altered.[81] A Full Bench of the Industrial Relations Commission of New South Wales rejected reading the instrument in a manner that narrowed its coverage, contending that confining interpretations of beneficial instruments, like awards and agreements, should be avoided.[82] In like manner, a Full Bench of the Australian Industrial Relations Commission concluded in *CSR Limited Officers' Association* that merely changing the name of a position held by an employee could not remove an employee from the coverage of an industrial instrument.[83]

The maxim *ut res magis valeat quam pereat* has also been deployed in contractual jurisprudence, in the embrace of an approach to interpretation that presumes the parties intended their bargain to be valid and effective.[84] Where words in a contract are susceptible of multiple meanings, a meaning which will invalidate the contract or frustrate its object, and another that will not, a court will opt for the later meaning.[85] Nonetheless, courts have urged caution in applying this approach too

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79 *San Remo (Southland) Pty Ltd v Farrell* (1987) 22 IR 291, 294-295; *Nestle Australia Limited and Patatou* (NSW IRC, unreported, Fisher P, Cullen J and Connor C, 16 July 1993).

80 Ibid.

81 *Firefighters' Award* [2002] NSWIRComm 159 [55].

82 Ibid.

83 *CSR Limited Officers' Association v CSR Ltd* (1997) 76 IR 310, 313.

84 *Moratic Pty Ltd v Lawrence James Gordon & ano* [2007] NSWSC 5, [17].

85 See, *Haigh v Brooks* (1839) 10 A & E 309, *Smith (A) & Son (Bognor), Mills v Dunham* [1891] 1 Ch 576, 590.

liberally, noting that it cannot be used as a pretence to rewrite or destroy the parties' bargain expressed in their written contract.[86]

An approach focused on 'saving the instrument' from invalidity has its manifestation in agreement jurisprudence in the favouring of interpretations that ensure employees remain 'within' the instrument, marking a further similarity between contracts and agreements. However, the fact that agreements will be interpreted, as far as possible, for the benefit of employees, has no corollary in contractual jurisprudence. This results from contracts being private instruments, entered into by commercial parties, and not the product of legislative schemes which identify a particular class of workers as in need of special protection.

VI INFELICITOUS LANGUAGE AND GENEROUS CONSTRUCTIONS

It has been recognised that agreements often lack the 'precision of drafting' of legislation and commercial contracts.[87] This has been said to result from the non-legal background of the drafters, which oftentimes leads to agreements being expressed in an imprecise manner and 'having the hallmarks of colloquial language'.[88] The use of infelicitous language has necessitated an approach to interpretation that directs consideration to the 'informal' context in which agreements are made,[89] and allows courts and tribunals to avoid 'inconvenience or injustice' by straining for 'sensible' meanings. As Justice French pointed out in *City of Wanneroo:*

> There is a long tradition of generous construction over a strictly literal approach… It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting… nor be astute to discern absurdity or illogicality or apparent inconsistency.[90]

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86 See, *Hillas (W.N.) v Arcos* (1932) 147 LT 503, *ABC v Australian Performing Right Association* (1973) 129 CLR 99, 119-120 per Gibbs J.

87 *AMCOR v CFMEU* (2005) 222 CLR 241, 270 (Kirby J).

88 Ibid. See , *AMWU v Rheem Australia Pty Ltd* [2011] FWA 7602, [71], (*AMWU v Rheem*).

89 *AMCOR v CFMEU* (2005) 222 CLR 241, 283 (Callinan J).

90 *City of Wanneroo* [2006] FCA 813, [57].

Meanings that avoid inconvenience and absurd outcomes, or outcomes that are 'unfair' and not conducive to industrial harmony, are to be avoided.[91] Justice Madgwick observed in *Kucks v CSR Ltd* that:[92]

> 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… 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.

The above analysis, whilst expounded in the context of award interpretation, has been held to apply with equal, if not more, force to the construction of agreements.[93] The words of an agreement are thus read in light of the 'non-legal' and 'informal' context in which they were made. This can be seen to be an instance of courts and tribunals employing the 'industrial context' as an interpretative touchstone to derive the 'legal' meaning of the words of an agreement.

The case of *AMCOR v CFMEU* involved the ascription of meaning to words in an agreement to produce an outcome that was 'industrially fair'. It was held that the construction by the trial judge of a provision in an agreement (although in line with its plain and ordinary meaning and surrounding provisions) could not stand, as it produced an outcome that was 'contrary to common sense' and 'unfair'.[94] This reading was rationalised as in line with of the 'industrial context and purpose' of agreements generally, namely, the facilitation of amicable industrial relations through the prescription of fair outcomes.[95] Kirby J concluded:

> 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

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91 *Kucks v CSR Ltd* (1996) 66 IR 182, 189 per Madgwick J. See, *SDA v Woolworths* [2011] FCAFC 67, [11]-[14].

92 Ibid.

93 *Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd* (1998) 80 IR 208, 212 per Northrop J.

94 *AMCOR v CFMEU* (2005) 222 CLR 241, 273 per Kirby J.

95 Ibid 246 per Gleeson CJ and McHugh J.

> 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.[96]

Justice French has, however, cautioned against being too ready to depart from the 'linguistic' meaning of words used to vindicate what may be considered fair or sensible outcomes:

> But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (1989) 30 IR 362 (at 380): *'Awards [and agreements], whether made by consent or otherwise, should make sense according to basic conventions of the English language.'*[97]

A similar canon of construction exists in contractual interpretation. Courts strive to give commercial contracts a 'businesslike interpretation,'[98] which informs the approach taken to attributing meaning to the words. Justice Kirby detailed in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd*[99] that a construction should be avoided that '[makes] commercial nonsense or is shown to be commercially inconvenient'. Lord Diplock distilled this precept in *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)*[100] as entailing that 'if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'. In that case, his Lordship interpreted 'breach' to mean 'repudiatory breach', to avoid the commercially nonsensical result that any minor breach of the agreement, not amounting to a repudiation, would allow shipowners to terminate a time charter party. Hence, in certain cases where something must have gone wrong with the language,' a court may depart from the natural and ordinary meaning of the language and give effect to what, objectively, the parties intended.[101]

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96 *AMCOR v CFMEU* (2005) 222 CLR 241, 270.

97 *City of Wanneroo* [2006] FCA 813, [57].

98 *Franklins Pty Ltd v Metcash Trading Ltd; Metcash Trading Ltd v Franklins Pty Ltd* (2009) 76 NSWLR 603, [19] per Allsop P, (*Franklins v Metcash*).

99 (1990) 20 NSWLR 310, 313-314.

100 [1985] AC 191 at 201. His Lordship's statement was endorsed by the High Court in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 198 per Gleeson CJ, Gummow and Hayne JJ.

101 *McGrath v Sturesteps* [2011] NSWCA 315, [18) per Bathurst CJ.

In a recent decision of the Court of Appeal of New South Wales,[102] Chief Justice Bathurst has pointed out that caution needs to be exercised in adopting such an approach as it 'does not permit the Court to depart from the ordinary meaning of the words used by the parties merely because it regards the result as inconvenient or unjust'.[103] Therefore, approaches to the interpretation of agreements and contracts share a focus on providing 'industrially sound, sensible and fair' and 'businesslike' constructions, but courts and tribunals must be careful not to too readily depart from the ordinary meaning of the words used.

VII MATTERS EXTRINSIC TO TEXT

In the context of contractual interpretation, the parol evidence rule was once said to preclude recourse to extrinsic evidence as an aid to construction when a contract had been evidenced in writing.[104] In light of recent decisions, it was averred that that rule had 'faded into obscurity'.[105] The 'true rule' as to the admissibility of extrinsic material was stated by Justice Mason in *Codelfa Constructions v State Rail Authority of NSW*[106] as follows:

> … 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.

In England, background facts or 'surrounding circumstances' were endorsed as a legitimate means to shed light on the meaning of contractual terms, without having to first identify an ambiguity, by Lord Hoffman in *Investor's Compensation Scheme*.[107] The High Court in its 2002 decision in *Royal Botanic Gardens* noted but did not analyse Lord Hoffman's approach and instructed Australian courts to continue to

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[102] Ibid Macfarlan JA and Sackville AJA agreeing with the Chief Justice on this point, [102] and [109].

[103] Ibid [17] per Bathurst CJ. See also *Jireh International Pty Ltd t/as Gloria Jean's Coffee v Western Export Services Inc* [2011] NSWCA 137, [55] per Macfarlan JA, Young JA and Tobias AJA agreeing.

[104] *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170.

[105] JW Carter, above n 29, 83.

[106] (1982) 149 CLR 337, 352, Stephen and Wilson JJ agreeing, (*Codelfa*).

[107] *Investors Compensation Scheme* [1998] 1 WLR 896, 912-913.

follow *Codelfa.*[108] Subsequent to a 2004 High Court decision in *Pacific Carriers v BNP Paribis,*[109] which ostensibly endorsed having recourse to surrounding circumstances without the need to first identify an ambiguity, it was suggested that *Codelfa* had been superseded without being overruled.[110] A subsequent High Court decision,[111] a decision of a Full Bench of the Federal Court[112] and a recent decision by the Court of Appeal of New South Wales[113] appeared to affirm that, at common law, evidence of the 'factual matrix' of circumstances surrounding the contract could be adduced in aid of interpretation, regardless of whether there were ambiguities in the contract, or the words in the contract were susceptible of more than one meaning.[114] Indeed, in *Toll v Alphapharm*, the High Court had said:

> 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.[115]

Hence, evidence of surrounding circumstances appeared to be necessary to consider at the outset of the interpretative task.[116]

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[108] *Royal Botanic Gardens*, (2002) 186 ALR 289, [39].

[109] *Pacific Carriers v BNP Parribas* (2004) 218 CLR 451, 461-462, (*Pacific Carriers*).

[110] JJ Spigelman, above n 44, 7.

[111] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (*Toll v Alphapharm*).

[112] *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd and Others* (2006) 156 FCR 1 (*Lion Nathan v Coopers*).

[113] *Franklins v Metcash* (2009) 76 NSWLR 603.

[114] See, *Pacific Carriers* (2004) 218 CLR 451, [22], *Lion Nathan v Coopers* (2006) 156 FCR 1, [46]-[53] per Weinberg J, (at [101] per Kenny J, [238] per Lander J; *Franklins v Metcash* (2009) 76 NSWLR 603 [14], [24] per Allsop P, [305] per Campbell JA.

[115] [40].

[116] See, *Lion Nathan v Coopers* (2006) 156 FCR 1 [14] per Weinberg J; *Maserton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382, [112]-[113]. Note that the Honourable J J Spigelman suggested (correctly as it emerged) in his article entitled *Contractual Interpretation: A comparative perspective* (2011) 85, Australian Law Journal 412, 421 that 'the view has been taken that the ambiguity requirement has been dispensed with. However, *Codelfa* has never been overruled.' See also: *Franklins v Metcash* (2009) 76 NSWLR 603, [14] per Allsop P, [305] per Campbell JA.

On 28 October 2011, in *Western Export Services v Jireh International*, in refusing to grant special leave to appeal from a decision of the Court of Appeal of New South Wales, a three bench High Court pronounced[117]:

> Acceptance of the applicant's submission, clearly would require reconsideration by this Court of what was said in *Codelfa*… to be the "true rule" as to the admission of surrounding circumstances. Until this Court embarks upon the exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges…

Therefore, *Codelfa* continues to represent the law in Australia, and only if an ambiguity in the contractual language is discerned can surrounding circumstances be assessed to throw light on the meaning of contractual language. If surrounding circumstances are considered by courts, they relate strictly to the facts known by the parties, and generally assist the court in giving meaning to a 'descriptive term' in the instrument.[118]

Evidence of the surrounding circumstances prevailing and known at the time an agreement was entered into have been said to be admissible as an aid to the interpretation of agreements.[119] The comments of Justice Mason in *Codelfa* that 'it has frequently been acknowledged that there is more to the construction of the words of written instruments than merely assigning to them their plain and ordinary meaning',[120] have been embraced by courts and tribunals in industrial jurisdictions as an apposite rationale for admitting evidence of the objective circumstances surrounding the making of an agreement. In *AFMEPKU v QANTAS*,[121] the Federal Court allowed evidence of the 'objective framework of facts' surrounding the making of an agreement to assist it in interpreting an ambiguous provision.[122] Such evidence included exchanges of correspondence between the parties and statements by the trade unions negotiating on behalf of employees as to the existing agreement and its

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117 *Western Export Services* [2011] HCA 45, [3].

118 *Codelfa* (1982) 149 CLR 337, 351 per Mason J.

119 See for example: *Michael Goldie v Envotec Pty Ltd t/as Australian Envelopes* [2006] AIRC 720; *NTEIU v University of Wollongong* [2002] FCA 31, [27]-[28].

120 *Codelfa* (1982) 149 CLR 337, 348.

121 *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors v Qantas Airways Limited* (2001) 106 IR 307.

122 Ibid 324.

relationship to the proposed new agreement.[123] It was held, however, that the objective framework of background facts did not shed light on the meaning of the impugned clause.[124]

Whether an ambiguity threshold exists before evidence of surrounding circumstances can be adduced to aid the construction of agreements has been a matter of controversy.[125] Some jurisprudence suggests that an ambiguity must first be identified.[126] This approach, premised either on an adoption of Justice Mason's threshold test in *Codelfa,* or s 15AB of the *Acts Interpretation Act,* has been labelled the 'cautious approach'.

The cautious approach has yielded to a 'generous approach', epitomised by the reasoning of Justice Burchett in *Short v Hercus*[127]:

> But even if the language, read alone, appeared pellucidly clear, the tendency of recent decisions… would seem to require the court to look at the full context. Only then will all the nuance of language be perceived.[128]

In 1997, Justice Marshall posited that 'More recent authority and the preponderance of authority… favours a generous approach to the use of extrinsic materials'[129] His Honour considered that Justice Burchett's

[123] Ibid 322.

[124] Ibid 326.

[125] *AMACSU v Treasurer of the Commonwealth of Australia* (1998) 82 FCR 175, (*AMACSU v Treasurer*).

[126] *Bell v Gillen Motors Pty Ltd* (1989) 24 FCR 77, 86.

[127] *Short v Hercus* (1993) 40 FCR 511.

[128] At (520).

[129] *Barlow v Qantas Airways Limited and Others* (1997) 75 IR 100, 113, (*Barlow v Qantas*), citing (at 113-114): *Hawkins v Queensland Meat Export Company Pty Ltd* (unreported, Industrial Relations Court of Australia, Madgwick J, 31 July 1996); *Finance Sector Union v Commonwealth Bank of Australia* (unreported, Industrial Relations Court of Australia, Moore J, 18 December 1995) and *Western Newspapers v Warren* (1994) 1 IRCR 393 at 405; 56 IR 340 at 351. In each of the cases the court had referred to the judgment of Burchett J in *Short v Hercus* (1993) 40 FCR 511. His Honour cited authority supportive of the 'cautious approach', at 114, that was decided pre *Short v Hercus* to include *Australian Bank Employees Union v Australia and New Zealand Banking Group Ltd* (unreported, Industrial Relations Court of Australia, Keely J, 12 October 1990, pp 10-11); *Victoria v Australian Teachers Union* (1993) 47 IR 328, 334; *Bell v Gillen Motors Pty Ltd* (1989) 27 IR 324, 331; *City of Wanneroo v Holmes* (1989) 30 IR 362, 378; and *Printing and Kindred Industries Union v Davies Bros Ltd* (1986) 18 IR 444, 449:

judgment in *Short,* with which Justice Drummond agreed, concluded the matter.[130] His Honour also proffered that 'there is no sound reason why recourse to probative extrinsic material should be conditional on identification of an ambiguity',[131] regardless of whether the scope and application of a clause in an agreement was abundantly clear.[132] This generous view, notwithstanding the existence of the *Acts Interpretation Act,* has become the predominant approach.[133] In my submission this approach is erroneous because agreements are instruments made by an authority and fall to be construed as statutes in accordance with the *Acts Interpretation Act*.

Section 15AB of that Act governs the circumstances in which recourse may be had to extrinsic material to assist discovering the meaning of provisions in an agreement. Extrinsic material, capable of establishing the meaning of a provision may be considered: to confirm the ordinary meaning of a provision as conveyed by its text and considered in light of its context in the agreement and the purpose and object of the agreement;[134] or to determine the meaning of the provision when the provision is ambiguous or obscure,[135] or where the ordinary meaning leads to a result that is manifestly absurd or unreasonable.[136]

Section 15AB(3) gives further guidance to courts and tribunals as to when it is appropriate to admit extrinsic material, providing that regard must be had to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision,[137] and the need to avoid prolonging legal proceedings without compensating advantage.[138]

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130 *AMACSU v Treasurer* (1998) 82 FCR 175, 177-178.

131 Ibid.

132 *Short v Hercus* (1993) 40 FCR 511.

133 See, *Barlow v Qantas* (1997) 75 IR 100; *AFMEPKIU v Skilled Engineering* [2003] FCA 260, [15]; *AMWU v Rheem* [2011] FWA 7602, [71]); *Australian Municipal, Administrative, Clerical and Services Union v Ergon Energy Corporation Limited* [2011] FWA 1956, [41].

134 *Acts Interpretation Act* s 15AB(1)(a).

135 Ibid s 15AB(b)(i).

136 Ibid s 15AB(b)(ii).

137 Ibid s 15AB(3)(a).

138 Ibid s 15AB(3)(b). Note that this is a non-exhaustive definition, courts may also consider 'other relevant matters' when determining whether extrinsic material may be considered.

Extrinsic materials can therefore only be used, at the outset of the interpretative task, to bolster the ordinary meaning of a provision.[139] As Pearce and Geddes point out, extrinsic materials may only be used to *alter* the ordinary meaning of a provision if it is ambiguous or its ordinary meaning reflects an absurd or unreasonable outcome.[140] Section 15AB(1)(b), as outlined by Justice Lindgren in *NAQF v Minister for Immigration*,[141] is premised on an ambiguity or absurdity arising only after the ordinary meaning of the provision has been gleaned.[142]

In a recent decision, Justice Cowdroy of the Federal Court determined that because a clause of an agreement was unambiguous, there was 'no occasion to have regard to the history and subject matter' of the instrument.[143] His Honour based this proposition on the 'threshold test' derived from Justice Mason's remarks in *Codelfa.* In like manner, Deputy President Sams in *Australian Workers' Union v Murrumbidgee Irrigation Ltd*,[144] with reference to a Full Bench of Fair Work Australia's endorsement of the ambiguity threshold in *Codelfa* in its 2011 decision in the *International Pilots Association* case,[145] concluded that as there was no doubt as to the meaning of the words used, it was unnecessary to have recourse to extrinsic material to resolve any uncertainty.[146] It is submitted that whilst correct in result, the common law methodology deployed by Justice Cowdroy, Deputy President Sams and a Full Bench of Fair Work Australia in *International Pilots Association,* was incorrect and the conclusion that an ambiguity was first required before extrinsic materials could be admitted should have been reached by reference to the *Acts Interpretation Act.*

In relation to utilising extrinsic material when interpreting agreements, it is submitted that the guidance offered by s 15AB(3)(a) should be of great importance. As noted above, courts and tribunals have placed a premium on certainty, by focusing on the plain and ordinary meaning of

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139 *Commissioner of Australian Federal Policy v Curran* (1984) 3 FCR 240, 250; 55 ALR 697, 706-707; *Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377, 383-384.

140 D C Pearce and R S Geddes, *Statutory Intepretation in Australia,* (7th ed: 2011), p. 85.

141 (2003) 130 FCR 456, [70].

142 Ibid.

143 *Oceanic Coal Australia Pty Ltd v Parker* (2010) 198 IR 455, [48], [59].

144 [2011] FWA 5306.

145 *International Pilots Association* [2011] FWAFB 3706.

146 Ibid [127].

words, as employers may be subject to pecuniary penalties if found to be in breach of an agreement, and because one of the purposes of such instruments is to foster industrial harmony.[147]

An example of 'surrounding circumstances' being used to shed light on the meaning of terms in an agreement is in the case of *City of Wanneroo*, in which Justice French had to consider the meaning of the classification of 'Community Services Officer'. The position was described in 'words of immense generality', such that it could be held to extend to the 'maintenance or improvement of general social and living standards'.[148] By virtue the extraordinarily broad nature of this definition, the provision was ambiguous, allowing his Honour to look at the history of the classification to ascertain the precise nature of the position.[149] Use of surrounding circumstances to shed light on the meaning of terms of agreements has been particularly pronounced in respect of similar clauses in agreements that are the product of a particular industrial history[150] as the meaning of a clause may 'have brought with it some of the soil in which it once grew'.[151]

The interpretation of contracts and agreements is similar to the extent that, following *Western Export Services*, the admissibility of extrinsic material is conditional upon the identification of an ambiguity (or, alternatively, an absurdity in the case of agreements). This constitutes an important correspondence in interpretative approaches, albeit one arising from different roots – common law principles of interpretation as opposed to the approach mandated by the *Acts Interpretation Act*.

Three further similarities in approach to the interpretation of contracts and agreements exist. Courts and tribunals have consistently held that in interpreting both types of instruments, recourse cannot be had to subsequent conduct of the parties.[152] It has been said that it is

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147 See also Gray J's analysis in *Toll Holdings v ACCC* 256 ALR 631, [18].

148 *City of Wanneroo* [2006] FCA 813, [59].

149 Ibid [60]-[67].

150 *Merchant Service Guild of Australia v Sydney Steam Collier Owners & Stevedores Association* (1958) 1 FLR 248, *Australian Federation of Air Pilots v Regional Express Holdings Limited re Regional Express Pilots' Agreement 2005* [2011] FWA 1465, [31].

151 See, Short v Hercus (1993) 40 FCR 511, 518; TWU v Autologistics [2011] NSWIRComm 1050, [24].

152 See, *AMACSU v Treasurer* (1998) 82 FCR 175; F M Douglas QC, 'Modern Approaches to the Construction and Interpretation of Contracts' (2009) 32, *Australian Bar Review* 158, 167; *Inglis v John Buttery & Co* (1878) 3 A C

impermissible to look at such conduct in the context of agreements as the agreement 'speaks from the date it is made'.[153] This postulate is sourced directly from contract jurisprudence.[154] It could likewise be said to derive from the objective theory of statutory interpretation.[155]

Additionally, resort to evidence of negotiations is precluded.[156] The

552, *LG Schuler AG v Whitman Machine Tool Sales Ltd* [1974] AC 235, 252, 260, 261-262, 265-270, 272. Note the comments of Campbell JA in *Franklins v Metcash* (2009) 76 NSWLR 603, [310], where his Honour noted that the High Court had endorsed such a position in *Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 446 per Gibbs J (Menzies J agreeing at 405), 460 per Stephen J; in *Codelfa* (1982) 149 CLR 337, 348 per Mason J (Stephen and Wilson JJ agreeing), but that this had the status of *obiter dicta* and was not the ratio decidendi of either case. His Honour drew attention to early High Court cases such as *Howard Smith and Co Ltd v Varawa* (1907) 5 CLR 68, 78, and *Hart v MacDonald* (1910) 10 CLR 417 and said that the reasoning in these cases lent support to the view that recourse could be had to subsequent conduct in construing contracts. Campbell JA noted that the High Court had departed from these earlier cases, although they had not been explicitly overruled, and consistent with *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, an intermediate Court of Appeal was bound to adopt the law as most recently stated by the High Court, (at [318]). His Honour did note that a subsequent event could potentially be relevant to the construction of a contract if it shed light on the context in which the contract was made. His Honour stated (at [324]) that "If, for example, a contracting party admitted, after the contract had been made, the truth of some fact that was a relevant part of the context in which the contract had been made, I see no reason why that admission could not be used as part of the means of proof of that background fact". His Honour further stated that subsequent conduct "cannot be used to prove what the parties meant by particular terms that they used in their contract" (at [327]). Allsop P, (at [13]) noted that later conduct could be utilised if it revealed probative evidence of the antecedent surrounding circumstances. See, *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [35].

153 *Financial Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 IR 158, 175.

154 Charles, 'Interpretation of Contracts by Reference to Subsequent Conduct' (1991) 4, *Journal of Contract Law*, 16.

155 See for instance: Suzanne Corcoran, 'Theories of Statutory Interpretation', in S Corcoran and S Bottomley (eds) *Interpreting Statutes,* (2005)

156 See, *Codelfa* (1982) 149 CLR 337, 351 per Mason J, *Investors Compensation Scheme* [1998] 1 WLR 896, 911-912; Catherine Mitchell,

rationale for this proscription in a contractual interpretive context was articulated in the case of *Prenn*,[157] viz that such evidence is unlikely to be useful as the parties will invariably have divergent positions until a contract is formulated.[158] This justification has also been explicitly adopted in the context of agreement interpretation.[159] Finally, the subjective intentions of the parties are irrelevant in assessing the meaning of a contract and an agreement.[160] Justice Mason's judgment in *Codelfa* has often been cited with approval in industrial matters in support of such an approach.[161] These similarities emphasise the significant influence contractual jurisprudence exercises on industrial jurisprudence.

The construction of agreements is premised on an objective theory of interpretation. This can be seen to flow from the fact that agreements are to be interpreted as statutes by operation of the *Acts Interpretation Act* and the fact that the objective theory of statutory interpretation prevails in Australia. A subjective approach to the interpretation of agreements, however, exists in South Australia. Section 11(2) of the *Fair Work Act 1994* (SA) directs courts to have regard to *any* evidence *reasonably available* of what the author of an award or enterprise agreement, and the parties to such award or agreement, intended it to mean when it was drafted, and to give effect to such common intention.[162] Section 11(2) therefore expands the ambit of available evidence to statements as to the subjective intention of the parties in an endeavour to ascertain, as far as possible, what that common subjective intention was when the agreement was made.[163] Hence, prior negotiations and statements made in such negotiations are admissible as an aid to construction. Only if

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Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule (2010) 26, Journal of Contract Law, 134-159.

157 *Prenn v Simmons* [1971] 1 WLR 1381, 1384 (Lord Wilberforce).

158 Ibid.

159 *Bryce v Apperley* (1998) 82 IR 448.

160 *AMWU v Rheem* [2011] FWA 7602, [71]), *Australian Federation of Air Pilots v Regional Express Holdings Limited re Regional Express Pilots' Agreement 2005* [2011] FWA 1465, [28].

161 Ibid.

162 *Fair Work Act* 1994 (SA) s 11(2).

163 *Department of Premier and Cabinet v South Australian Salaried Medical Officers' Association* (2010) 194 IR 435, 457.

common intention is unascertainable will the court resort to the plain and ordinary meaning of the language of the award or agreement.[164]

A focus on ascertaining the subjective intention of the parties is akin to that provided by the UNIDROIT Principles of International Commercial Contracts 2010, which impel ascertainment of the common intention of the parties.[165] The UNIDROIT Principles provide that only if the common subjective intention of the parties cannot be determined will the contract be interpreted according to the meaning reasonable persons in the position of the parties would have given it.[166] UNIDROIT also mandates that evidence of preliminary negotiations and subsequent conduct be considered.[167] This approach is reflective of a civil law framework of analysis, as opposed to the common law objective theory of contractual interpretation adopted by Australian courts.[168]

IX CONCLUSION: AGREEMENTS AS PUBLIC LAW INSTRUMENTS

Approaches to the interpretation of agreements and contracts thus share many similarities in relation to their focus on the ordinary meaning of words, imperative to read provisions in the context of the instrument as a whole, and inadmissibility of evidence of negotiations, subsequent conduct and the subjective intentions of the parties. In interpreting agreements, industrial jurisprudence has drawn heavily on contractual jurisprudence. This can be explained by virtue of the similar nature of these instruments, being bargains reached by private parties. The principal differences in interpretation stem from the conception of agreements as a species of beneficial legislation, which follows from agreements being instruments made by an authority that must be interpreted as statutes as per the *Acts Interpretation Act.* As the paper

164 194 IR 435, 460.

165 UNIDROIT Principles, Article 4.1(1), *Franklins v Metcash* (2009) 76 NSWLR 603, [7]-[8] per Allsop P.

166 UNIDROIT Article 4.1(2).

167 UNIDROIT Article 4.3(a) and 4.3(c).

168 *Franklins v Metcash* (2009) 76 NSWLR 603, [6], [9] per Allsop P, [327] per Campbell JA; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [39] per Lord Hoffman. See also the United Nations Convention on Contracts for International Sale of Goods (Vienna, 11 April 1980) 1489 UNTS 3, which attributes primacy to ascertaining the common actual intention of the parties. See further the discussion of similar instruments by Allsop P in *Franklins v Metcash* (2009) 76 NSWLR 603, [8].

has observed, courts and tribunals have historically not paid heed to this fact, leading to inconsistent approaches to interpretation and the application of incorrect 'ambiguity' thresholds in regards to extrinsic evidence. There is thus a need for courts and tribunals to more assiduously mobilise a statutory interpretive approach, as required by the *Acts Interpretation Act*, as opposed to focusing on private law contractual approaches. Whilst agreements may be 'private' instruments in the sense that they are bargains concluded by private industrial parties, they are also public law instruments and the legislature has decreed that they be interpreted as such.