FEDERAL COURT OF AUSTRALIA

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation [2017] FCA 1091

File number:	VID 232 of 2016
Judge:	**MORTIMER J**
Date of judgment:	15 September 2017
Catchwords:	**INDUSTRIAL LAW** – superannuation schemes – application of Average Weekly Ordinary Time Earnings indexation for the purposes of calculating superannuation entitlements – definition of "salary" in Australia Post Superannuation Scheme Trust Deed – whether definition of "salary" incorporated indexation elements of *Superannuation Act 1976* (Cth) – application dismissed **INDUSTRIAL LAW** – enterprise bargaining – section 345 of *Fair Work Act 2009* (Cth) – false or misleading representations about workplace rights – interpretation of section 345 – application of authorities concerning section 4 of *Australian Consumer Law* and section 52 of *Trade Practices Act 1974* (Cth) – consideration of representations with respect to "future matters" – whether Australia Post contravened section 345 – application dismissed **INDUSTRIAL LAW** – variation of contracts – estoppel – whether employment agreement varied for individual – whether Australia Post estopped from removing superannuation indexation for individual – application dismissed
Legislation:	*Competition and Consumer Act 2010* (Cth), Sch 2 *Australian Consumer Law,* ss 4, 18 *Corporations Act 2001* (Cth), s 129 *Evidence Act 1995* (Cth), s 191 *Fair Work Act 2009* (Cth), ss 180, 181, 182, 228, 345, 349, 678, 793 *Fair Work (Registered Organisations) Act 2009* (Cth) *Superannuation Act 1976* (Cth), ss 5, 45, 46, 47, 55, 56, 57 *Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Act 2002* (Cth) *Trade Practices Act 1974* (Cth), ss 51, 52

Superannuation (CSS) Continuing Contributions for Benefits Regulations 1981 (Cth)

Superannuation (CSS) (Eligible Employees—Exclusion) Declaration 2003 (Cth)

Superannuation (CSS) Salary Regulations 1978 (Cth)

Cases cited:

Australian Nursing and Midwifery Federation v Kaizen Hospitals (Essendon) Pty Ltd [2015] FCAFC 23; 228 FCR 225

Australian Securities and Investments Commission v Hellicar [2012] HCA 17; 247 CLR 345

BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FCA 1291

Blatch v Archer (1774) 1 Cowp 63; 98 ER 969

Byrnes v Kendle [2011] HCA 26; 243 CLR 253

Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd [1975] HCA 49; 133 CLR 72

Dilosa v Latec Finance Pty Ltd (1966) 84 WN (Pt 1) (NSW) 557

Director of Consumer Affairs Victoria v Gibson [2017] FCA 240

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 353

Fair Work Ombudsman v W.K.O. Pty Ltd [2012] FCA 1129

Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480

Gold Coast City Council v Satellite Wireless Pty Ltd [2014] FCAFC 51; 220 FCR 412

James v Australia and New Zealand Banking Group Ltd (1986) 64 ALR 347

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361

McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd [2008] FCAFC 2; 165 FCR 230

Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145; 190 FCR 248

Northside Developments Pty Ltd v Registrar-General [1990] HCA 32; 170 CLR 146

Powercor Australia Ltd v Perry [2011] VSCA 239; 33 VR 548

R v Hunt; Ex parte Sean Investments Pty Ltd [1979] HCA 32, 180 CLR 322

	R v Le [2002] NSWCCA 186; 54 NSWLR 474 *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; 158 CLR 327 *Shape Shopfitters Pty Ltd v Shape Australia Pty Ltd* (No 3) [2017] FCA 865 *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389; 109 FCR 152 *Thompson v Mastertouch TV Service Pty Ltd (No 2)* (1977) 15 ALR 487 *United Voice v Phillip Cleaning Service Pty Ltd* [2017] FCA 392 *Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33; 242 FCR 505
Date of hearing:	20, 21, 22, 29 March 2017
Registry:	Victoria
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	302
Counsel for the Applicants:	Ms S M Kelly
Solicitor for the Applicants:	Ryan Carlisle Thomas Lawyers
Counsel for the Respondent:	Ms J Batrouney QC with Ms R Preston
Solicitor for the Respondent:	Corrs Chambers Westgarth

ORDERS

VID 232 of 2016

BETWEEN:	**COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA** First Applicant
	GLENN FARLEY Second Applicant
	MICHAEL WALTERS Third Applicant
AND:	**AUSTRALIAN POSTAL CORPORATION** Respondent
JUDGE:	**MORTIMER J**
DATE OF ORDER:	**15 SEPTEMBER 2017**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. On or before 4 pm on 29 September 2017 the parties file and serve any joint proposed minutes of orders in relation to the lump sum costs of the proceeding.
3. If the parties do not agree on proposed minutes of orders in relation to the costs of the proceeding, any submissions on costs, together with any affidavit material on which the parties wish to rely are to be filed and served on or before 4 pm on 13 October 2017.

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

REASONS FOR JUDGMENT

MORTIMER J:

1 This proceeding concerns a decision by Australia Post to remove an indexation benefit available to approximately 17,000 Australia Post employees as part of their superannuation arrangements. The benefit was provided by way of the indexing of those employees' salaries for the purposes of calculating superannuation benefits, in circumstances which I describe later in these reasons, in accordance with movements in the Average Weekly Ordinary Time Earnings, as calculated and reported by the Australian Bureau of Statistics. I will refer to this measure as "AWOTE indexation" in these reasons. The two primary claims are brought by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU).

2 The proceeding also involves a separate claim by an individual Australia Post employee affected by the decision to remove AWOTE indexation, Mr Farley. As well as joining in the claims made by the first applicant on behalf of its members, Mr Farley makes his own individual claims for breach of contract and raises a claim of estoppel against Australia Post. Mr Walters, as the third applicant, did not raise any individual claims: see [107] below.

3 For the reasons set out below, I have concluded that none of the causes of action have been made out, and the application will be dismissed. As I note at [302], it would be understandable if the applicants, and other Australia Post employees in the position of Mr Farley, took the view this outcome did not hold Australia Post to account for the way it removed a significant benefit like AWOTE indexation.

BACKGROUND

The evidence and witnesses

4 The parties helpfully filed a detailed statement of agreed facts pursuant to s 191 of the *Evidence Act 1995* (Cth), attaching a number of key agreed documents, including:

(1) a copy of the Superannuation Trust Deed at the centre of this proceeding and the rules set out in Schedule 1 to the Deed;

(2) the staff bulletin dated 24 May 2013, and set out at [68] in these reasons;

(3) the poster dated 24 May 2013, and set out at [70];

(4) the "Manager's Update" dated 24 May 2013, and set out at [73]; and

(5) an email sent by Mr Desmond Kinsey to Mr Farley dated 23 January 2012, and set out at [100].

5 In addition to the statement of agreed facts, four affidavits were filed by each of the applicants and respondent. The applicants sought to rely on evidence from:

(1) Daniel Lee Dwyer, an industrial officer employed by the Victorian Postal and Telecommunications Branch of the Communications Division of CEPU. Between 2011 and 2015, Mr Dwyer was the Divisional Secretary of the Communications Division, as well as a director and trustee of the Australia Post Superannuation Scheme (APSS). Mr Dwyer was the applicants' primary witness and deposed to the bargaining process;

(2) Joan Doyle, an organiser with the Victorian Postal and Telecommunications Branch of the CEPU who has held various positions at the CEPU since 2003, and deposed to the structure and characteristics of the respondent's workforce;

(3) Gary John Cleland, a postal delivery officer employed by the respondent and a CEPU delegate. Mr Cleland deposed to his awareness of the bargaining process leading up to him voting "yes" to the enterprise agreement; and

(4) Glenn Farley, a processing officer employed by the respondent, whose evidence is described above.

6 The respondent sought to rely on evidence from:

(1) Bridget Florence Sebire, the General Manager, Superannuation and Enterprise Projects for Australia Post. Ms Sebire deposed to the details of the APSS, particularly its governance and sustainability, as well as the impact of AWOTE indexation;

(2) Geraldine Anne Rivers, the Group Head of Workplace Relations and Policy for Australia Post. Ms Rivers deposed to the bargaining process and communications to Australia Post employees during the bargaining process;

(3) Neil Robinson, the Manager of Human Resources Business Systems for Australia Post. Mr Robinson deposed to the payroll quality team at Australia Post and his relationship with Mr Farley; and

(4) Desmond Joseph Kinsey, a business applications analyst at Australia Post. Mr Kinsey deposed to his experience with the Commonwealth Superannuation Scheme (CSS) and APSS, and his relationship with Mr Farley.

7 What is set out in this section is taken largely from the agreed statement of facts, together with aspects of the witness evidence which I have accepted.

8 The first applicant, the CEPU, is an organisation of employees registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth). There is no dispute that it is eligible to represent the industrial interests of each of Mr Farley and Mr Walters.

9 The respondent, Australia Post, is a national system employer within the meaning of the *Fair Work Act 2009* (Cth) (FW Act). It is a party to the Superannuation Trust Deed (the Deed) dated 19 June 1990 that established the APSS. There have been various amendments to the Deed but none are significant to the proceeding. The APSS commenced on 1 July 1990. The APSS is exclusively for eligible employees of Australia Post and "associated employers", as well as former employees who elect to remain in the APSS after ceasing employment, and their spouses.

10 Mr Farley has worked for Australia Post for a long time, having started in 1985. He has been a member of the APSS since July 1990. Mr Walters has worked for Australia Post for even longer, since 1978. Like Mr Farley, he has been a member of the APSS since July 1990: that is, since its commencement.

11 Prior to the establishment of the APSS, the only superannuation fund Australia Post employees were eligible to join was the CSS. The CSS is established under, and regulated by, the *Superannuation Act 1976* (Cth). Mr Farley was previously a member of the CSS, and transferred into the APSS on its commencement. Mr Walters may also have previously been a member of the CSS, however as he did not give any evidence, and as this was not stated as an agreed fact, I do not make any finding about this. There appeared to be no dispute he was a member of the APSS with standing to bring a claim. Australia Post employees were also able to remain members of the CSS if they did not wish to transfer to the APSS, however persons who joined Australia Post between 1 July 1990 and 30 June 2005 inclusive (at which time choice of superannuation fund legislation commenced operation) became members of the APSS and were not permitted to join the CSS.

12 Ms Sebire described the superannuation options for Australia Post employees after 1 July 1990 in the following way in her affidavit, which I accept:

> From 1 July 1990 until 30 June 2005 inclusive, persons commencing employment with Australia Post became members of the APSS.

> This exclusivity ended on 1 July 2005, with the introduction of choice of superannuation fund legislation *(Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2005* (Cth)). All employees were then given a choice of fund (although defined benefit savings are not portable until retirement or resignation).
>
> This has meant that over time Australia Post systems have needed to accommodate and process contributions to different funds.

13 The trustee of the APSS is PostSuper Pty Ltd (the Trustee). The Trustee is a corporate trustee, with a board comprising three member-representative directors and three employer-appointed directors. The former category comprises three union representatives. Between 2011 and 2015, the applicants' key witness in this proceeding, Mr Dwyer, was one of the member-representatives. These six directors together appoint a seventh independent director, who serves as the Chairman of the Trustee.

Relevant details of the APSS

14 The APSS has both a defined benefit section and an accumulation section. All Australia Post employee members are in the defined benefits section. That section is funded by employer contributions (from Australia Post or its associated employers as defined in the Deed), together with any positive investment returns.

15 APSS members can also elect to make personal contributions to the accumulation section, and create an accumulation account for their spouse. They are also able to keep their money in the accumulation section after they leave Australia Post, and to close their accumulation account.

16 Defined benefits under the APSS are calculated on the basis of a formula, and are not linked to the amount of employer contributions or the investment performance of those contributions. Relevantly, the formula was calculated as a multiplier of the defined term "Final Average Salary" (FAS). FAS was relevantly defined in cl 2 of the Deed:

> ***Final Average Salary***, means in relation to a Member the average of the Member's Equivalent Full-Time Salary on the three birthdays occurring immediately prior to the date of calculation or such other amount as determined by the Trustees with the consent of the Corporation **PROVIDED THAT**:
>
> ...
>
> (ii) in relation to a Member who transfers from the Commonwealth Superannuation Scheme on the Transfer Date, for the purposes of this calculation, the Member's benefit salary for the purposes of the Commonwealth Superannuation Scheme on the Member's birthdays while a member of the Commonwealth Superannuation Scheme shall be taken into

> account as if the Member's benefit salary had been Salary and as if the relevant period was a period of Membership and if the Member's total period of Membership and period of membership of the Commonwealth Superannuation Scheme is less than three years the benefit salary at the date of becoming a member of the Commonwealth Superannuation Scheme shall be deemed to be the benefit salary which applies for any other earlier birthday which it is necessary to take into account for the purposes of the calculation;
>
> ...

17 The term "Salary" was also defined in cl 2:

> ***Salary*** means in relation to a Member an amount determined from time to time as required for the purposes of the Scheme by the Employer with the approval of the Trustees *having regard to the relevant provisions of the Superannuation Act 1976 applicable for determining the salary of a Member for the purposes of the Commonwealth Superannuation Scheme* **PROVIDED THAT** in any particular case the Employer may from time to time and at any time certify to the Trustees that some other amount shall be the Member's Salary for the purposes of the Scheme for the time being.
>
> (Emphasis added.)

18 The words in italics assume some significance for the applicants' arguments in this proceeding, and are the key words on which the parties differed in terms of the scope of the application of the *Superannuation Act* to the calculation of salary under the Deed. I note the parties eventually agreed the 1990 version of the Deed should be used, and I have adopted that approach.

19 Section 5(1) of the *Superannuation Act* defines "salary" for the purposes of the CSS as follows:

> In this section, ***salary*** means salary or wages and includes any allowance, or the value of any allowance, or any fee, that is an allowance or fee of a kind that, under the regulations, is to be treated as salary for the purposes of this Act, but does not include any part of any salary or wages that, under the regulations, is not to be treated as salary for the purposes of this Act.

20 To be clear about the issue – in substance, the level of defined benefit any APSS member would secure depended on the calculation of her or his average "Salary" on the last three birthdays prior to the benefit being paid out. The higher that average, the higher the defined benefit which would be received.

21 The defined benefit stream of the APSS was a significant employment benefit for Australia Post employees. As at June 2016, almost 25,000 Australia Post employees were members of the stream. The defined benefit section was also a significant liability for Australia Post: in 2016, the evidence was the liability stood at about $3.7 billion. The defined benefit section

was closed to new members in July 2012. I infer that is because of its high cost to Australia Post.

22 Australia Post was required by the Deed to provide salary data to the Trustee for the purposes of administering the APSS, including the calculation of FAS for the purposes of paying out benefits.

23 The salary data was provided to the Trustee annually in respect of each employee and on a fortnightly basis in respect of employees whose birthdays fell within that fortnight. This meant that by 30 June each year Australia Post had provided updated salary data for all relevant employees to the Trustee. This was the "reported superannuation salary" for each employee member. Ms Sebire's evidence was that this annual and fortnightly reporting schedule had been followed by Australia Post since before the introduction of the APSS.

24 From the commencement of the APSS until July 2014, Australia Post indexed its employees' salaries for the purposes of their superannuation benefits, in circumstances where an employee member's salary had not otherwise increased since the last reporting period. In this way, the amount of reported superannuation salary for an individual employee member could never decrease. There was one indexation method in place between July 1990 and August 2003, and another between August 2003 and July 2014. It is the second indexation method which assumes significance to the applicants' arguments in this proceeding, but it is worthwhile explaining both methods.

25 In either case, indexation may have been applied to an individual employee member because her or his actual superannuation salary (that is, the employee member's actual paid salary for APSS purposes, before tax) reduced, or had not grown, since their last birthday for some reason – for example, where she or he elected to change from night to day shifts or was redeployed to a lower paid position following a redundancy.

26 Between July 1990 and August 2003, employee members' salaries were indexed for superannuation purposes by reference to salary increases applicable through the relevant award or enterprise agreement, if those salaries had not otherwise in fact risen in accordance with those award or enterprise agreement increases.

27 From August 2003, the AWOTE indexation method was in place. Australia Post's decision to remove, or cease, the use of AWOTE indexation is at the centre of the applicants' claims.

28 As I have noted above, AWOTE is an acronym for Average Weekly Ordinary Time Earnings. The evidence referred to it as a method used and reported by the Australian Bureau of Statistics. None of the parties adduced any evidence regarding the calculation of AWOTE, and accordingly it cannot be explained in any more detail, although there is likely to be publicly available material which does so.

29 It was an agreed fact that for the period in which AWOTE indexation was in place, it would continue to be applied to a particular employee member until that employee's actual superannuation salary exceeded their reported superannuation salary.

The enterprise bargaining process in 2013

30 In 2013, Australia Post commenced bargaining negotiations with its employees for an enterprise agreement to replace the existing 2010 Enterprise Agreement. One of Australia Post's key witnesses at trial, Ms Geraldine Rivers, who was the Group Head of Workplace Relations and Policy for Australia Post, accepted that completing bargaining before the nominal expiry date of the 2010 Enterprise Agreement and securing "back to back" industrial agreements was a key bargaining target for Australia Post. I find that to have been the case.

31 Until the making of the statements which are relied upon by the applicants as representations for the purposes of its claims, there is no substantial dispute between the parties about the course of those negotiations. Negotiations were conducted by bargaining teams, and commenced in March 2013. Mr Dwyer, the principal witness for the applicants in this proceeding, was one of seven members of the CEPU bargaining team. Mr Dwyer deposed, and it was not disputed, that negotiations progressed by way of bargaining meetings with the bargaining teams and also by way of telephone calls and correspondence. These communications involved, Mr Dwyer deposed, communications with Ms Catherine Walsh, Australia Post's General Manager of Human Services, and Australia Post Managing Director, Mr Ahmed Fahour.

32 There were also three "national summit meetings" attended by the CEPU bargaining representatives and members of Australia Post's executive team (as well as representatives from the Community and Public Sector Union (CPSU), not involved in this proceeding). These meetings occurred on 1 March 2013, 7 May 2013 and 15 May 2013. Mr Fahour attended each of these meetings.

33 In terms of the way the CEPU communicated with its members about the negotiations, Mr Dwyer's evidence was:

> The CEPU Divisional Office created a dedicated website at the address www.eba8.com.au to update members about the progress of negotiations (the **EBA8 website**). That website is no longer available. The badge of the Divisional Office was "EBA8: Time to Deliver". Updates were published on the EBA8 webpage throughout the negotiation process. In addition, the Divisional Office distributed updates to members using an email list database that had approximately 1400 members' email addresses in it (the **Email List**).
>
> While the Divisional Office had some direct contact with members, it primarily relied on the state branches to communicate with CEPU members. The Branch Secretaries were the primary points of contacts for members in each State. Sometimes the state branches used the materials put out by the Divisional Office, and other times they used their own materials. During the EBA negotiations, the NSW/ACT Branch and the Queensland Branch of the Communications Division published updates about bargaining to webpages operated and controlled by the branches. The content of those updates was not controlled, authorised or approved by the Divisional Office.

34 The 2010 Enterprise Agreement did not contain any provisions concerning employee superannuation. However, Mr Dwyer's uncontested evidence was that:

> One of the issues that the CEPU had put on the table was the defined benefit superannuation in APSS. When speaking about that issue during bargaining, I said that with the increase in the superannuation guarantee rate for accumulation funds, there was no commensurate benefit for defined benefit fund members. I said that the CEPU wanted to secure an improved benefit for defined benefit members to match the increasing superannuation guarantee rate.
>
> Australia Post had put defined benefit superannuation in its list of issues without specifying what its claim was.

35 Mr Dwyer's evidence, which I accept, was that negotiations continued on an issue by issue basis until a second summit proposed by Australia Post, held in May 2013.

36 It appears from Mr Dwyer's evidence that two other unions were involved in the negotiations – the Communication Workers Union (CWU) and the CPSU.

37 Mr Dwyer's evidence about this summit, and the third summit, was not substantively challenged and I accept it. Mr Dwyer's evidence was that at the second summit, Australia Post presented a new offer which took the CEPU by surprise. He described it as coming "out of the blue". The offer was:

(a) to roll over the 2010 Agreement with minimal changes;

(b) to pay a 10.5% pay increase over three years;

(c) that the defined benefit superannuation scheme would remain untouched;

(d) all conditions [in the 2010 Enterprise Agreement] would be maintained...

38 This offer was confirmed in writing on 7 May 2013. The national branch of the CEPU did not communicate this offer to its members, on the basis – according to Mr Dwyer – that it wished to "consider its position and to consult with the bargaining representatives for the other unions", in circumstances where the CEPU saw this offer as "cut[ting] right across negotiations" up to that point. Before the CEPU could engage in very much consideration, on 15 May 2013, another summit was convened by Australia Post and a second offer was put. The offer included the 10.5% pay rise over the term of the agreement.

39 However, it also included the following term:

> During this agreement there will not be any flow-on to the APSS members' FAS (i.e. FAS will be frozen and 2013 FAS will be the new start for 2017), but the regular 14.3 per cent annual rate will be paid.
>
> (Footnote omitted.)

40 This term became known as the FAS Freeze proposal. The contents of a document containing this and other terms, and some statements by Australia Post about the unions' position on its proposals, was subsequently the subject of a communication by Mr Dwyer to Mr Fahour, disputing some of the key statements made in the document. For present purposes, those disputes need not be set out.

The footnote

41 The group of documents sent to summit participants by Australia Post about its offer (including the FAS Freeze proposal) assumed significance in the proceeding, because of a footnote in the documents which appeared three times. Australia Post relied on this footnote as part of the evidence it submitted defeated the applicants' false or misleading representation claim in particular.

42 The footnote stated:

> The Union representative on APSS will make best endeavours in their role as a trustee to act in a manner consistent with this proposal. If for whatever reason the company cannot implement the FAS freeze, then an equivalent cost reduction in pay rates, benefits or pension must be substituted to deliver an equivalent P/L outcome to Australia Post.

43 This footnote appears against the following statements in the Australia Post offer:

> Agreement to maintain APSS, but freeze the Final Average Salary [footnote] during the EBA 2013 period (1st August 2013 – 31st December 2016).

...

Condition of pay offer is that the APSS scheme will keep running and the 14.3% contribution will continue, but a free of "FAS" [footnote] during EBA 2013 period

- This applies to the 3% per annum.
- If the FAS freeze also applies to the 1.5% pay in December, then "allowances" will also rise with pay rates.

...

(Emphasis in original.)

44 The third appearance of the footnote appeared against two separate statements on the same page:

> During this agreement there will not be any flow-on to the APSS members' FAS (i.e. FAS will be frozen and 2013 FAS will be the new start for 2017), but the regular 14.3 per cent annual rate will be paid [footnote].
>
> ...
>
> Identification of new productivity and revenue improvement initiatives to help improve Post's profitability and customer satisfaction/net promoter score [footnote].

45 Ms Rivers' evidence was that the footnote appeared three times because of the importance to Australia Post of securing the financial benefit behind the FAS Freeze proposal.

46 Australia Post's reasons for the proposing the FAS Freeze should be set out.

Why Australia Post proposed the FAS Freeze

47 The principal evidence about this was given by Ms Sebire. Ms Sebire initially affirmed an affidavit on 13 October 2016, at which time she was Head of Corporate Superannuation, Group Finance for Australia Post. After that affidavit was filed, Ms Sebire's role changed to her current role as General Manager, Superannuation and Enterprise Projects. An amended affidavit was affirmed on 17 March 2017 and filed at the commencement of the trial without objection by the applicants. Ms Sebire was a careful witness, and I found her evidence reliable. I make the following findings based on her evidence, and the documentary evidence she annexed to her affidavit. Ms Sebire was employed in her previous role as Head of Corporate Superannuation between October 2012 and December 2016, when her role changed to the General Manager role, which she continues to hold. She has been employed by Australia Post in various roles since May 2011.

48 Ms Sebire explained in her evidence that the percentage rate of normal employer contributions is determined by Australia Post, based on the advice of the APSS actuary, so as

to ensure sufficient funding for the defined benefits payable to members. Australia Post's contributions are reviewed regularly through an actuarial review. One variable that is considered during any review of the appropriate percentage rate of contribution for Australia Post, is the level of the Vested Benefits Index (VBI) and assumed future investment returns and salary inflation. Ms Sebire explained that the VBI is a ratio which

> ...indicates the extent to which a defined benefit fund is able to cover vested benefits by the value of accrued assets. It is the net market value of a fund's assets divided by the total of the vested benefits. A VBI of 100% indicates an equal amount of vested benefits and fund assets.

49 If the VBI drops to or below 97%, an investigation must be undertaken by the actuary. In anticipation this might occur, there was a joint funding plan prepared between the Trustee and Australia Post providing for top-up contributions to restore the VBI to 100%, alongside Australia Post's normal contributions. This plan assumed that the VBI remained over 97% over the period of the plan. If the VBI were to drop below 97%, further top-up contributions may be required.

50 The course of events in relation to the VBI and the viability of the APSS was described by Ms Sebire in her evidence, which I accept:

> In 2010, as a result of economic conditions, letter volumes and, consequently, revenue for Australia Post, began to decline quickly, as did the VBI. Superannuation salary inflation was significantly higher than actual salary inflation in the 2011 financial year.
>
> In the 2011/2012 financial year, the VBI dropped below 100%. Discussions were held between Australia Post and the Trustee, with advice from the Scheme Actuary, to contribute an additional $20 million in employer contributions, on top of its normal contributions of $181 million in that financial year to protect the viability of the APSS. A further $23 million was anticipated in 2013 (in addition to the normal contributions), however an upswing in markets in late June 2013 restored the VBI to a satisfactory position and therefore the further contribution was not necessary.
>
> Around this time it became apparent to Australia Post that changes had to be made to the APSS to ensure the sustainability of the fund for the future. Broadly, there was a realisation that the level of superannuation salary inflation in the APSS was simply unsustainable, compared with much more limited wage growth - particularly for a company that was not in high growth mode.
>
> Accordingly, Australia Post began to consider options to further limit the liability of the APSS.

51 Ms Sebire identified the first step in this containment as the closure of the APSS defined benefit section to new members in July 2012. The next substantive steps, I find, were the FAS Freeze proposal, and when that had to be abandoned, the AWOTE indexation decision.

52 In cross-examination, Ms Sebire accepted that the specific issue identified was "hyperinflation inside the scheme, compared to actual wages", and that this was identified when she started in her Head of Corporate Superannuation role in October 2012, around six months prior to enterprise bargaining commencing. She accepted AWOTE indexation was identified as the reason:

> So the first thing we did was to investigate and understand what was occurring that was creating this large difference. And that's when we discovered there was this indexation process going on and because at the time in particular it was being indexed with AWOTE, that AWOTE was running very high, mostly because of the mining boom, and it was creating this hyperinflation, because indexation was occurring at that much higher rate.

53 Thus, constraining growth and liability in the APSS became the focus, and the FAS Freeze proposal was the mechanism chosen.

54 I note Ms Sebire suggested in her evidence that the Trustee of the APSS may not have ever approved the introduction and continuation of AWOTE indexation, and that the APSS actuary only became aware of the AWOTE indexation when she raised it with him in 2013. She also gave evidence that Australia Post does not have any records showing AWOTE indexation was approved by the Trustee. In cross-examination Ms Sebire accepted she had no personal knowledge about the introduction of AWOTE indexation, or any knowledge of what the Trustee did or did not know, or how the AWOTE indexation decision was made, because she was not at Australia Post at the time it was introduced. The origins of the AWOTE indexation are not relevant to the issues to be determined in this proceeding and I make no findings about them. It seemed to me the purpose of this evidence was some suggestion on the part of Australia Post that the introduction of AWOTE indexation may not have been formally authorised, but ultimately no submission to this effect was made and it need not be further considered.

55 However Ms Sebire's evidence, as I have recounted it at [54], stands. The absence of any proof in this proceeding of authorisation by the Trustee of AWOTE indexation is one of the matters relevant to the assessment of the applicants' contentions about s 47 of the *Superannuation Act*.

Reaction to the FAS Freeze proposal

56 By approximately 18 May 2013, the NSW/ACT Branch of the Communications Division of the CEPU had informed members of the FAS Freeze proposal, and the rest of Australia Post's

offer, although Mr Dwyer's evidence was that the national body had not done so. The different approaches, and tensions, between the national branch of the CEPU and some of the state branches (notably NSW) also featured in the evidence and submissions, although ultimately it is not material to my reasoning.

57 Once the membership became aware of this proposal, Mr Dwyer's evidence described the reaction:

> Over the course of 20 May 2013 and in the days that followed, I started getting telephone calls from CEPU members about the FAS Freeze Proposal. I was surprised that the membership had reacted to the Second Offer so quickly. The feedback was overwhelmingly negative. I was surprised by the strength of the negative feedback. The message from the membership was clear: the FAS Freeze Proposal was not acceptable, nor was any change that would negatively impact on superannuation.

58 The last part of the last sentence of Mr Dwyer's evidence was challenged by Australia Post, at least in the sense of it being an accurate reflection of the views of the membership by the time the agreement was endorsed through a vote. Nevertheless, I accept Mr Dwyer's evidence is an accurate statement of the membership reaction which he observed in mid-May 2013.

59 Ms Doyle, who was at various times the Secretary of the Victorian Postal and Telecommunications Branch of the CEPU, and since 2003, an official or employee of the CEPU, participated in the second summit and gave evidence, which I accept, about the level of disquiet and opposition to the FAS Freeze proposal:

> The proposed FAS Freeze became known to members very quickly. I starting [sic] taking calls about it shortly after the meeting of 15 May 2013, even though at that time there had been no formal communication of the proposal to the workforce, either from Australia Post or the CEPU. I took a lot of calls from members about the proposal. The union also received emails from members expressing their opposition. The feedback was completely negative. To the best of my recollection, there was not one single positive comment from a member about the proposal.
>
> The proposal caused a storm among the members. It was the key topic of discussion for a period of a few weeks.

60 Australia Post withdrew the FAS Freeze proposal within two weeks from the offer having been made, a clear acknowledgement of its unpopularity amongst employees. A revised offer was communicated. The form and contents of the communications about the revised offer are important in the applicants' contentions in this proceeding, and in Australia Post's defence. Before I turn to the next round of bargaining communications, it is necessary at this point to

refer to the evidence, and make some findings, about the nature of Australia Post's workforce.

Australia Post's workforce

61 The nature of Australia Post's workforce was important to the applicants' false or misleading representation case under s 345 of the FW Act, because they submitted that the class to whom the alleged representations were made through these communications affected the characterisation of the statements as false or misleading.

62 In 2014, Australia Post employed 36,944 employees, 30,665 of whom were covered by the 2013 Enterprise Agreement. Australia Post employees are drawn from more than 130 nationalities and speak more than 65 languages. The workforce is varied in its levels of education, and in its abilities and interests in reading complex documentation. It has a high proportion of older workers, with Australia Post's 2014 annual report stating that 41.7% of Australia Post's employees are older than 50. Approximately one-third of Australia Post's workforce are employed as "Postal Delivery Officers", known colloquially as "posties". Posties, mail officers, drivers and retail staff make up more than three-quarters of Australia Post's workforce. Much of their work is routine, in a tightly regulated work environment, and most of their work would be classified as unskilled, although that is not a reflection on the diligence and dedication with which it is performed. Many people in this workforce are likely to remain in the current positions they occupy, without much change or advancement. Ms Doyle's evidence, based on her own experience over many years with Australia Post employees, is that the majority of them are content to remain in their position and are satisfied with the work they do.

63 Ms Doyle gave evidence about the levels of understanding of Australia Post employees who are CEPU members and whom she has encountered over the last 13 years since she has been employed by CEPU, and the aspects of their employment benefits which interest them most. She gave persuasive evidence which I accept. I found her to be a reliable and sincere witness.

> Over the past thirteen years I have spent a lot of time talking to Employees about their working conditions. A frequent topic of conversation is superannuation. Employees frequently express to me their opinion that they joined Australia Post, or stay working at Australia Post, because they have good job security and good superannuation.
>
> While superannuation is frequently raised, my experience is that members are generally not well informed about the detail of their superannuation. There are always exceptions, but my observation is that members understand the basics of

superannuation, but do not understand the details.

For example, it is commonplace for members to talk to me about:

(a) Australia Post paying the administration fees on their superannuation accounts;

(b) death and disability cover;

(c) their defined benefit accounts;

(d) the concept of final average salary; and

(e) the final average salary multiplier.

However, it is very unusual for a member to be able explain to me how final average salary is calculated, or to say that they understand it.

64 Ms Doyle's evidence about how the Australia Post employees she has encountered access information about their employment is also important. This evidence was predominantly about those she described as "operational employees" (that is, employees including posties and those who work in mail processing, retail and transport). This was her evidence:

> The operational Employees do not have access to computers during their work day. It is not at all common for an operational Employee (other than supervisors and managers) to spend time using a computer during a shift. One of the consequences is that the operational Employees do not use email or the Internet as their primary source of information. In fact, my experience is that the Employees will rarely use email or the Internet to find out information about work.
>
> My observation is that the Employees are less connected to the digital world than the general population. Many of them don't have emails. Members often give me their partner's or child's email address if I ask for an email address to communicate with them.
>
> During my time as Branch Secretary the union spent many months trying to get members across to electronic communications, but we were lucky to get 10% to check their emails regularly. The exception seems to be Facebook, which I know is accessed by some members.
>
> Method of obtaining information
>
> The Employees generally obtain information from their team leader. Most teams have a daily tool box talk. During the daily briefing, the team leader will read out the communications from Australia Post. My experience has been that there is a large amount of communication from Australia Post to the workforce. The workforce is constantly told information from Australia Post about all types of matters.
>
> Australia Post puts out a lot of written material. My experience is that the Employees rarely read it. The Employees that I deal with prefer to be told things directly. The exception is in the administrative and customer service areas where there is more access to email and a greater onus on the administrative workers to read things.
>
> While there are exceptions, my observation is that very few Employees read the enterprise agreement. The Employees absorb verbal information, assess it, ask questions and then make their decisions based on what they are told

65 Evidence of this kind may tend for and against various aspects of the applicants' claims.

The two communications

66 The two communications, sent by Australia Post on 24 May 2013 to its workforce, are central to the applicants' allegations of contravention of s 345 of the FW Act.

67 The communications informed employees that Australia Post had revised its offer by removing the FAS Freeze proposal from the bargaining process. The relevant communications took the following form:

(a) a staff bulletin: "EA 2013 Staff Update – Responding to Your Feedback"; and

(b) a poster.

68 The Staff Update stated:

24 May 2013

EA2013 Staff Update - Responding to your feedback

By now, your Manager will have updated you on negotiations for our new Enterprise Agreement, including Australia Post's proposed wages offer.

My senior leadership team and I travelled extensively across the country this week talking to you about the offer and hearing from you about your workplace and your reaction to the proposal. We had promised to be transparent and discuss with you what our business challenges and opportunities are and how we are going to tackle them.

On the whole, the response has been positive, particularly to the commitment to roll over the existing agreement and maintain all of the protections to your conditions and the significant increase in the pay offer. Many of you told us that the proposed 10.5 per cent wage rise over three years was a higher figure than you had anticipated and that you welcomed Australia Post honouring its commitment to deliver 1.5 per cent in December 2013 which was part of the last Fair Work Agreement in 2010.

The new 3% pay deal in December of 2014, 2015 and 2016 also helps staff keep up with inflation (2.5 per cent forecast according to the Reserve Bank of Australia) and cost of living pressures. Taking into account the compound effect of the pay increases, this deal actually delivers around a 9.3% compound growth pay rise in the years 2014-2016.

Many of you expressed surprise that in addition to the business challenges we are facing, that Australia Post is also attempting to manage a significant and growing superannuation liability that is having an impact on our ability to invest in our business, reward our people and remain profitable.

Overwhelmingly, staff told us they were confused about the superannuation offer including the operation of and benefits associated with the APSS defined benefit scheme and the potential impact of a FAS freeze on the growth associated with the 10.5 per cent pay rise.

I want to ensure staff are clear on this point - Australia Post is not encouraging staff to leave the defined benefit scheme nor have we offered at any point to shut down APSS. We think it is a vital and important benefit which we know you value. This is why we offered in our EBA proposal to keep the scheme running but merely wanted to have a temporary freeze of the FAS growth. Furthermore, to ensure any discussions around managing our superannuation liability continue in an informed and transparent manner, I will remove the FAS freeze from current Enterprise Agreement considerations to give you certainty and security.

Once an Agreement is finalised, I will work with our counterpart in APSS – the ACTU – to conduct a review of APSS and discuss how we can collectively manage Australia Post's growing liability and develop a plan to strengthen its performance to enable it to remain viable for the benefit of members.

With the recent news of many people affected by business difficulty at places like Ford who are closing in Australia and thousands of people losing their jobs, it is vital that we put in place an Enterprise Agreement that provides certainty and protection of rights and conditions.

I will meet again with your representatives next week to finalise our offer to you. All parties have publically and continually stated that we are committed to back-to-back Agreements to deliver the business and our staff certainty.

To deliver back-to-back Agreements, allow staff ample time to consider the detail of the Agreement and vote; a decision needs to be made shortly to stand together or go back to the drawing board leaving every valued staff member with more uncertainty to securing the very important benefits and rewards this new EA2013 brings.

I am optimistic about our future and I see many opportunities for Australia Post to grow and to continue to be a powerhouse of community and business success. But the business and you need certainty. I hope you will continue to consider the revised offer (with the removal of the FAS freeze) and give both myself and your representatives your views, prior to our final union summit next week.

Our EA 2013 Offer – In Summary:

- Roll over the current Agreement including all conditions and benefits to 31 December 2016.
- A wage offer of 1.5 per cent in December 2013 (as per current Agreement) and 3 per cent per annum in December of 2014, 2015 and 2016 provided we meet Postie delivered letters and parcels service performance and make at least $1 of profit.
- Total wages offer of 10.5 per cent will be in pay rate, not cash bonuses which has a higher benefit to you and is not linked to volume.
- A commitment to keeping the APSS defined benefit fund running for existing members and the full pay rate (maximum) of 10.5 per cent will go into FAS.
- A renewed commitment to core workplace principles – safety, respect and recognition.
- A commitment to work together on a new delivery model to maximise full-time workers and to consider a new mode of transport for posties.
- A culture and productivity program to deliver new initiatives and

innovations to benefit our customers, employees and our business.

Kind Regards,

Ahmed Fahour
Managing Director & Chief Executive Officer

69 Although the document is stated to be a communication from Mr Fahour, Ms Rivers' evidence in cross-examination was that there was more than one author. Her evidence was that initially the document was drafted by Australia Post's communications team, then circulated to others, including Ms Rivers' team and it was her team who looked at these kinds of documents. Although that might explain the origins of the documents, for the reasons I set out at [81]-[84] below, I find that Mr Fahour is to, and should, be identified as the maker of the statements in these communications to Australia Post employees.

70 The second communication was a poster. It had a picture of a smiling female Australia Post employee, next to the heading "Enterprise Agreement 2013" on one side of the photo, and the logo of Australia Post on the other. The text of the poster was as follows:

Enterprise Agreement 2013

Australia Post offer

Our EA 2013 Offer –

In Summary:

- Roll over the current Agreement including all conditions and benefits to 31 December 2016.
- A wage offer of 1.5 per cent in December 2013 (as per current Agreement) and 3 per cent per annum in December of 2014, 2015 and 2016 provided we meet Postie delivered letters and parcels service performance and make at least $1 of profit.
- Total wages offer of 10.5 per cent will be in pay rate, not cash bonuses which has a higher benefit to you and is not linked to volume.
- A commitment to keeping the APSS defined benefit fund running for existing members and the full pay rate (maximum) of 10.5 per cent will go into FAS.
- A renewed commitment to core workplace principles – safety, respect and recognition.
- A commitment to work together on a new delivery model to maximise full-time workers and to consider a new mode of transport for posties.
- A culture and productivity program to deliver new initiatives and innovations to benefit our customers, employees and our business.

71 There was also a box at the bottom of the poster inviting feedback, or questions, and giving a 1800 telephone number and an email to which feedback or questions could be sent.

The communication to Australia Post managers

72 In addition to those two communications, Australia Post provided its managers with a guide to assist their discussions with relevant employees. Two versions of these additional documents were distributed. The first set was distributed on 20 May 2013, consisting of posters and "talking notes" for the managers. This set included the FAS Freeze proposal. However this set was replaced with another set on 24 May 2013, reflecting the change in Australia Post's position concerning the FAS Freeze proposal.

73 The second version was headed "EA2013 Manager's Update" and stated:

> **24 May 2013**
>
> **EA2013 Manager's Update**
>
> On Monday 20 May, a Manager's Update was distributed outlining a proposed EA2013 offer that Australia Post tabled with the Unions.
>
> Through extensive consultation with our employees this week, senior leaders learned that there was confusion around the FAS freeze and the impact it would have on individuals.
>
> In response to this feedback, and to give our employees certainty and security, I have decided to remove the FAS freeze from the offer. All other aspects of the offer stay the same, including the 10.5 per cent pay increase.
>
> It is important that managers:
>
> - ensure staff are aware of the removal of the FAS freeze from the offer.
> - remove any posters referring to the FAS freeze and replace them with the new version.
>
> Attached is a copy of the staff update which will be distributed today for your information.
>
> **Action required**
>
> - Immediately replace all EA2013 posters that were distributed last week with the new version that is attached.
> - Ensure staff are aware that the FAS freeze has been removed from the offer and that all other aspects remain the same, including the 10.5 per cent pay deal.
> - Remind staff that they can provide feedback or ask questions through the EA2013 hotline ([redacted]) or email ([redacted]).
>
> Regards,
>
> **Ahmed Fahour**
> **Managing Director & Chief Executive Officer**
>
> (Contact information redacted.)

Events after the Australia Post communications

74 After these communications, another negotiating meeting occurred on 29 May 2013. Mr Fahour attended this meeting. Mr Dwyer's evidence, which I accept, is that Mr Fahour told those present at the meeting that it would be the last negotiating meeting and that he would put the offer to a ballot of employees with or without the CEPU's support. The evidence was unclear whether the offer to which Mr Fahour referred did or did not include the FAS Freeze proposal, but in any event subsequent events clarified that the offer put to employees was one without the FAS Freeze proposal. Mr Dwyer's evidence confirms that the CPSU also continued to express concerns about aspects of the agreement, including by contending that there was a conflict between Australia Post's statements that it would commit to retaining the APSS defined benefit scheme for the life of the enterprise agreement while informing the employees it would review the APSS during the same period.

75 A "final offer" from Australia Post was put to the CEPU (and the other two unions) on 6 June 2013. A further "Manager's Update" was distributed by Australia Post on the same day. In that update managers were instructed to hold a "toolbox talk" to their group of employees by a certain date. The text of the manager's talking notes was as follows:

> **Manager's Update**
>
> **Enterprise Agreement 2013**
>
> 6 June 2013
>
> **Manager's talking notes**
>
> Hold Tool Box Talk between Friday 7 June and Wednesday 12 June
>
> - Since we commenced negotiations for Enterprise Agreement 2013 in March there has been much common ground between Australia Post and the majority of your union representatives.
> - There have been detailed discussions about our business challenges and working conditions for our staff and we have made significant progress over the last three months towards finalising a new Agreement.
> - Management have also listened to your feedback about the proposed Agreement and have put the following offer to your Union representatives:
>   - All of the entitlements and conditions in the current Agreement will continue under the new Agreement, including shift penalties, job security and the RRR Agreement.
>   - The Agreement will deliver a guaranteed pay rise of 10.5 per cent which is permanently in your pay rate by 2016. That's a pay rise which is double the last Agreement.
>   - Australia Post will bring forward payment of your pay rise so you

can access the money earlier. This year you'll receive the 0.5 per cent guaranteed pay rise in August with a further 1 per cent guaranteed pay rise in December. For 2014, 2015 and 2016 you'll receive 0.5 per cent each August and 2.5 per cent every December, **giving you a total of 3 per cent, all guaranteed.**

- **Australia Post will pay an up-front, "back-to-back agreement" cash bonus** - $500 for full-time staff and $250 for part-time staff - as a reward and recognition for your achievement if we have a majority of staff supporting EA2013. This is worth around 1 per cent extra on top of the pay rise for an average award employee and will be paid in the first pay period in August.

- They've listened to your feedback in regards to the APSS Final Average Salary (FAS) freeze, and profit and service performance requirements for some of the pay rise and these conditions have been removed. **All of your pay rise in this Agreement is guaranteed and the maximum amount of the 10.5 per cent pay rise will flow into your superannuation.**

- They heard you when you said that safety, respect and recognition in the workplace are important to your welfare and wellbeing. Management will immediately commence work with your representatives to deliver new initiatives in your workplace.

- Productivity and service improvements have always been a hallmark of Australia Post Enterprise Agreements and we will continue the tradition of working together to improve our performance for our customers in both the traditional letters business and in our growing parcels business. Australia Post will work constructively and positively to identify business and workplace improvement programs to deliver on our customer service commitments and maximise our commercial return.

- Most critically, the proposed new Enterprise Agreement is a deal that Australia Post can afford while delivering a reward to our staff. It gives us certainty and stability as we head into difficult times and enables us to invest in the future of our company and our staff with confidence.

- Enterprise Agreement 2013 balances the needs of the business with the needs of staff. It will help you keep up with cost of living pressures and is above expected inflation for every year of the Agreement while ensuring you continue to have a job to come to every day.

- We understand a number of union representatives are supportive of the EA2013 offer but a minority of people will encourage you to vote 'no'. We believe they are not acting in the best interests of employees. The proposed Agreement is a deal that we can afford while meeting the needs of our staff. It gives us certainty and stability as we head into difficult times and enables us to invest in the future of the company with confidence.

- For anyone who isn't convinced of the merits of the offer, please consider the alternative. Should we not reach the required 50 per cent plus one 'YES' votes from our staff there is no certainty of a pay rise beyond the 1.5 per cent in December 2013 and no certainty Australia Post will be able to invest in the company to support your job and our future.

- You will have ample time to consider the Enterprise Agreement 2013 before you are asked to formally vote in the coming weeks.
- It is important that you carefully read all materials sent to you.
- During the access period, if you have any questions about the Agreement you can speak to your manger or call the EA2103 [sic] hotline on [redacted] or email [redacted].
- A summary guide that clearly explains the Agreement will be mailed to all employees. This will also be available online on EA2013 website in Vietnamese, Tagalog and Chinese – Traditional.
- You will be able to access the full Agreement and reference materials in a number of ways:
    - You can visit the website (www auspost.com.au/ea2013)
    - You can phone the EA2103 hotline on [redacted]
    - You can email [redacted]
    - You can ask your manager.

(Emphasis in original; contact information redacted.)

76 There were no further negotiations after this point. On 12 June 2013, Australia Post put a copy of the proposed agreement on its website, together with a guide to the agreement and other relevant documents. Between 6 and 13 June 2013 there had been several further communications from Australia Post to its employees, each in terms which were consistent with the communications I have set out above. Those communications also set out the voting process. The substance of what was communicated was: that there will be certainty for the workforce, that existing entitlements from the 2010 Enterprise Agreement will be rolled over, that pay rises in the new agreement were "guaranteed" and the 10.5% pay rise "will flow into superannuation", and that Australia Post will continue to consult and work with the unions on further significant changes.

77 The communications from the union side were less consistent, as I have already noted. This was the subject of some cross-examination of Mr Dwyer at the hearing. Essentially, Australia Post contends, in relation to the s 345 claim, that there were confusing and contradictory representations from some of the union branches to its workforce occurring during this time, and any confusion in its employees was the responsibility of the unions, not Australia Post.

78 There is some support in the evidence for the proposition that confusing and contradictory statements were being made by different CEPU branches. Mr Dwyer's own evidence revealed some difficulties, which he also accepted in cross-examination. For example in his affidavit, Mr Dwyer deposed:

> In about June 2013, the CEPU NSW Postal and Telecommunications Branch issued a document headed 'E-Bulletin Postal #10 June 2013. That document stated in part that:
>
> > '**Locks** in the flow of the entire 10.5% pay increase to your superannuation with NO FAS FREEZE with commitments to maintain both the APSS defined benefit scheme and the negotiated (above legislated guarantee) superannuation rate for accumulation benefit employees'
> >
> > and
> >
> > 'Post have sent a letter to all stating that the APSS and *your defined benefit will be guaranteed for the life of the agreement, this is contrary to what the Victorians and Divisional office are saying.*"
>
> (Emphasis added in italics.)

79 It is not possible from the evidence to make any findings about the impact of these communications (if any) on Australia Post's employees who were eligible to vote, nor on those affected by AWOTE indexation.

80 The proposed agreement was approved by a vote of Australia Post employees during the two week period from 20 June 2013. On 22 July 2013, the Fair Work Commission approved the proposed agreement under the title "Australia Post Enterprise Agreement 2013". It commenced operation on 29 July 2013.

Mr Fahour's personal involvement in the negotiations

81 It is necessary to make some findings on this issue, because the document containing the principal representations for the applicants' s 345 case was a communication that, on its face, came from Mr Fahour. However, Mr Fahour was not called as a witness in this proceeding.

82 My view of the evidence is that it clearly discloses Mr Fahour played a personal and critical role in the enterprise agreement negotiations, and indeed personally led them. He attended all three critical bargaining negotiation meetings.

83 The final offer on 6 June 2016 was communicated to the CEPU by a letter from Mr Fahour, which it would appear he has personally signed and in which he addressed Mr Dwyer by handwriting his first name. There were numerous examples of communications in the evidence coming directly from Mr Fahour. There was also ample evidence of his personal attendance at meetings, or his personal communications. For example, in Mr Dwyer's evidence there are numerous email communications sent directly from Mr Fahour to Mr Dwyer.

84 On that basis, I have no difficulty in concluding that where the 24 May 2013 communication to staff purports to be signed by Mr Fahour, it is properly characterised as a communication from Mr Fahour as the Managing Director and Chief Executive Officer of Australia Post, and a communication to which responsibility for its contents can be assigned to Mr Fahour himself. I also find that Australia Post intended these communications to be viewed by the workforce as communications from Mr Fahour, in his capacity as the CEO, and on behalf of Australia Post as the employer.

Cessation of AWOTE indexation

85 Although AWOTE indexation ceased from 1 July 2014, the planning by Australia Post concerning this decision commenced shortly after the 2013 Enterprise Agreement was approved.

86 The consequence of Australia Post deciding to remove AWOTE indexation was that the reported superannuation salary of affected employees would not increase until their actual superannuation salary rose to a level higher than their reported superannuation salary. What happened to Mr Farley's reported superannuation salary, at least after 1 July 2014, is an example of the effect: see [105] below.

87 Ms Sebire's evidence was that the "serious work" to find another way to contain Australia Post's superannuation liability (after the abandonment of the FAS Freeze proposal) began in July 2013. However she conceded that during June 2013 there may have been some discussions on this topic. I find that within Australia Post, likely including Mr Fahour and his relevant senior executives, and certainly including Ms Sebire's team, attention turned fairly quickly after the approval vote on the 2013 Enterprise Agreement to other ways to contain the superannuation liability, and that was a direct consequence of Australia Post having to abandon the FAS Freeze proposal. In other words, a course of action to achieve the outcome contemplated by the footnote to the 17 May 2013 slides was implemented. Given the level of concern about Australia Post's superannuation liability going forward, that is hardly surprising.

88 According to Ms Sebire, and I find, six options were examined in the review. Factors such as financial implications and ease of implementation of each option were assessed. Ms Sebire admitted there was no involvement from any person from the Australian Council of Trade Unions (ACTU) in the Australia Post review, nor was any person from the CEPU involved.

89 In mid-August 2013, Australia Post's Superannuation Committee adopted proposals put by Ms Sebire in her report to it. She recommended removing the AWOTE indexation.

90 Thus, this recommendation to remove AWOTE indexation was made only approximately three weeks after the Fair Work Commission approved the enterprise agreement on 22 July 2013.

91 The evidence does not reveal what then happened in terms of decision-making between August 2013 and December 2013, when on 13 December 2013 the ACTU was notified of the proposal by correspondence. The evidence reveals there was one meeting and some correspondence between Australia Post and ACTU, CPSU and CEPU officials in February 2014. There was a further meeting between Australia Post and ACTU, CPSU and CEPU officials to discuss the contents of a letter dated 17 February 2014, sent by Australia Post to ACTU, although it is not clear on the evidence when this occurred. In late March 2014, Australia Post sent a communication to its employees, informing them of, amongst other things, the removal of AWOTE indexation.

92 In cross-examination about this process, Mr Dwyer said that Australia Post's 13 December letter told the unions "what was going to happen", and that what occurred in February was after Australia Post had resolved to implement the changes, including removing AWOTE indexation. Mr Dwyer refused to accept this process could possibly be described as "consultation".

93 I accept that what occurred was that in December 2013, Australia Post presented a decision about AWOTE indexation which had been internally made and ratified some months' earlier. That can be seen from the terms of Mr Fahour's letter to Mark Birrell, the Chair of the APSS, on 20 December 2013, which relevantly stated:

> As such, I write to inform you that Australia Post intends to implement the following changes to the APSS prior to 30 June 2014. The estimated effective date for the implementation is Monday 2 June 2014.
>
> **1. Removal of indexing superannuation salary to Average Weekly Ordinary Time Earnings (AWOTE)**
>
> Processing changes introduced to the APSS in 2003 stated that where an Award level employee's superannuation salary does not grow between each birthday, or if the growth is less than the salary increases in the current Australia Post Fair Work Agreement, AWOTE indexation is applied.
>
> ...
>
> The removal of the AWOTE indexation will seek in the longer term, to bring

> superannuation salary more in line with actual salary level. This will bring greater equity for all members and support the viability of the APSS scheme, while maintaining the guarantee that no one's superannuation salary will decrease.
>
> The change will apply prospectively only and will be implemented prior to 30 June 2014. It is appropriate to advise that AWOTE indexing is in the jurisdiction of Australia Post HR Policy and as such does not require Trust Deed modification.

94 The letter to the ACTU on 13 December 2013 was in similar terms. One of the reasons the sequence of events may have proceeded like this is because, according to Australia Post, removal of AWOTE indexation did not require any amendment to the Deed, and Australia Post's obligations to consult with the ACTU were, under the Deed, only concerned with amendments to the Deed.

95 Nevertheless, there is some force in the applicants' submissions, to which I return below, that what occurred bore little resemblance to an ordinary reading of what had been said throughout the enterprise agreement negotiations, in particular in the "footnote", to which I have referred above. The absence, on the evidence, of any real opposition from the ACTU to the removal of AWOTE indexation may be part of the explanation: see [242] below. Ultimately, I do not consider the applicants' criticisms, even if well-founded, contribute to the establishment of a contravention of s 345 of the FW Act.

The claims of Mr Farley, and Mr Walters' role in the proceeding

Mr Farley

96 It is necessary to set out some of the factual background to the individual claims made by Mr Farley in this proceeding. Mr Farley's position as Pay Response Coordinator was made redundant in April 2011, which meant he became what was called by Australia Post an "unattached employee". In January 2012, after working in the position on a trial basis, he was offered a permanent position as a Processing Officer, which was classified at a lower level than that of Pay Response Coordinator and attracted a lower salary.

97 In considering whether to accept the new position, Mr Farley had some conversations and emails with Mr Desmond Kinsey, who was at the time Australia Post's "Human Resources Application Controller" in relation to superannuation systems. He also had some conversations with Mr Neil Robinson, Australia Post's "Manager, Payroll Quality", and the person for whom Mr Farley was working in the new position.

98 Mr Farley wanted to understand what impact taking the new positon might have on his superannuation entitlements. Mr Farley, and his partner, were also worried about the prospect of taking a position with a lower salary, but the relevant issue for present purposes was his concern about his superannuation entitlements.

99 His evidence was:

> The second major issue [after the lower salary] was my superannuation. I was not prepared to take a lower paid position if my superannuation was going to be affected. I am relying on my superannuation to provide for me and my family in my retirement. After Neil said that Australia Post would not maintain my salary at AO5 permanently, I started researching the superannuation entitlement through the AWOTE Indexation. It was my understanding that if my salary was decreased, then on my next birthday after the two years' salary maintenance ended, my superannuation salary would increase by AWOTE.

100 According to Mr Farley, Mr Kinsey was regarded by employees as the "go to" person within Australia Post about superannuation matters, having been involved with that subject matter at Australia Post over many years. It was agreed between the parties that Mr Kinsey "had acquired particular knowledge about superannuation matters through his position with Australia Post". As part of his discussion with Mr Farley, Mr Kinsey sent him the following email in January 2012:

> In June 2012, your super salary will be $79,317, i.e., your base A5 salary on that day.
>
> Let say the prior to your birthday in June 2013, your salary maintenance expires and they pay you as an A4.
>
> In June 2013, your calculated Super Salary might be $75,000 (estimated A4 rate at that time)
>
> The system recognises that your Super Salary has dropped from June 2012.
>
> Super Salary cannot be decreased so we would take the 2012 Super Salary ($79,317) and apply an AWOTE increase to it.
>
> (The AWOTE % is updated each quarter and currently stands at 5.251% (it has gone up and down between 3.9 and 5.25 in the last few years)
>
> Using the current AWOTE rate, your Super Salary in June 2013 would be **$83,482** (i.e., $79,317 * 1.05251)
>
> Had you stayed on an A5 rate (like I will be!) the June 2013 Super Salary would have been $80,903 at best (assuming we get a 2% EBA increase)
>
> Assuming you stay on the A4 pay rate, you will get an AWOTE increase each year.
>
> (Emphasis in original.)

101 I pause here to note the obvious fact in the figures provided by Mr Kinsey to Mr Farley: AWOTE indexation would have had a very beneficial effect on his reported superannuation salary, and therefore on his ultimate superannuation entitlement.

102 Mr Farley decided to accept the position, and notified Australia Post of this on 15 February 2012. He gave the following evidence, on which he was not seriously challenged:

> In 2011 I had been planning to retire at somewhere between 55 and 60 years of age. The AWOTE Indexation meant that I would still be able to do that, even though I would be earning a lower wage, because over the years it would be worth more to me than the additional money I would earn as an AO5 employee. When I took the transfer, I was thinking about my retirement. I had already done 25 years of service. I had made up my mind that I would not apply for a promotion again. The AWOTE Indexation meant that I could work until retirement without having to apply for a promotion to make up the salary. After 25 years of hard work, that suited me.
>
> Based on what Des and Neil said to me, I believed that the AWOTE Indexation would apply to me for the rest of my career. I made the decision to accept the position based on the AWOTE Indexation. I would not have taken a position with a lower salary if I had known that the AWOTE Indexation would not apply to me, or could be removed in the future. Neither Neil nor Des said to me that they were only telling me the current Australia Post practice, nor did they tell me that the AWOTE Indexation might cease in the future. When I accepted the position, I relied on what Des and Neil had said to me.

103 Mr Farley accepted during cross-examination that he did not ask Mr Kinsey or Mr Robinson whether AWOTE indexation would be removed in the future, and he also accepted that neither of them told him he would be entitled to AWOTE indexation for the rest of his career. Mr Farley's evidence under cross-examination was, however, that he *understood* what Mr Kinsey told him meant he would get AWOTE indexation for the rest of his career. In re-examination, he added that he was never told AWOTE indexation would *not* apply to him.

104 I consider this evidence in more detail at [299].

105 Part of the offer to Mr Farley was a two-year period of salary maintenance but thereafter, from 13 March 2014, Mr Farley's actual salary reduced from $81,719.00 to $75,197.00. The unavailability of AWOTE indexation meant that his reported superannuation salary remained at $81,719.00 because, under the APSS arrangements, his reported superannuation salary could not decrease. However, nor could his reported superannuation salary increase from $81,719.00 unless his actual salary exceeded this figure.

106 Mr Farley's evidence about the effect of the AWOTE indexation decision was as follows:

> As a result of the changes, I will have to delay my retirement. I had planned to retire somewhere between 2020 – 2025. I now plan to retire in 2030. That is because, to the

> best that I can estimate it, it will be 2030 before I make up the difference between the increase in my superannuation benefit from AWOTE Indexation and my AO4 salary.

Mr Walters

107 Mr Walters held the permanent position of Postal Delivery Officer within Australia Post and had AWOTE indexation applied to his reported superannuation salary since 2004. His reported superannuation salary was $58,537.00 in July 2014, at the time AWOTE indexation ceased. No particular evidence was led about Mr Walters' circumstances. Counsel for the applicants informed the Court Mr Walters had been named as an applicant to ensure there was a proper controversy before the Court, I assume to protect against objections to the CEPU's standing or similar. No such objections were made, and as such there are no individual claims made by Mr Walters which need to be determined.

THE DEED AND RELEVANT LEGISLATIVE PROVISIONS

108 I note the parties agreed that the relevant version of the Deed was the one at the time it was settled: namely 19 June 1990, although there were no material changes to the terms of the Deed prior to the impugned conduct in the first half of 2014.

109 As I have noted above, when the APSS was introduced, defined benefits for APSS members were to be calculated on the basis of an employee's "final average salary". The definition of FAS is extracted at [16] above.

110 As the respondent submits, the calculation of superannuation benefits for CSS members is rather more complicated, under the terms of the *Superannuation Act*, than for APSS members, whether new members or those who transferred from the CSS to the APSS. The precise details of the various provisions of the *Superannuation Act* as they apply to CSS members are not necessary to set out, although when I come to consider the competing arguments about the application of s 47(1) of the *Superannuation Act*, the general nature of those provisions is material.

111 Central to the applicants' case is the definition of "salary", also in cl 2 of the Deed and extracted at [17] above. The regulations to which this definition refers are the *Superannuation (CSS) Salary Regulations 1978* (Cth). It is not presently necessary to reproduce the text of those regulations.

112 The applicants contend, and the respondent disputes, that the "relevant provisions" of the *Superannuation Act* are ss 46, 47, 55, 56 and 57. I propose to set out the key parts of those provisions here, and will return to the arguments in further detail below.

113 Section 46(1) provides:

> The amount of the fortnightly basic contribution payable by an eligible employee on a contribution day is an amount equal to 5 per centum of the fortnightly rate of salary that was payable (or is deemed by section 47 to have been payable) to the employee on the anniversary of his or her birth last preceding that contribution day or, if that amount is not a multiple of 10 cents, the next higher amount that is such a multiple.

114 Section 47(1), as amended in 2003, provides:

> **47 Decreases in salary**
>
> (1) If, on an anniversary of an eligible employee's birth (in this subsection referred to as the ***relevant anniversary***), his or her annual rate of salary is less than the highest annual rate of salary that was payable (or is deemed by a previous application of this subsection, or by subsection (3), to have been payable) to him or her on any day during the period commencing on the anniversary of his or her birth last preceding the relevant anniversary and ending on the day immediately preceding the relevant anniversary, his or her annual rate of salary on the relevant anniversary shall, unless he or she has made or makes an election under subsection (2) by virtue of a decrease in his or her annual rate of salary that occurred during that period, be deemed, for the purposes of section 46, and any subsequent application of this subsection, to be such rate as is relevant to the eligible employee under the regulations or if there is no such rate:
>
> (a) where paragraph (b) does not apply—that highest annual rate of salary; or
>
> (b) where, if:
>
> (i) there had not been any decrease in his or her annual rate of salary during the period beginning immediately after the last day on which that highest annual rate of salary was payable to him or her and ending on the relevant anniversary; and
>
> (ii) his or her annual rate of salary had been increased during the period by the same percentage as any overall percentage increase in AWOTE that occurred over the period (being an overall percentage increase worked out from estimates of changes in AWOTE in respect of the period published by the Australian Statistician, other than estimates published in substitution for earlier estimates);
>
> the annual rate of salary of the eligible employee on the relevant anniversary (in this paragraph called the ***imputed annual rate of salary***) would be higher than that highest annual rate of salary—that imputed annual rate of salary.

115 It is presently unnecessary to set out the terms of ss 55, 56 and 57. The applicants contend that the relevant effect of these provisions, read with the terms of ss 55-57, was:

> Section 47 operated where, on their birthday, the annual rate of salary payable to an employee was less than it was at any time since that employee's last birthday. Where s 47 was engaged, the employee's annual rate of salary for the purposes of s 46, was deemed to be:
>
> (a) the rate relevant to the employee under the regulations; or, if no such rate exists
>
> (b) the higher of:
>
> (i) the highest rate paid to the employee in that 12 month period; or
>
> (ii) the employee's annual rate of salary indexed to AWOTE.
>
> The annual rate of salary calculated under s 47 was expressed to be for the purposes of s 46. Those purposes were identified in subsection (1) of paragraph 46, which established the mechanism for calculating the amount of an employee's fortnightly basic contribution.

116 In contrast, Australia Post contends the only "relevant provision" of the *Superannuation Act* for the purposes of the definition of "salary" in cl 2 of the Deed are those referred to (through s 5(1)) in the *Superannuation (CSS) Salary Regulations*.

117 The following provisions of the FW Act are relevant to the applicants' second cause of action. The key contravention provision on which the applicants rely is s 345, which provides:

> **345 Misrepresentations**
>
> (1) A person must not knowingly or recklessly make a false or misleading representation about:
>
> (a) the workplace rights of another person; or
>
> (b) the exercise, or the effect of the exercise, of a workplace right by another person.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

118 There are also some provisions concerning voting on enterprise agreements which are relevant. Section 181 provides:

> **181 Employers may request employees to approve a proposed enterprise agreement**
>
> (1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will

be covered by the agreement to approve the agreement by voting for it.

(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

119 During enterprise bargaining negotiations, employers have obligations of disclosure of information pursuant to ss 180, 228 and 345 of the FW Act. Section 345 (which will apply to employers, but also to other persons) is set out above. Section 180 sets out the obligations of an employer prior to putting a proposed enterprise agreement to vote. It provides:

180 Employees must be given a copy of a proposed enterprise agreement etc.

Pre-approval requirements

(1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

Employees must be given copy of the agreement etc.

(2) The employer must take all reasonable steps to ensure that:

(a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:

(i) the written text of the agreement;

(ii) any other material incorporated by reference in the agreement; or

(b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

(a) the time and place at which the vote will occur;

(b) the voting method that will be used.

(4) The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).

Terms of the agreement must be explained to employees etc.

(5) The employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

(6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a bargaining representative for the agreement.

120 Section 228 sets out "good faith bargaining requirements", which also includes the disclosure of relevant information:

228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

COMPETING CONTENTIONS

121 I propose briefly to summarise the parties' competing contentions here, and deal with their submissions in more detail where necessary on particular issues.

The Deed argument: Applicants

122 The applicants contend Australia Post breached the terms of the Deed in two ways, consequent upon Australia Post's decision to remove the indexation of reported superannuation salary for APSS members in the defined benefit stream of the APSS. First, the breach is said to be constituted by the failure to include in employees' "salary" as defined in cl 2 of the Deed, the AWOTE indexation for which s 47(1) of the *Superannuation Act* provides. Second, the breach is said to be constituted by the failure properly to calculate Australia Post's employer contributions. This failure is put as a breach which is consequent upon the first breach, as I explain below.

123 The applicants' arguments only concern the defined benefits stream of the APSS.

124 On the first breach, the applicants contend Australia Post was not permitted to cease the AWOTE indexation process, and in fulfilling its reporting obligations to the Trustee under cl 9.3 of the Deed, it was required to apply that process in reporting employees' superannuation salary. Since the calculation of a member's accrued retirement benefit (relevantly, for these employees, the higher of the two benefits payable under the scheme and the benefit applicable to them) relied upon a calculation by reference to a member's FAS, the inputs into the FAS were critical to the ultimate superannuation payout a member would receive. The term "final average salary" is defined in cl 2, by reference to another term – "equivalent full-time salary". In turn the application of this term to either full-time or fractional workers depends on the definition of the word "salary" in the Deed. Clause 2 contains the definition of "salary" that I have set out at [17] above.

125 The applicants contend that the words "having regard to the relevant provisions of the *Superannuation Act 1976* applicable for determining the salary of a member for the purposes of the Commonwealth Superannuation Scheme" in the definition of "salary" required Australia Post, for the purposes of reporting each employee's "salary" to the Trustee (through the stages of equivalent full-time salary and final average salary), to calculate the employee's salary by reference to s 47 of the *Superannuation Act*, which is, in substance, the provision that incorporates AWOTE indexation. That is, the applicants' submission is that the definition of "salary" in cl 2 of the Deed required Australia Post to use the AWOTE indexation contained in s 47, and this was not something Australia Post could "opt out" of. The two key components to the applicants' contentions are first, that s 47 (and accompanying provisions) are the "applicable" provisions for the purposes of the definition of "salary" in cl

2; and second, that "having regard to" construed in context imposes an obligation on Australia Post to apply the AWOTE indexation in s 47.

126 On the second breach, the applicants contend that if Australia Post was required, in effect, to apply the AWOTE indexation to its employees superannuation salary, it was also obliged (by item 3.3 of the Rules at Sch 1 to the Deed) to set its rate of employer contributions at a sufficiently high level to ensure that members would receive the benefits for which item 4 of the Rules provided. Instead, the applicants contend that since the decision to cease AWOTE indexation on 1 July 2014, Australia Post has calculated its contributions under item 3.3 without reference to the AWOTE indexation process. This, the applicants contend, is also a breach of the Deed: namely, of item 3.3 of the Rules.

The Deed argument: Respondent

127 Australia Post contends the applicants are incorrect on both limbs of their construction argument about the definition of salary in cl 2 of the Deed. It also makes some further contentions about why the applicants' breach of the Deed allegations cannot succeed.

128 One of the basic points made by the respondent is that s 47 of the *Superannuation Act* is applicable to CSS members only. The respondent in its submissions points to a number of substantive differences flowing from membership of the CSS and the APSS. Section 47 deals with members' contributions and because the APSS was a non-contributory scheme it had no relevance.

129 In terms of the construction of cl 2 of the Deed and the meaning of salary, Australia Post emphasises that cl 2 picks up only the "relevant" provisions of the *Superannuation Act*, and contends the definition of "salary" in s 5(1) is the relevant provision, which in turn picks up the *Superannuation (CSS) Salary Regulations*. That is, it contends, what cl 2 of the Deed refers to. Section 47 is relevant only to the calculation of benefits under the CSS not the APSS. Even if that were not the case, Australia Post contends the phrase "having regard to" means only "consider" but carries no implication that those provisions *must* be applied.

130 If, contrary to its primary position, Australia Post was required to take into account the operation and application of s 47, then it submits it did so, in two ways. Prior to 30 June 2014 it did so because it required the AWOTE indexation to be undertaken and, after 30 June 2014, Australia Post has continued to have regard to the AWOTE indexation process as "a matter which it can no longer undertake if the viability of the APSS is to be maintained".

131 Finally, the respondent contends that, with or without any obligation to apply AWOTE indexation after 30 June 2014, its annual and monthly contributions to the scheme were, at all times, at levels Australia Post's actuarial advisors considered sufficient to ensure the APSS was adequately funded.

The s 345 argument: Applicants

132 The applicants' second allegation is that Australia Post contravened s 345 of the FW Act by making false or misleading representations to employees about the effect of the 2013 Enterprise Agreement. The representations are alleged to concern the effect of the 2013 Enterprise Agreement on the superannuation entitlement of APSS members. The employees' participation in the enterprise agreement approval process under s 181(1) and the making of the 2013 Enterprise Agreement under s 182 are said to be the workplace rights about which false or misleading representations were made by Australia Post.

133 The applicants contend that the statements made in what was described in the evidence as a "Staff Update" on 24 May 2013 (extracted above at [68]) contained five representations, said to be implied from the whole of the document, each of which was false or misleading. Those representations were contended to be:

1. Australia Post would not implement what the applicants called the "AFS Freeze Proposal"; and/or
2. the proposed agreement would give employees "certainty and security" about their superannuation entitlements for its duration; and/or
3. Australia Post would not otherwise freeze employees' final average salary for the life of the enterprise agreement; and/or
4. Australia Post would conduct a future review of the APSS collectively with the ACTU; and/or
5. any future changes to the APSS would be agreed collectively between Australia Post and the ACTU.

134 The applicants described, in their amended statement of claim at [23]-[24], the "AFS Freeze Proposal" as a proposal by Australia Post that average final salary for the purposes of the APSS would be frozen for a period of three years, so that superannuation salary would no longer increase in any way, including by the use of AWOTE indexation, for the period of the enterprise agreement. This differs from a representation that Australia Post would not implement a **"FAS"** Freeze proposal, which does not necessarily include a representation that

Australia Post would not remove AWOTE indexation, which has an effect on FAS. Nor does it include a representation that Australia Post would make no changes to superannuation benefits. I return to this at [207]-[209].

135 Mr Fahour was identified as the maker of the representations because the Staff Update was expressed to be a communication from him. The applicants allege that he made the representations "knowingly or recklessly" (which is an additional requirement in s 345, as distinct from the consumer law provisions).

136 The applicants contend that the representations were misleading because:

- at the time the representations were made, Australia Post was continuing to contemplate changes to employee superannuation during the life of the 2013 Enterprise Agreement, specifically, the possible removal of the AWOTE indexation;
- Australia Post believed that removing the AWOTE indexation did not require an amendment to the Deed and that the consent of the ACTU was not required;
- regardless of whether the ACTU endorsed the changes, Australia Post intended to make them so as to contain and reduce its superannuation liability;
- Australia Post knew removing the AWOTE indexation would have the effect of "freezing" FAS for more than 17,000 employees for an indefinite period; and/or
- removal of AWOTE indexation (or other changes of this nature) would not provide "certainty and security" for Australia Post employees, but would have the opposite effect, and Australia Post knew, or ought to have known, that would be the case.

The s 345 argument: Respondent

137 Australia Post contends none of the alleged representations were made in the Staff Update circulated by Mr Fahour. It contends the Staff Update addressed the removal of the FAS Freeze only, and specifically noted that further changes "were under immediate contemplation".

138 It further contends the representations – if made – were not "about" a workplace right, or the exercise of a workplace right because decisions about superannuation were outside the 2013 Enterprise Agreement process, and the consequences about superannuation would flow regardless of whether the employees approved the agreement.

139 Finally, Australia Post contends that even if the representations were made, they were not false or misleading as it "was always expected" there would be changes to the APSS that were less generous to APSS members, and the CWU had been warning Australia Post employees of the threats to benefits under the APSS scheme.

The contract/estoppel argument: Applicants

140 The applicants' third argument centres on causes of action personal to Mr Glenn Farley. Mr Farley alleges that his contract of employment with Australia Post was varied in 2012 to incorporate the AWOTE indexation, and therefore Australia Post is bound as a matter of contractual obligation to continue to pay on his behalf superannuation indexed in accordance with AWOTE. Alternatively, Mr Farley contends that because of representations made to him by Mr Kinsey and Mr Robinson (in their capacity as officers of Australia Post), Australia Post is estopped from denying that it has an obligation to index his superannuation salary in accordance with AWOTE.

141 The variation is alleged to be constituted by conversations between (principally) Mr Kinsey and Mr Farley in early 2012, and Mr Robinson's demurrer to the alleged advice given to Mr Farley by Mr Kinsey, which, on the applicants' contentions, led Mr Farley to accepting Australia Post's offer of employment in a new, but lower permanent position. The applicants contend what Mr Kinsey said was promissory in nature, and that, as consideration, Mr Farley accepted a pay reduction, chose to remain in Australia Post's employment rather than leave and compromised his rights under the applicable "Redundancy/Redeployment/Retraining Agreement". In ceasing the AWOTE indexation from 1 July 2014, it is alleged Australia Post breached its contract of employment (as varied) with Mr Farley.

142 In the alternative, the applicants make an estoppel argument. They contend the representations to Mr Farley (again, principally by Mr Kinsey) that the AWOTE indexation would continue to apply to him for the rest of his time at Australia Post induced Mr Farley to rely on that representation in making his decision to accept a lower paid AO4 position, and to remain in employment with Australia Post. Australia Post knew and intended Mr Farley would rely on those representations, and unless Australia Post is held to those representations Mr Farley will suffer a detriment, because his superannuation salary will not be linked to AWOTE indexation and the present value of his superannuation benefits is reduced.

The contract/estoppel argument: Respondent

143 Australia Post contends that what Mr Kinsey said was no more than an explanation to Mr Farley of how the AWOTE indexation operated. If, in doing so, Mr Kinsey presented that information as if the AWOTE indexation would continue for the duration of Mr Farley's employment with Australia Post that could not, and did not constitute any kind of legal commitment by Mr Kinsey on behalf of Australia Post which could be considered contractual in nature. Mr Kinsey had no such authority and it would have been unreasonable of Mr Farley to consider that he had such authority.

144 On its contentions, Australia Post also denies Mr Farley has suffered any loss or damage, especially given that the alternative for him was to cease his employment with Australia Post.

145 On the estoppel argument, Australia Post accepts the evidence discloses an assumption on Mr Farley's part that the AWOTE indexation would continue to apply to him, but contends that is all the evidence shows. It does not show Mr Farley expected a contractual entitlement to arise, and any inducement towards that was outside the authority of Mr Kinsey and Mr Robinson. In any event, to the extent that Mr Farley's assumption concerned any legal relationship, the respondent contends that legal relationship is between Mr Farley and the Trustee. It contends, as in the breach of contract case, that although genuine, Mr Farley's expectations or assumptions were not reasonably based. It also contends there was no unconscionability on Australia Post's part. Finally, as in the breach of contract case, Australia Post submits there was no detriment to Mr Farley because he was able to remain in a stable job with a stable income in circumstances where he was anxious about being forcibly retrenched.

RESOLUTION

How was the AWOTE indexation process imposed or applied by Australia Post?

146 Australia Post contends that the AWOTE indexation process was applied "as a matter of HR policy or practice". The consequence of this contention is significant, because it means the AWOTE indexation process had the character of some kind of ex gratia or voluntary process within the discretion of Australia Post to maintain or remove. It had, Australia Post contends, no basis in s 47 of the *Superannuation Act*, nor in the Deed.

147 It was an agreed fact that Australia Post consistently applied AWOTE indexation to all of the relevant cohort of employees across the material period of time, up until its removal on 1 July 2014.

148 The evidence about precisely how AWOTE indexation was introduced, and what the basis in contract or in statute might have been for it, was not the subject of any clear evidence.

149 It is not necessary conclusively to determine the origins or source of AWOTE indexation, however there is force, on the evidence, in Australia Post's submissions that it was voluntarily applied by Australia Post as a matter of policy or practice. I return to this at [158]-[162] below.

Why was the AWOTE indexation removed?

150 The respondent's explanation for removing the salary indexation is succinctly set out in its written outline of submissions:

> Australia Post ceased the Indexation Process as a step in its bid to constrain its growing defined benefit superannuation liability, to ensure the viability of the APSS for the time being. It implemented this measure having regard to matters including the high cost to it of AWOTE indexation, and on equity grounds, where the consequential superannuation salary inflation did not apply to all employee Members, and was far in excess of the affected Members' actual paid salary and relevant allowances for superannuation purposes…
>
> (Footnote omitted.)

151 I accept this is, on the evidence, the explanation for the removal of AWOTE indexation. Despite Mr Dwyer's evidence, which I accept represents his genuine opinion, that there were other ways in which Australia Post could have decided to tackle the inflationary trend of its superannuation liabilities, including that it could have chosen methods which did not impact so directly on its employees, the fact is that Australia Post chose the mechanism it did. The applicants' first cause of action contends it was not open to it to do so, but as I set out below, I do not accept that argument.

What was the timing of the removal of AWOTE indexation?

152 Australia Post in particular relied on the timing of the removal of AWOTE indexation as part of its answer to the applicants' s 345 allegations. It submitted the evidence demonstrated, in particular Ms Sebire's evidence, that the decision to remove AWOTE indexation was taken ***after*** the 2013 Enterprise Agreement vote and the conclusion of the 2013 Enterprise Agreement.

153 As I have set out earlier in these reasons (see [85] to [94]), there is no doubt as a matter of chronology that is correct, but only just. However, contrary to Australia Post's submissions, I do not consider the timing of the decision in itself would preclude the applicants succeeding on their s 345 allegations. Some of the representations alleged to have been made by Australia Post relate to future conduct and if the applicants are correct about the nature of the representations, one question may be whether Australia Post had a reasonable basis for making the representations at the time they were made.

First cause of action: breach of Deed

154 The applicants accept there are differences between the CSS and the APSS, including differences relating to employee contributions. The applicants accept that the CSS is established by and regulated under the *Superannuation Act* and the regulations. They do not dispute, as I understood their submissions, that there were differences between the schemes – including, for example, differences about employee contributions: for about a decade after the APSS began, APSS members were required to contribute 2% of their salary, a lower percentage than the contributions required by CSS members, but since 2000, they have not been required to make contributions. CSS members were required to make contributions until about 2007, and thereafter could elect to do so. The applicants do not contest Australia Post's proposition, in general terms, that the terms of the *Superannuation Act*, after 1990, were directed at employees who had remained members of the CSS.

155 The difference between the parties is, as I have observed, only about how far the Deed picks up the provisions of the *Superannuation Act* and applies them, as a matter of contract, to APSS members as part of the scheme for determining their superannuation entitlements.

156 As I understood the submissions, the parties are broadly in agreement also that the differences between them involve a question of the proper construction of the Deed. The applicants made the following submission on the correct approach:

> The rules for the construction of contracts apply also to trusts: *Byrnes v Kendle* [2011] HCA 26; (2011) 43 CLR 53, 275 at [59] per Gummow and Hayne JJ, 286 at [102] per Heydon and Crennan JJ. The court's primary task is to discover the intention of the settl [sic] from the words used in the instrument, read as a whole. In relation to trusts, as in relation to contracts, the search for 'intention' is a search for the intention as revealed in the words the parties used, amplified by facts known to both parties: *Byrnes* at 286 [105] per Heydon and Crennan JJ. The construction is to have regard to the ordinary and natural meaning of the words: *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48; (2012) 46 CLR 326, 332 at [25] per curium (French CJ, Hayne, Crennan, Bell and Gageler JJ). Where an instrument is capable of more than one meaning, the interpretation which avoids consequences which are

capricious or unreasonable will be preferred.

157 I did not understand Australia Post to cavil with those principles and I accept they are applicable.

158 The applicants' counsel properly accepted that there have been complex changes to the *Superannuation Act* since 1990 which were not material to the applicants' argument: the material change was the introduction from 2003 of the AWOTE indexation method for CSS members. It is important to bear in mind that Australia Post contends that even if the *Superannuation Act* indexation changed in 2003 to such a method, the *Superannuation Act* was not the source of the AWOTE indexation applied by Australia Post to APSS members' superannuation benefits. The source of that was, on Australia Post's submissions, an executive decision by Australia Post, without any changes to the Deed. Although the applicants complained about the lack of detail in the evidence as to how AWOTE indexation came about, and (correctly) pointed out that Ms Sebire could not give direct evidence on this issue because she was not employed by Australia Post at the time, I am satisfied that the evidence supports a finding that AWOTE indexation was introduced because of an internal executive decision, and no more than that. It appears to be part of the applicants' case that Australia Post commenced applying AWOTE indexation at about the same time (2003) as the amendments to the *Superannuation Act*, and s 47(1) in particular, commenced, when AWOTE indexation formed part of the calculation under s 47(1). There was, however, no direct evidence about this coincidence in timing.

159 Mr Kinsey's evidence, both in his affidavit and as clarified in cross-examination was that when the APSS commenced operation in 1990, all employees were given information about both the APSS and the CSS so they could make a decision on whether to stay in the CSS or transfer to the APSS. Mr Kinsey was told at an information meeting, around the time that the APSS commenced operation, that APSS superannuation salary was to be calculated in the same manner as it had been calculated in the CSS, and that the "internal practices" for administration of CSS superannuation would be applied for APSS members, in accordance with the CSS Rules. Later in his evidence, Mr Kinsey confirmed that he and his team had no policy role but acted on directions from what became Ms Sebire's team, although he confirmed that "[t]he CSS Rules formed the basis of the APSS superannuation calculations and processes". I accept Mr Kinsey's evidence as to his understanding that the AWOTE indexation was to continue to apply to APSS members as it did to CSS members, and that is illustrated by his evidence about what occurred when the 2003 AWOTE indexation changes

were introduced into the *Superannuation Act*. Mr Kinsey's evidence was that he received a newsletter entitled "ComSuper News" about the 2003 changes introduced by the *Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Act 2002* (Cth) for, relevantly, the CSS. As a consequence, Mr Kinsey sent an email on 29 July 2003 to Mr George Sherry, who was Australia Post's then Superannuation Administration Manager. Mr Kinsey deposed:

> In my email I wrote to Mr Sherry:
>
> > *My question is, as the calculation of salaries for APSS members has always been based on the same principles as calculating CSS salaries, do you want us to change the manner in which APSS member's [sic] calculations are performed to reflect the new changes to the CSS calculation?*
>
> On Wednesday, 30 July 2003, Mr Sherry responded to me saying:
>
> > *As discussed, please adopt the change as advised by Comsuper for all effected [sic] APSS members.*
>
> I understood 'effected members' to mean those employees who fell into the circumstances described in paragraphs 19(a), 19(b) and 19(c) above.
>
> ...
>
> After having received Mr Sherry's email, I took steps to ensure the necessary changes in systems and procedures occurred for the change to be implemented.

160 It may well be, at least on the evidence in this case, that this internal email from Mr Sherry was the "internal executive decision" or "policy" to which Australia Post refers.

161 The evidence demonstrates that, at least until July 2014, Australia Post sought to treat its CSS and APSS members relatively consistently in terms of this aspect of their superannuation benefits. However, none of this evidence says anything about the source of Australia Post's decision to do so, let alone whether as a matter of law, it was obliged to apply the provisions of the *Superannuation Act* (and in particular s 47(1), read with ss 46, 55-57) to APSS employees.

162 I do not consider the applicants are correct in their submission that the Deed required Australia Post to apply, and to continue to apply, the provisions of the *Superannuation Act* identified (ss 46, 47, 55-57) to APSS members. There is no evidence that the Trustee either knew about, or approved, the application of AWOTE indexation to APSS members, and there was evidence (again not disputed by the applicants) that the APSS actuary (at least the actuary in place as at 2013), who works closely with the Trustee, only became aware of it in 2013. The legal basis for the AWOTE indexation for APSS members remains unclear. No

party sought to have the Court decide this question, and I have not done so, especially given there may be ramifications neither party sought to have the Court explore.

163 I consider the main points which support Australia Post's position are as follows:

(1) The text and language of the Deed tend against the applicants' construction.

(2) In particular, the relevant term in contention is "salary", as defined in cl 2 of the Deed, not "final average salary" or any other phrase with the word "salary" in it. The term "salary" has a definition in s 5(1) of the *Superannuation Act*.

(3) The structure of the *Superannuation Act* tends against the applicants' construction. In particular, I accept Australia Post's submission that s 47(1) is a provision dealing with a CSS member's contribution under the *Superannuation Act*. Its purpose is to enable the calculation of CSS member contributions in line with AWOTE.

The text and language of the Deed

164 The general point to be made about the Deed is that it establishes its own self-contained regime for eligibility, contributions and for the payment of benefits. It does not operate within the structure of the *Superannuation Act*: rather, it draws on the provisions of that legislation as necessary, but for the purposes of the operation of the APSS as a separate scheme.

165 As I have noted above, the word used in cl 2 of the Deed and whose meaning is in issue on the applicants' contentions is the word "salary" itself, not "final average salary" or "equivalent full-time salary" or any other phrase with the word "salary" in it, the meanings of which all depend to some extent on how the *Superannuation Act* defines the word "salary" alone. This might tend to support the respondent's contention that the definition in cl 2 of the Deed intends the reader to look only to the definition of the same word in the *Superannuation Act*: namely, to what is found in s 5(1) of the *Superannuation Act*.

166 Section 5 of the *Superannuation Act* is primarily directed at identifying what is to be treated as an employee's "annual rate of salary" for various purposes under the Act. For example, for calculating an employee's "final annual rate of salary" (in relation to the calculation of superannuation benefits) or an employee's "fortnightly basic contribution" to her or his superannuation (see ss 45 and 46 and the use of "fortnightly rate of salary" which in turn is to be calculated by reference to annual rate of salary). In order to provide for that identification, in subs (1) there is a definition of what is meant by the word "salary" in the section, by reference to the regulations. This facilitates certain allowances and circumstances being either

picked up or excluded, for the purposes of calculating what an employee's annual rate of salary is. In s 5, the purpose is so that contributions to, and benefits under, the CSS can be ascertained.

167 In my opinion, the purpose of cl 2 of the Deed is to ensure consistency as between the APSS and the CSS in terms of what is and what is not included, or picked up, in an employee's salary, for the purposes of any necessary calculations under the APSS as set out in the Deed.

168 Clause 2 is definitional. It is not a provision which is intended itself to confer benefits on employees, but that is the effect which the applicants' construction would give it.

169 A further difficulty with the interpretation of cl 2, but not one to which the parties drew attention, is that the definition expressly contemplates that an amount will be determined by the employer "with the approval of the Trustee". There is no evidence the Trustee at the relevant times knew about, let alone approved, the determination of the salary of APSS members for superannuation purposes by reference to AWOTE indexation. That being the case, it is difficult to see how an AWOTE indexed amount could be within the definition of "salary" in cl 2, unless there was evidence of Trustee approval. As I have noted, the burden of proof fell on the applicants in this proceeding, not on Australia Post.

170 Finally, the proviso to the definition in cl 2 – namely that the employer is able to certify to the Trustee that "some other amount shall be the Member's Salary", was not addressed by the parties, in particular it was not addressed by the applicants. On a plain reading of the proviso, Australia Post was in any event able to certify "some other amount" to the Trustee, which could have been an amount exclusive of AWOTE indexation. It is true that at [71] of its written submissions, Australia Post submitted:

> Australia Post does not rely on the second limb of the definition in respect of its abolition of the Indexation Process.

171 I understood this to mean that Australia Post did not submit, on the evidence, that what had in fact occurred when it decided to remove AWOTE indexation was that it had given a certification to the Trustee under this proviso in cl 2. I did not understand Australia Post to disclaim any reliance whatsoever on this part of the definition. Even if it had, in my opinion the text and existence of the proviso must be taken into account in construing cl 2. When that is done, it tells against the applicants' construction.

The text of s 5 at the time the Deed was settled

172 The principles I have set out at [156] above direct attention to what, objectively, can be said to have been known to the settlor at the time the Deed was concluded in 1990. The terms of s 5 of the *Superannuation Act* were then somewhat different, although s 47 was in relatively equivalent terms, save for the changes to the indexation method. In 1990, s 5 of the *Superannuation Act* provided:

> 5. (1) In this section, 'salary' means salary or wages and includes any allowance, or the value of any allowance, or any fee, that is an allowance or fee of a kind that, under the regulations, is to be treated as salary for the purposes of this Act, but does not include any part of any salary or wages that, under the regulations, is not to be treated as salary for the purposes of this Act.
>
> (2) For the purposes of this Act but subject to sub-sections (3), (3A), (3B) and (3C), the annual rate of salary of an eligible employee on a particular day is an amount equal to the amount per annum of the salary payable to him on that day.
>
> (3) The regulations may provide that, in a case specified in the regulations, the annual rate of salary of an eligible employee on a particular day shall, for the purposes of this Act or a provision of this Act specified in the regulations, be an amount equal to such amount per annum as is ascertained under the regulations.
>
> (3A) Where, immediately before a person ceased or last ceased to be an eligible employee, the person was entitled to partial invalidity pension under section 77 or 78, the annual rate of salary payable to the person immediately before the person so ceased or last so ceased shall, for the purposes of this Act, other than sections 77 and 78-
>
> (a) in a case where that entitlement was an entitlement under section 77- be taken, subject to sub-section (3B), to be the amount per annum that would have been the person's final annual rate of salary on the occasion on which the person ceased or last ceased to be an eligible employee that preceded the person's becoming so entitled to that partial invalidity pension; or
>
> (b) in a case where that entitlement was an entitlement under section 78- be taken, subject to sub-section (3C), to be the amount per annum that would, if the person had ceased to be an eligible employee on the day immediately preceding the day on which the person became so entitled to that partial invalidity pension, have been the person's final annual rate of salary on the occasion of the person's so ceasing.
>
> (3B) Where at any time the Commissioner, having regard to any changes in rates of remuneration which have occurred since the occasion on which a person referred to in paragraph (3A)(a) ceased to be an eligible employee that preceded the person's becoming entitled to partial invalidity pension under section 77 and which the Commissioner considers to be relevant, is of the opinion that the annual rate of salary of the person should, for the purposes of this Act, be a rate other than the rate referred to in sub-section (3A) or a rate specified by the Commissioner in a previous determination made under this sub-section, the Commissioner may determine that, for the purposes of this

Act, other than sections 77 and 78, the annual rate of salary payable to the person shall, from the day of the determination or such other day as is specified in the determination, be deemed to be such rate as is specified in the determination.

(3C) Where at any time the Commissioner, having regard to any changes in rates of remuneration which have occurred since a person referred to in paragraph (3A)(b) became entitled to partial invalidity pension and which the Commissioner considers to be relevant, is of the opinion that the annual rate of salary of the person should, for the purposes of this Act, be a rate other than the rate referred to in sub-section (3A) or a rate specified by the Commissioner in a previous determination made under this sub-section, the Commissioner may determine that, for the purposes of this Act, other than sections 77 and 78, the annual rate of salary payable to the person shall, from the day of the determination or such other day as is specified in the determination, be deemed to be such rate as is specified in the determination.

(4) Where the rate of the salary, or of a part of the salary, of an eligible employee is not an annual rate, the amount per annum of that salary, or of that part of that salary, as the case may be, shall, for the purposes of this section, be ascertained-

(a) where the rate is a weekly rate-by multiplying the weekly rate by 52;

(b) where the rate is a monthly rate-by multiplying the monthly rate by 12; and

(c) in any other case-in such manner as is prescribed.

173 At the same time, Part IV of the *Superannuation Act*, headed "Contributions" provided in ss 45 and 46 for the amount of "basic contribution" by employees. Section 47 dealt with decreases in salary and contained a form of indexation. It provided:

47. (1) If, on an anniversary of an eligible employee's birth (in this sub-section referred to as the "relevant anniversary"), his annual rate of salary is less than the highest annual rate of salary that was payable (or is deemed by a previous application of this sub-section, or by sub-section (3), to have been payable) to him on any day during the period commencing on the anniversary of his birth last preceding the relevant anniversary and ending on the day immediately preceding the relevant anniversary, his annual rate of salary on the relevant anniversary shall, unless he has made or makes an election under sub-section (2) by virtue of a decrease in his annual rate of salary that occurred during that period, be deemed, for the purposes of section 46, and any subsequent application of this sub-section, to be:

(a) where paragraph (b) does not apply-that highest rate; or

(b) where, if:

(i) there had not been any decrease in his annual rate of salary during the period commencing immediately after the last day on which that highest annual rate of salary was payable to him and ending on the relevant anniversary; and

(ii) account were taken of any increase in salary that he would have received during that period other than an increase resulting from his progressing to a higher level of salary

within a graduated range of salaries applicable to the office held by him or the employment in which he was employed;

the annual rate of salary of the eligible employee on the relevant anniversary (in this paragraph called the '**imputed annual rate of salary**') would be higher than that highest annual rate of salary-that imputed annual rate of salary

(2) If the annual rate of salary payable to an eligible employee decreases, the employee may, not later than 3 months after the anniversary of his birth next following the date of the decrease, elect, by notice in writing to the Commissioner, that sub-section (1) shall not apply in relation to his annual salary on that anniversary of his birth.

(3) Where-

(a) an eligible employee makes an election under sub-section (2) by virtue of a decrease in his annual rate of salary; and

(b) the annual rate of his salary on the anniversary of his birth next following the date of the decrease is less than the highest annual rate of salary that was payable to him on any day during the period commencing on the date of the decrease and ending on the day immediately preceding that anniversary,

the annual rate of his salary on that anniversary shall, for the purposes of section 46 and sub-section (1) of this section, be deemed to be:

(c) where paragraph (d) does not apply-that highest rate; or

(d) where, if:

(i) there had not been any decrease in his annual rate of salary during the period commencing immediately after the last day on which that highest annual rate of salary was payable to him and ending on the relevant anniversary; and

(ii) account were taken of any increase in salary that he would have received during that period other than an increase resulting from his progressing to a higher level of salary within a graduated range of salaries applicable to the office held by him or the employment in which he was employed;

the annual rate of salary of the eligible employee on the relevant anniversary (in this paragraph called the '**imputed annual rate of salary**') would be higher than that highest annual rate salary-that imputed annual rate of salary.

(4) Where-

(a) an eligible employee makes an election under sub-section (2) by virtue of a decrease in his annual rate of salary;

(b) the annual rate of salary payable to him immediately after the decrease is less than the rate of salary that was payable (or is deemed by sub-section (1) or (3) to have been payable) to him on the anniversary of his birth last preceding the date of the decrease; and

(c) the election is made before the anniversary of his birth next

following the date of the decrease,

> the annual rate of his salary on the anniversary of his birth last preceding the date of the decrease shall, for the purpose of calculating the amount of the basic contribution payable by him on each contribution day occurring after the date of the election and before the anniversary of his birth next following that date, be deemed to be the annual rate of his salary immediately after the decrease.

174 As it apparent from its text, s 47 operated on an employee's "annual rate of salary", which in turn was defined in accordance with s 5. However, s 5 did no more than define the parameters of an employee's annual rate of salary, including picking up inclusions or exclusions for which the regulations provided. It did not purport to confer, of itself, any entitlements to a particular amount for an employee's annual rate of salary. The text of s 5 at that time reinforces the view I have reached above.

175 Indeed, s 5(2), read with the then existing version of s 47 makes it clear that the indexation for superannuation purposes for which s 47 provided was separate from the definition in s 5(1).

Text and language: "having regard to" relevant provisions of the Superannuation Act "applicable for determining the salary" of an employee

176 The parties' submissions broke up this part of cl 2 of the Deed into two components – "having regard to" and "applicable for determining the salary". However, the relevant text of cl 2 – "having regard to the relevant provisions of the *Superannuation Act* applicable for determining the salary of a Member for the purposes of the Commonwealth Superannuation Scheme" – is in its context an entire phrase and must be construed accordingly.

177 The respondent is correct to submit that the text of cl 2 makes it clear the function being performed by the employer for the purposes of the definition of "salary" in cl 2 is a calculation function. In that sense, "determination" when first used in cl 2 (that is, "an amount determined from time to time… by the Employer") means identification, and does not suggest any discretionary decision. That is the way in which the verb "determining" is also used in the central phrase I have quoted at [176] above: that is, "identifying". This may be contrasted against the function for which the proviso provides, where the ability to "certify" an amount to the Trustee may indeed convey some element of choice about the amount to be certified. However, that need not be decided as it was not a matter in issue between the parties in this proceeding.

178 If that is the case, and the function to be performed is one of determining applicable provisions from the *Superannuation Act* for the purposes of calculating salary, then the requirement to "hav[e] regard to" those provisions must mean, in context, that Australia Post is required to look to and consider each of them, and to apply them if they are applicable to a particular employee's circumstances. In that sense, if an analogy is sought with approaches taken in the authorities in relation to other statutory schemes, the closer analogy is to the reasoning of Mason J in *R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32, 180 CLR 322 at 329, and also Gibbs CJ in *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; 158 CLR 327 at 333. The provisions of the *Superannuation Act* which are designed to be inputs into the calculation of salary are to be a "fundamental element" of the process of calculating an employee's salary for superannuation purposes. They are not intended, by the use of the phrase "hav[e] regard to", to be applied at the discretion of Australia Post and given what weight Australia Post thinks fit: see the discussions of statutes in which that approach might be the correct one in *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389; 109 FCR 152 at [54] (Sackville J) and *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145; 190 FCR 248 at [60]-[62].

179 In that sense I consider the applicants' approach to the construction of this phrase is preferable, but that does not assist the applicants' ultimate contention.

180 The phrase "having regard to" indicates that Australia Post must look to certain provisions of the *Superannuation Act* before calculating the applicable salary of an employee for superannuation purposes and for reporting to the Trustee, and the purpose of this is, so far as possible, to ensure consistency as between APSS and CSS members on what (in terms of subject matter) is and is not included in the calculation of salary. Section 47 of the *Superannuation Act* is not a provision which is applicable to the calculation of salary: rather, it is a provision which confers an additional entitlement on CSS members. It is therefore not a "relevant provision" for determining (meaning, identifying) an employee's amount of salary for superannuation purposes under the APSS.

181 The parties did not submit the use of the phrase in a contractual document was, in itself, a basis for giving it a different meaning to the competing meanings which have been discussed in a statutory context. However, to say that the respondent was required to take into account the "relevant provisions" of the *Superannuation Act* will not advance the applicants'

arguments unless s 47, and the other provisions on which the applicants rely, are properly to be seen as "relevant provisions" for the purposes of cl 2, which I have found they are not.

The structure of the relevant provisions in the Superannuation Act

182 Section 47 appears in Part IV of the *Superannuation Act*, which is headed "Contributions". Section 45 deals with what it describes as "basic contributions" which are, given the terms of s 45, contributions by employees. Section 45, as well as the provisions which follow it (including ss 46 and 47) are directed at "eligible employees". For the reasons I set out below, this does not include Australia Post employees.

183 Section 3(1) contains a lengthy definition of who is and who is not an eligible employee. Paragraph (j) excludes from the definition "a person included in a class of persons declared by the Minister, by legislative instrument, not to be eligible employees for the purposes of this Act". The relevant legislative instrument for the purposes of para (j) is the *Superannuation (CSS) (Eligible Employees—Exclusion) Declaration 2003* (Cth), cl 6 of which sets out "[p]ersons who cease to be eligible employees—persons mentioned in Schedule 1". Schedule 1 to the Declaration contains a table setting out all persons who may cease to be an eligible employee under the Act on the occurrence of an event. Item 5 in the table (by reference to the *Superannuation (CSS) Continuing Contributions for Benefits Regulations 1981* (Cth)) refers to employees of, and statutory office holders of, Australia Post. The triggering events in item 5 for such persons to cease to be eligible employees are, among others, that they cease to be an employee or statutory office holder of Australia Post, or a period of leave without pay has expired. Clause 6(1)(b) of the Declaration however, provides a further trigger event: an Australia Post employee (or office holder) will also cease to be an eligible employee if they become "a member of an alternative superannuation scheme". "Alternative superannuation scheme" is defined in cl 3(1) of the Declaration to mean "a superannuation scheme to which contributions are made in relation to the person's employment or holding of the office", with exclusions that are presently not relevant. The APSS is such an alternative superannuation scheme.

184 As such, Australia Post employees or office holders who are APSS members are excluded from the definition of "eligible employee" for the purposes of the *Superannuation Act*.

185 Section 45(1) imposes an obligation on eligible employees to pay a contribution, which obligation is made subject to a number of other provisions in Part IV, which are not presently relevant. Section 46, as its heading suggests, then deals with the "amount" of basic

contributions by eligible employees, fixing the amount as an "amount equal to 5 per centum of the fortnightly rate of salary that was payable (or is deemed by section 47 to have been payable) to the employee" at a particular time as set out in the remainder of s 46. However, s 46(2) provides that an eligible employee may also elect to pay "an amount equal to 0% of the fortnightly rate of salary". Section 46(3) clarifies that even where an eligible employee makes an election under subs (2), basic contributions continue to be payable; only that the *amount* of the basic contributions payable is nil. Thus, in simple terms (recognising that not much about either the CSS or APSS can appropriately be described as simple), s 46 provides a method by which an eligible employee's basic contribution is calculated, and which the employee is obliged to pay. That method is tied to the employee's "fortnightly rate of salary" at a particular time.

186 Section 47, as its heading again suggests, deals with a situation where an employee has experienced a drop in her or his annual rate of salary. Indexation (including through the AWOTE method) is then applied in those circumstances, in the way set out in s 47(1), the details of which I have already described.

187 Part V then deals with the benefits to which eligible employees are entitled. There are, as Australia Post submits, a range of benefits: age retirement, early retirement, invalidity benefit and so forth. Sections 55, 56 and 57 (in Div 1 of Pt V) then deal with the circumstances in which a person becomes eligible to receive age retirement benefits, whether as a pension or by way of a lump sum, and how those benefits are to be calculated. Div 2 of Pt V deals with the payment of early retirement benefits.

188 I see nothing in the structure or subject matter of these provisions that assists the applicants' contentions about the interpretation of cl 2 of the Deed. These provisions deal with entitlements under the CSS. In any event, Australia Post employees who moved to the APSS have been expressly excluded by regulation. The applicants' contentions appear selectively to import into the APSS entire aspects of the CSS, contrary to the structure of the APSS as a separate scheme. Even if Australia Post APSS members were not expressly excluded by regulation, in my opinion the structure of these provisions clearly demonstrates they are intended to apply to CSS members only. As I noted at the start, the APSS is intended to be self-contained, and only picks up aspects of the *Superannuation Act* for the purposes of identifying matters such as relevant subject matter for the calculation of salary. It does not reach back into the *Superannuation Act* for entitlements.

Other matters raised

189 Mr Kinsey gave evidence that he was informed that APSS salary was to be calculated in the same manner as it had been under the CSS, when the APSS commenced operation. During cross-examination, he gave evidence to the following effect:

> [Counsel for the applicants:] Who told you that?---[Mr Kinsey:] At the time I was an employee and the member of the APSS, so we all had to do information sessions on the choice that you had to make between either staying with the CSS or transferring to the APSS. And in those information sessions, there was a lot of information about how – what the differences were in the schemes and what the similarities were. And in that they talked about superannuation salary and – because I had already had a bit of dealings with superannuation salary in a previous job, I had some understanding of it already.
>
> [Counsel for the applicants:] So it was actually in the course of one of these employee information sessions that you were told that?--- [Mr Kinsey:] That's right.
>
> [Counsel for the applicants:] Do you recall who ran the session?--- [Mr Kinsey:] No, I don't.
>
> [Counsel for the applicants:] Okay?--- [Mr Kinsey:] It was 1990, I think.
>
> [Counsel for the applicants:] The session – who was the session open to?--- [Mr Kinsey:] It was open to all staff, because all staff employed by Post at the time had to make that decision. So they had arranged to have everyone sit these information sessions and get information, so they can make an informed decision.

190 Counsel for the applicants submits that this is a "contemporaneous statement of the intention of the settlor under the deed as to what that provision was to mean." Along with the other aspects of Mr Kinsey's evidence I have set out at [159], counsel for the applicants submits that this reveals that

> at every stage there is a contemporaneous expression of intention by Australia Post, we say, to apply the provisions, which we say was not being done merely as some ex gratia benefit provided to employees, but in fact reflected the intention of Australia Post when they settled the deed to mirror what happened in the CSS.

191 It is well-established that the intention of any private legal document, including a deed, is to be ascertained from the document itself, and not from any extrinsic material, such as the subjective intention of the persons involved in drafting the deed: *Byrnes v Kendle* [2011] HCA 26; 243 CLR 253 at [53]-[59] (Gummow and Hayne JJ, French CJ agreeing at [17]), [98]-[115] (Heydon and Crennan JJ), and the authorities there set out. Gummow and Hayne JJ said, at [53]:

> The fundamental rule of interpretation of the 1997 Deed is that the expressed intention of the parties is to be found in the answer to the question, "What is the meaning of what the parties have said?", not to the question, "What did the parties mean to say?"

192 Heydon and Crennan JJ said (at [115]):

> As with contracts, subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification – an equitable challenge for mistake or misrepresentation or undue influence or unconscionable dealing or other fraud in equity, a challenge based on the non est factum or duress defences, an application for modification by reason of some estoppel, an allegation of illegality, an allegation of "sham", a claim that some condition has not been satisfied, or a claim for rectification. *But subjective intention is irrelevant both to the question of whether a trust exists and to the question of what its terms are.*
>
> (Emphasis added.)

193 This is all the more so in relation to the state of mind of a person, such as Mr Kinsey, who was not involved in the drafting of the deed, but was informed by an employee or delegate of the settlor about the contents of the deed after it was settled.

194 I do not consider that any statements by Mr Kinsey can affect the proper construction of the Deed. He was an employee of Australia Post with relevant expertise in superannuation matters, but he could in no way be seen as a person whose state of mind in 1990, when the Deed was settled, bore on the construction of its terms.

Second cause of action: s 345

195 The parties did not raise any substantial areas of dispute in relation to the applicable principles for the purposes of this cause of action. Both adopted the authorities which have considered s 52 of the *Trade Practices Act 1974* (Cth) (TPA), and subsequently s 18 of the *Australian Consumer Law* (ACL), on the basis that those authorities could be applied to s 345. There does not appear to have been any authority which has substantively considered the construction and operation of s 345, nor considered the appropriateness of adopting, without substantive change, the approaches taken in relation to s 52 and s 18 of the ACL. There are authorities which have applied or referred to s 345, but not in a way which deals with the parties' submissions in this proceeding: see for example *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129; *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FCA 1291; *United Voice v Phillip Cleaning Service Pty Ltd* [2017] FCA 392.

196 In a given case, there may be good reason to take a different approach from that taken in relation to the TPA/ACL provisions. Regulating as it does a particular relationship between employer and employees, but not in its terms being confined to that relationship and therefore regulating also the conduct of others (such as unions) who might seek to make statements

about the workplace rights of persons protected by s 345, it may well be that a purposive approach to s 345 could be different to a purposive approach to s 18 of the ACL.

197 In this case, no nuanced arguments about the construction and operation of s 345 were made so as to raise these issues, although as I note below there is at least one issue which does arise and does require consideration of the extent to which it is appropriate to apply authorities from the consumer and trade practices field. Insofar as it is necessary for the Court to determine an approach to s 345, I am satisfied the parties' submissions reflect an approach based on some of the authorities dealing with s 18, and before it, with s 52. One apparently consistent principle is that the particular group to whom the representations are alleged to be directed must be identified. Like s 18, the text of s 345 does not identify any particular group so as to confine its operation on its face. Although as far as s 18 is concerned one naturally identifiable group might be consumers, that might not in a given case be the only way to identify the group: see my observations in *Shape Shopfitters Pty Ltd v Shape Australia Pty Ltd* (No 3) [2017] FCA 865, [93]-[101].

198 A second consistent principle is, as I adopt below, what must be established, objectively, to show a representation is (relevantly to this proceeding) misleading.

199 Some aspects of s 345 are obviously different from s 18 of the ACL, such as the express mental element.

200 For ease of reference, it is worthwhile setting out the text of s 345 again:

> **345 Misrepresentations**
>
> (1) A person must not knowingly or recklessly make a false or misleading representation about:
>
> (a) the workplace rights of another person; or
>
> (b) the exercise, or the effect of the exercise, of a workplace right by another person.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

201 The applicants identified the "workplace right" for the purposes of s 345(1) as participating in the approval process for an enterprise agreement under s 181(1) of the FW Act and making an agreement under s 182 of the FW Act. The respondent did not submit these matters were incapable of constituting workplace rights for the purposes of s 345(1), but did submit that

even if the representations alleged were made (contrary to its submissions), neither s 345(1)(a) or (b) were engaged because the representations were not "about" either of the workplace rights alleged by the applicants. In particular, the respondent submits that the representations were not "about" the effect (or consequences) of employees exercising their workplace right to vote to approve the proposed enterprise agreement.

202 As the applicants submit, an enterprise agreement is "made" under s 182 of the FW Act if a majority of the employees who have been asked to approve the agreement under s 181(1), and who cast a valid vote, approve the agreement. It is appropriate to characterise the entitlement to vote on whether or not to approve a proposed enterprise agreement as a workplace right. "Workplace right" is defined in s 341 to mean, among other things, the ability "to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument": para (1)(b). "Process or proceedings under a workplace law or workplace instrument" is defined in s 341(2)(e) to include "making, varying or terminating an enterprise agreement". The entitlement to vote on a proposed enterprise agreement clearly falls within these provisions. This was also the conclusion reached by Tracey J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353 at [38].

203 It is worthwhile re-stating the representations alleged by the applicants to have been made by Mr Fahour, and importantly to recall that all were alleged to have been made in the "Staff Update" document of 24 May 2013 (which is reproduced at [68] above):

1. Australia Post would not implement the AFS Freeze proposal (as I have explained that term in [134] above); and/or
2. the proposed agreement would give employees "certainty and security" about their superannuation entitlements for its duration; and/or
3. Australia Post would not otherwise freeze employees' final average salary for the life of the agreement; and/or
4. Australia Post would conduct a future review of the APSS collectively with the ACTU; and/or
5. any future changes to the APSS would be agreed collectively between Australia Post and the ACTU.

204 At least indirectly by the terms of s 345(2), s 345 contemplates a representation will be made "to" another person. And that must be so in order for there to be a determination whether a

representation is misleading. The person or persons who are likely to be misled must be identified. The applicants appeared to contend (for example in their written opening submissions at [96]) that these representations by Mr Fahour were made to *all* Australia Post employees.

205 However that would be too broad a group, and would not address the purposes of s 345. The group is properly identified as those Australia Post employees who were covered by the 2013 Enterprise Agreement, because it is in the context of exercising the workplace right concerning that agreement that the representations are alleged to have been made. Further, the nature of the applicants' case means the group should be narrower again to those employees who also had superannuation entitlements to which AWOTE indexation attached.

206 Objectively, those were the only people upon whom the alleged misrepresentations could operate, since this proceeding concerns the removal of AWOTE indexation and not any other allegations of diminution in superannuation entitlements for Australia Post employees. It is correct, as the applicants' written submissions set out, that the use of the medium of a "staff update" meant these communications went out to the entirety of the Australia Post workforce covered by the Agreement, which was approximately 30,665 people. Relevantly however, the class or group to whom the alleged representations were made was those Australia Post employees whose superannuation entitlements were affected by AWOTE indexation. On the evidence, as I have earlier set out, this was approximately 17,000 employees. I accept those employees, as a group, are still likely to have some or all of the characteristics I have set out at [62]-[64]. I am also prepared to infer that this cohort placed importance on their superannuation entitlements and were interested in understanding, at a general level, how particular offers or decisions made by their employer would or would not affect their superannuation entitlements. These employees had the benefit of a relatively generous superannuation scheme and I am satisfied on the evidence that, as a cohort, these employees understood this was the case and certainly Australia Post was aware that its employees valued their superannuation entitlements. I draw that inference from Mr Farley's evidence, Ms Doyle's evidence, as well as the evidence of Mr Kinsey, about his role and the inquiries he fielded from ordinary Australia Post employees over the years, together with the terms of Australia Post's communications in general which reveal a clear understanding by Australia Post of the value to its employees of their superannuation entitlements.

Were the alleged representations made?

207 There is no real dispute on the facts that there was a representation that Australia Post would not proceed with the FAS Freeze proposal. This representation was made expressly by the 24 May 2013 Staff Update, where Mr Fahour said:

> I will remove the FAS freeze from current Enterprise Agreement considerations to give you certainty and security.

208 Mr Fahour repeated, later in the document, that the FAS Freeze would be removed. In its written submissions, Australia Post submits, and I accept, that this was the representation expressly made in the 24 May 2013 Staff Update. This representation is not one of the five impugned by the applicants.

209 However, I am not satisfied that the "AFS Freeze proposal" as defined by the applicants in their pleadings and as I have set out at [134] above, was made. The applicants ask the Court to read into Australia Post's communications more than objectively can be said to exist. The AWOTE indexation removal was not formulated as a proposal in any substantive sense until just after the 2013 Enterprise Agreement was concluded. It was not the subject of Mr Fahour's communications on 24 May 2013, even impliedly. Mr Fahour was giving employees assurances about the FAS Freeze proposal only, being the express proposal that Australia Post had put forward to its employees as a way to curtail superannuation liability. I am satisfied that is how his statements would have been understood: indeed, that is the import of Mr Dwyer's evidence about the immediate reaction he observed from employees. They were reacting to the FAS Freeze proposal as put, and to a more general apprehension that the APSS scheme as a whole might be abolished. Even looking at the broader context of previous communications and employees' obvious general concern about their superannuation entitlements, it is not possible to draw from Mr Fahour's communications the first representation as alleged by the applicants. There was no wholesale representation by Australia Post that there would be no adverse effects on employees' superannuation salaries. There was a representation that its FAS Freeze proposal would be removed, and this is what occurred.

210 I do not accept the second alleged representation was made. Even read in the context of the other statements to employees which had been made to that point, I do not consider Mr Fahour's statements in the 24 May Staff Update would be understood by ordinary, reasonable Australia Post workers to mean that there was a "certainty and security" that their

superannuation entitlements would remain as they were for the duration of the period covered by the proposed enterprise agreement. The "certainty and security" Mr Fahour was telling employees they would have related to the removal of the FAS Freeze proposal. It was also the case that employees had expressed concern that the entire APSS was in jeopardy. It was this concern that Mr Fahour recognised and addressed by stating "Australia Post is not encouraging staff to leave the defined benefit scheme nor have we offered at any point to shut down APSS". If the "certainty and security" had any extended meaning, in my opinion it was to convey to employees that the APSS as a scheme would remain in place.

211 I am not satisfied the third alleged representation was made in the 24 May Staff Update. There was simply nothing said in this announcement about any other changes to final average salary calculations, and certainly not for the life of the enterprise agreement. In contrast, as the respondent submitted, Mr Fahour made it clear to employees that Australia Post was experiencing real financial difficulties managing its superannuation liabilities, and that the question of how to manage them would have to be reviewed. It is true that these statements by Mr Fahour are put in the most general terms, and studiously avoid foreshadowing anything specifically negative or alarming to employees. That is explicable by the context in which the statements were made. Mr Fahour was attempting to encourage employees to approve the enterprise agreement and it can be safely concluded he, and those others within Australia Post responsible for the drafting and making of these communications, were concerned not to give employees cause for any concern about entitlements outside the enterprise agreement until the agreement was approved. That was also the clear sense conveyed by Ms Rivers' evidence, and her reluctance during cross-examination to agree with obvious propositions put to her about Australia Post's objectives during this time.

212 Ms Rivers' reluctance to give evidence which might reflect badly on Australia Post's objectives and conduct during this time, while less than satisfactory, has no substantive bearing on the findings I make about this cause of action. If relevant at all, her cross-examination was relevant mostly to the s 345 allegations. However her own views about what employees would or would not understand from the communications, and about Australia Post's motives or reasons for designing communications in a particular way, or for making particular statements, is at best of marginal relevance to the success or failure of this cause of action. Just as with s 18 of the ACL and s 52 of the TPA, a contravention of s 345 is to be ascertained by the Court determining, objectively, the likelihood that the identified

representation would lead an ordinary and reasonable member of the relevant group into error. Whether Ms Rivers did or did not accept there was such a likelihood was not relevant.

213 I am satisfied the fourth representation *was* made: namely that Australia Post would conduct a future review of the APSS collectively with the ACTU. That is how an ordinary and reasonable Australia Post employee would understand the following statement by Mr Fahour:

> Once an Agreement is finalised, I will work with our counterpart in APSS – the ACTU – to conduct a review of APSS and discuss how we can collectively manage Australia Post's growing liability and develop a plan to strengthen its performance to enable it to remain viable for the benefit of members.

214 The two key components of the alleged representation – that Australia Post would conduct a review; and that it would be done collectively with the ACTU – are present. Any employee reading this statement would understand it to mean that there would be a collaborative process between Australia Post and the ACTU to address the growing superannuation liability Australia Post had identified. The importance of the reference to the ACTU is that it conveys that the peak organisation whose function is to represent the interests of workers would be collaborating in the review, and therefore, employees were given some comfort from this statement that their interests would be represented in the review.

215 I am not satisfied that the fifth and final alleged representation was made: namely, that "any future changes to the APSS would be agreed collectively between Australia Post and the ACTU". Read fairly and in context, it is clear that Mr Fahour conveyed to Australia Post employees that their employer was going to "work" with the ACTU on the matters he referred to in that last paragraph on the first page of the Staff Update. The reference to "collectively manage" does not necessarily connote there would be an agreed outcome with the ACTU on how to manage Australia Post's superannuation liability. I do not consider that a reasonable Australia Post employee, who can be taken to know at least in general terms that her or his employer would be unlikely to tie its further decision-making on a matter as important as its growing superannuation liability to securing an agreement with the ACTU, would read the Staff Update as saying that Mr Fahour was conveying that any future changes would need to be agreed with the ACTU, as opposed to discussing issues with the ACTU. In my opinion, a reasonable Australia Post employee, taking into account the characteristics of the workforce to which I have referred, would know enough about employer/union relationships to realise that an employer like Australia Post would not be promising to agree

only to something the ACTU considered was an appropriate solution to Australia Post's superannuation liabilities.

216 In summary, the only representation that I find was made by Mr Fahour on behalf of Australia Post, for the purposes of the applicants' allegations under s 345 of the FW Act, was the fourth representation: namely, that "Australia Post would conduct a future review of the APSS collectively with the ACTU".

Were the representations false or misleading?

217 Since I have only found one of the five alleged representations was made, I turn now to consider whether that representation is properly characterised as false or misleading.

218 At the outset, it is important to note that the applicants only pressed the contention that the five representations were misleading, not that they were false. Counsel for the applicants made this clear in closing submissions. Accordingly, on the findings I have made, the question is whether the ACTU representation was misleading.

219 The first point to note, not specifically addressed by the parties, is that this representation concerned a future matter. It is well-established that, under the ACL and the TPA before it, the approach to whether a representation as to a future matter is misleading is different from the approach taken to a representation of a current matter: see *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240 at [198]-[202]. Under s 4(1) of the ACL, if a person makes a representation with respect to any "future matter", and the person does not have "reasonable grounds" for making that representation, the representation is taken to be misleading for the purposes of the ACL. Under s 4(2) of the ACL, a person is taken not to have had reasonable grounds for making the representation unless evidence is adduced to the contrary.

220 Plainly, representations as to what may occur in the future pose particular issues for the determination of whether they have the character of being false or misleading. To understand why a different approach might be required, it is necessary to go back to the TPA authorities prior to the introduction of the provisions which expressly mandated a different approach.

221 Prior to the introduction of s 51A into the TPA (which is the predecessor to s 4, although not an identical provision), statements about future conduct would only be caught if the representation was false or misleading about past or existing facts, or it could be proven that the person making the statement did not believe that it was true or was recklessly indifferent

as to the truth of the forecast: see *Thompson v Mastertouch TV Service Pty Ltd (No 2)* (1977) 15 ALR 487 at 495 (Franki J).

222 In *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347 at 372 Toohey J summarised the state of the law concerning future matters, just prior to the introduction of s 51A. His Honour's summary was:

> ...
>
> (2) The mere fact that representations as to future conduct or events do not come to pass does not make them misleading or deceptive: *Bill Acceptance Corporation Ltd v GWA Ltd* (1983) 50 ALR 242.
>
> (3) Nevertheless, a statement relating to the future may contain an implied statement as to present or past fact. It may represent impliedly that the promisor has a present intention to make good the promise and it may represent impliedly that he has the means to do so: *Thompson v Mastertouch TV Services Pty Ltd* (1977) 15 ALR 487.
>
> (4) A statement involving the state of mind of the maker of the statement, eg promises, predictions and opinions, ordinarily conveys the meaning that the maker of the statement had a particular state of mind when the statement was made and that there was basis for that state of mind. If the meaning contained in or conveyed by the statement is false in that or in any other respect, there will have been a contravention of s 52: *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 55 ALR 25 *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1984) 58 ALR 549.

223 Clearly, this was a difficult threshold. As Allsop J (as his Honour then was) set out in *McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd* [2008] FCAFC 2; 165 FCR 230 at [162]ff (Emmett J agreeing; Stone J in dissent), the difficulties in threshold and proof were what the Parliament sought to address with the introduction of s 51A and the evidential burden in s 51A(2).

224 In s 345, it is clear the Parliament has sought to restrict contraventions to circumstances where a mental element, or particular state of mind, is present, in contrast to the terms of s 18. That is at least one indicator that s 345 is intended to capture representations as to future matters.

225 I note also that ss 349 and 678 of the FW Act contain provisions similar to s 345, but again without any qualifications about future matters, and without any evidentiary burden on the representor. On that basis it can safely be concluded that it would be inappropriate to impose any evidentiary burden on Australia Post in the present circumstances, such as that imposed on the maker of a representation under s 18 by s 4 of the ACL.

226 That leaves the question of the appropriate threshold the applicants must prove. To adopt Toohey J's language, must they prove, at May 2013, a present intention by Mr Fahour to make good on his promise that Australia Post would "conduct a future review of the APSS collectively with the ACTU" of its superannuation liabilities; and that Mr Fahour had "the means" to do so? By s 345, the applicants must prove a particular state of mind in Mr Fahour in any event. Given the state of mind requirement is express, it may be that there is little substantive difference between the pre s 51A approach and the "reasonable grounds" approach now contained in s 4(1) of the ACL (if one puts the evidential burden of s 4(2) to one side).

227 When Mr Fahour represented, as I have found he did, that *Australia Post would conduct a future review of the APSS collectively with the ACTU*, this was in terms expressed as a future plan for Australia Post – that is, something it intended to do, if the enterprise agreement was approved. Mr Fahour states that "once an Agreement is finalised", then Mr Fahour "will work" with the ACTU on the matters he then refers to.

228 If the question is framed in the way I have outlined at [226] above, reflecting the pre s 51A position, I consider the applicants have not discharged their burden of proving it was misleading.

229 Alternatively, if a similar approach is taken to future matter representations in s 345 as is taken in relation to s 18 (excluding the evidentiary burden imposed by s 4(2) of the ACL), then the question is whether Mr Fahour had reasonable grounds for that representation. The applicants have not discharged their burden of proving he did not. Forensically, to prove he had no reasonable basis was always going to be difficult when he was not called as a witness by either party.

230 As I have found based on Ms Rivers' evidence, the 24 May Staff Update was drafted by others, but Mr Fahour endorsed and adopted its contents, and was content for it to be presented to employees as a communication from him as CEO on behalf of Australia Post. By this time, on Ms Sebire's evidence, investigations were under way about the cause of the hyperinflation of Australia Post's superannuation liabilities, but her team's work on identifying six options for constraining growth of those liabilities did not occur until shortly after the enterprise agreement had been approved.

231 I accept Australia Post's submissions that Ms Sebire's evidence establishes the following sequence of events:

- Her team in Corporate Superannuation began investigating the cause of superannuation hyperinflation in around October 2012, however their focus was then still on outsourcing the internal operations of the APSS.
- Her team was not aware of the FAS Freeze proposal until shortly before it was communicated to employees and it was not their proposal.
- Although Ms Sebire personally had thought about a "simpler" alternative to the FAS Freeze proposal, involving reducing the accrual rate of Australia Post's superannuation liabilities, and she had mentioned this to a colleague, there had not been any formal examination of such options and certainly no reporting of them to Australia Post management.
- The work that Ms Sebire and her team did undertake on options for constraining APSS growth (what she described in her evidence as the "six levers") did not occur until July 2013.
- It was not until around 6 August 2013, that Ms Sebire decided to recommend the removal of AWOTE indexation as an option to the Superannuation Committee. This was a week or so after the Fair Work Commission had approved the enterprise agreement.

232 This being the case, the applicants have not laid a sufficient evidentiary foundation for the Court to infer that at the time he made the 24 May 2013 statement, Mr Fahour had any knowledge of the AWOTE indexation removal proposal; nor any knowledge or intention that Australia Post would present a "fait accompli" about removal of AWOTE indexation to the ACTU and the other unions in December 2013 which could not meet the description of conducting a review "collectively" with the ACTU.

233 It is clear that Mr Fahour, and the rest of Australia Post's management, were aware of and most concerned about the hyperinflation of the company's superannuation liabilities. There is no basis to infer any decision had been taken on how that problem would be addressed by 24 May 2013. Nor is there any basis to infer that Mr Fahour did not intend to "make good" on the representation to conduct a review of Australia Post's superannuation liabilities collectively with the ACTU.

234 It a reasonable inference, and one I am prepared to draw, that given the known importance of superannuation entitlements to the Australia Post workforce, and given the opposition to the

FAS Freeze proposal, Mr Fahour understood in May 2013 that he needed to work with union representatives on any alternative means to constrain superannuation liabilities. Presumably the ACTU was nominated in the Staff Update as Australia Post's "counterpart in [the] APSS", given that cl 12 of the Deed requires consultation with the ACTU for amendments to be made to the Deed.

235 On 13 August 2013, the Superannuation Committee of Australia Post met. The minutes of that meeting, with irrelevant redactions, are in evidence. The Committee's function, as explained by Ms Sebire, is to consider enterprise-wide strategy, policies and decisions in respect of superannuation and to endorse (or not) recommendations put to it by the Head of Corporate Superannuation. The minutes record the following:

> S20: Processes and implications for the removal of AWOTE and reduction of time period for accrual during periods of Leave Without Pay.
>
> 1.1 The Committee agreed that AP will seek to remove indexing, but that scope exists to replace current AWOTE indexing with the EBA rate *depending on the nature of the ACTU discussions.*
>
> 1.2 The Committee agreed that indexing change will apply from a date to be nominated, *pending ACTU discussions*, and one superannuation salary will be maintained for the calculation of future superannuation benefits.
>
> [Emphasis added.]

236 To this point, the Committee's understanding of what would occur was consistent with what Mr Fahour had told employees in May 2013, and with the alleged representation. It is also consistent with Ms Sebire's oral evidence that the Committee "was open to further feedback, depending on the nature of those discussions [with the ACTU]".

237 At the end of 2013, Australia Post did correspond with the ACTU. A letter was sent from Catherine Walsh, General Manager Human Resources at Australia Post to Tim Lyons, Assistant Secretary of the ACTU, which relevantly stated:

> During the Enterprise Agreement process, our management team outlined the significant business challenges we are facing, and that Australia Post is also attempting to manage a significant and growing superannuation liability that is having an impact on our ability to invest in our business, reward our people and remain profitable.
>
> We considered and shared with staff during the EBA discussions proposed changes to ensure the protection and an ongoing viability of the APSS, and many staff made clear to us that the APSS was an important benefit which is highly valued.
>
> As a result, the New Agreement delivered for Award employees a commitment to keep the APSS defined benefit fund running for existing members and that the full pay rate (maximum) of 10.5 per cent flow into superannuation.

> We also indicated that on approval of the Agreement, we would work with the ACTU as our counterpart in the APSS to review the APSS and discuss how we can collectively manage Australia Post's growing liability and develop a plan to strengthen its performance to enable it to remain viable for the benefit of Members.
>
> As such, I write to inform you that Australia Post intends to implement two changes to the APSS prior to 30 June 2014.
>
> **1. Removal of indexing superannuation salary to Average Weekly Ordinary Time Earnings (AWOTE)**
>
> Processing changes introduced to the APSS in 2003 stated that where an Award level employee's superannuation salary does not grow between each birthday, or if the growth is less than the salary increases in the current Australia Post Fair Work Agreement, AWOTE indexation is applied.
>
> AWOTE indexation occurs in situations where an employee has previously received higher duties or allowances have reduced or are no longer being paid, leaving their superannuation salary remaining at the higher level than their current salary level (because superannuation salary can never decrease). The application of the AWOTE indexation (currently 4.9% as calculated by the Australian Bureau of Statistics) then further increases the gap between superannuation salary and current salary level.
>
> The removal of the AWOTE indexation will seek in the longer term, to bring superannuation salary more in line with actual salary level. This will bring greater equity for all members and support the viability of the APSS scheme, while maintaining the guarantee that no one's superannuation salary will decrease.
>
> The change will apply prospectively only and will be implemented prior to 30 June 2014.
>
> ...
>
> Tim, as you know it is imperative for Australia Post to manage the growing superannuation liability prudently to enable the ongoing provision of the APSS to existing members. We believe that these two changes are fair in that both changes only impact employees who are already receiving benefits that are in excess of the general population at Australia Post and significantly in excess of the benefits provided to the general population across Australia.

238 There were some redactions in the letter as it was tendered, relating to the second proposed change, but the parties accepted the redacted parts were not material to the matters in issue. The contents of this letter from Ms Walsh are again consistent with what was said to employees by Mr Fahour during the enterprise bargaining process. What she says in this letter, in particular, about consultation with the ACTU, reflects what was in the 24 May 2013 Staff Update. On the evidence, there was no response from the ACTU to this letter.

239 Meetings were held between the ACTU, the CEPU and Australia Post in February 2014. At the meeting on 4 February 2014, Ms Walsh, Ms Rivers and Ms Sebire met with Mr Dwyer, as well as representatives from the ACTU and CPSU. Ms Sebire's evidence, which was not challenged on this point, was that the ACTU representative, who ran the meeting, did not

give an opinion either way on the proposed measures, but did seek further information on the proposals.

240 Further information was sought and exchanged. In a letter dated 17 February 2014, Ms Walsh said to Mr Lyons, amongst other things:

> For the employees receiving AWOTE indexing, the excessive benefits of this is heavily skewed towards a few hundred people. These are employees whose superannuation salary is more than 100% of actual salary. These cases appear to have arisen through contract managers taking up Award level roles, and so moving from a base salary of $120k to a salary of $50 - $60k For the majority of employees, we expect actual salary to catch up with superannuation salary within one to two years.

241 A subsequent meeting was held with Ms Sebire, Mr Lyons and other Australia Post and union representatives to discuss the contents of the letter of 17 February.

242 There was no evidence whether these kinds of assertions by Australia Post influenced the attitude of the ACTU. The evidence does not reveal any specific protests or arguments from the ACTU after this correspondence, nor any indication the ACTU was determined to oppose the implementation of AWOTE indexation removal. That is despite such evidence being, one would have thought, critical for the applicants' case in this respect. No witness from the ACTU was called by the applicants. I am prepared to infer that the state of evidence reveals that, at least by the end of February 2014, the ACTU was not actively and directly opposing the removal of AWOTE indexation.

243 On 26 March 2014, Australia Post informed its employees about the removal of AWOTE indexation. In doing so, in the communication it published, it said:

> Many staff made it clear that the APSS was an important and highly valued benefit. As a result, the Australia Post Enterprise Agreement 2013 included a commitment to flow the full pay rate increase of 10.5 per cent (maximum over the life of the Agreement) into superannuation. However, Australia Post also made a commitment to manage the APSS in a responsible way to ensure that the scheme remains sustainable into the future.
>
> Following discussion with the ACTU, Australia Post is making some important and necessary changes to the APSS. These changes will contribute to the sustainability of the scheme and ensure that it is fairer and more equitable for members.
>
> *It is important to note that these changes apply only to members of the APSS defined benefit (generally, these are employee members who joined the APSS prior to 30 June 2012). They do not apply to members of the Commonwealth Superannuation Scheme (CSS) in the APSS, members of the AMP-managed Australia Post Superannuation Plan (APSP), or any other accumulation fund selected by an employee, and they do not impact Spouse, Rollover or Pension members in the APSS.*
>
> (Emphasis in original.)

244 Again, this (in particular the second paragraph) is consistent with what Mr Fahour had told employees in May 2013 would occur.

245 It is true, as the applicants submit, that the review headed up by Ms Sebire had no involvement from any person from the ACTU in that review, nor any person from the CEPU, although Ms Sebire did consult with persons she described as "different superannuation experts", and also obtained legal opinions, including from Corrs Chambers Westgarth. It is also true that on the evidence, and as Ms Sebire accepted in cross-examination, that Mr Fahour personally did not "work with" the ACTU, nor discuss the removal of AWOTE indexation with the ACTU. However, there was no representation in May 2013 about how the ACTU would be asked to work with Australia Post. Nor was there any representation that Mr Fahour would have any consultations personally with the ACTU. Any reasonable and ordinary employee would, I am satisfied, have realised that when Mr Fahour said that he would "work with" the ACTU, he was not suggesting he personally would do so. I consider that the correspondence and meetings disclosed by the evidence can comfortably be described as Australia Post "working with" the ACTU. It would appear, as the respondent submits, that the absence of any significant opposition by the ACTU to the removal of AWOTE indexation limited the amount of interaction from the ACTU.

246 Finally, there was much emphasis in the applicants' case on the footnote, to which I have referred at [41]-[46] above. This, as I have noted, did not appear in the document said to contain the representations, but rather was found in presentations made to bargaining representatives. That appears to be the applicants' point: the footnote, it was contended, contained an important qualification or clue, to Australia Post's intentions which was not conveyed to employees. It will be recalled that the substance of the footnotes was that if the FAS Freeze was not deliverable, then Australia Post would look for other ways to curtail its increasing superannuation liabilities.

247 I accept the respondent's submissions that a focus on the footnote does not advance the applicants' case for at least two reasons. First, in substance, the need to review how to contain and manage its superannuation liabilities was a component of the communications directly to employees in any event. While the text of the footnotes might have been more forceful, and some might say, couched as a warning, that is hardly remarkable in the heat of bargaining negotiations. Second, those present at these meetings were there in their capacity as the employee's representatives. Part of their duties involved communicating what they

considered to be important from those discussions to their members. If Australia Post's message was clearer or more forcefully put during these negotiations, I fail to see how that advances a case that Mr Fahour's statements were misleading, and indeed it may tend against such propositions.

248 I am satisfied the representation was not misleading. The evidence establishes that Australia Post did work with the ACTU on the review of its superannuation liabilities and proposals to constrain them, including the AWOTE indexation removal proposal, although the "work" and consultation was at a minimum level. Perhaps, by December 2013 and early 2014, it would be possible to describe what occurred as presenting a "fait accompli" to the CEPU about removal of AWOTE indexation. As I have noted earlier in these reasons, that is certainly one inference that can be drawn from the terms of the correspondence to the CEPU. However, the applicants have elected to allege Mr Fahour's representation was misleading, not false and that means they need to prove what his state of mind was in May 2013 about making good on the promise to work collectively with the ACTU. They need to do this whether the future matter approach I have set out at [229] above is taken, or to establish the express state of mind which the terms of s 345 require. They have not done so, and what evidence there is suggests that what occurred was as Mr Fahour represented – that there were discussion with the ACTU, which can be described as working "collectively", and for reasons not apparent on the evidence, no opposition from the ACTU to the removal of AWOTE indexation, so that the discussions were not lengthy or complex.

Did any misleading representation concern the protected workplace right?

249 Even if I had otherwise been persuaded that the alleged representations were made, and that each was misleading, I consider there is some force in the respondent's submissions that the alleged representations were not "about" an identified workplace right or "about" the exercise of the identified workplace right.

250 As to the first aspect of s 345, in my opinion none of the alleged representations were "about" (in the sense I have outlined at [202] above) the participation by Australia Post employees in the approval process for an enterprise agreement under s 181(1) of the FW Act, nor "about" their participation in the making of an agreement under s 182 of the FW Act. The alleged representations did not relate to the approval process for the enterprise agreement: they related to what might occur after the approval of the enterprise agreement, in the sense of what would be the situation about employees' superannuation entitlements. In my opinion

there is not the requisite kind of connection between the alleged representations and the identified workplace rights themselves. The FW Act is, through s 345, intending to protect the rights the FW Act itself gives to workers, and ensure that no person (whether employer or anyone else) misleads workers about what rights they have under the FW Act.

251 To take perhaps the most obvious example, a representation that an employer could take an enterprise agreement to the Fair Work Commission for approval without a vote from the employees concerned would be a misleading representation "about" the workplace rights of employees to participate in an approval process and to vote on an agreement. There is a clear connection between the subject matter of the representation and the existence of the workplace right. To take another example, a misleading representation "about" the approval process for an enterprise agreement might be a statement that an enterprise agreement could only be approved if 90% of the employees voted in favour of it, where in fact a simple majority of those employees covered by the proposed agreement who cast a valid vote was required. Such a statement would be capable of leading employees into error about the nature of the workplace right they possessed under the FW Act. Another representation that may be a false or misleading representation "about" the approval process would be a representation that permanent part-time employees, who would be covered by the proposed enterprise agreement, were not eligible to participate in the vote, merely because they worked part-time.

252 None of the representations had this kind of character and were not "about" the workplace rights identified by the applicants.

253 I accept that the second aspect of s 345 – representations "about" *the exercise* of a workplace right or about *the effect of the exercise* of a workplace right – may have a wider operation. The applicants' case would have s 345 apply to any statement made during the course of bargaining or enterprise agreement negotiations which touched on the way in which employees should exercise their voting rights: that is, any statement made in order to persuade employees to vote one way or the other. I am not persuaded s 345 should be construed in that way.

254 In this context, the word "about" in s 345 means "in relation to" or "concerning": that is, it contemplates some degree of connection or relationship between the representation and (relevantly) the exercise of a workplace right: see generally *Gold Coast City Council v Satellite Wireless Pty Ltd* [2014] FCAFC 51; 220 FCR 412 at [38]-[39], [43] (the Court); *R v Le* [2002] NSWCCA 186; 54 NSWLR 474 at [59] (Heydon JA, Dunford and Buddin JJ

agreeing). The connection must be sufficient for the operative false or misleading conduct to occur. That is not to say there must be a causal connection: rather it is to recognise that the core purpose of the prohibition is to protect the exercise of the identified workplace rights in the FW Act from conduct which could undermine, frustrate or otherwise adversely affect the exercise of those rights.

255 If I had found the alleged representations had all been made, then it would of course be straightforward to find they were all made "in the context of" the exercise by employees of the identified workplace right. They were all to be found in a document whose sole purpose was to communicate an employer's position on an enterprise agreement to its employees, and to encourage them to approve the version the employer put forward. However none of the alleged representations were related to how or whether employees should exercise their entitlement to approve or reject the enterprise agreement. How or whether to approve or reject the enterprise agreement is what is comprehended by the "exercise" of that workplace right. Nor did the alleged representations relate to the nature or content of the exercise of that workplace right. Rather the representations were about the maintenance of employee entitlements not in the agreement (that is, superannuation and the APSS), as well as what Australia Post proposed to do about its superannuation liabilities after the enterprise agreement was finalised. The second limb of s 345(1)(b) (and the third subject matter after "workplace rights" and "exercise of workplace rights") concerns the ***effect*** of the exercise of workplace rights. The alleged representations were not related or connected to *the effect* of exercising the right to participate in an enterprise agreement approval process and to vote on an agreement. Rather they were about an employee entitlement expressly not to be dealt with, or adversely affected, by the enterprise agreement approval process. That was the consequence of the abandonment of the FAS Freeze proposal: superannuation entitlements and Australia Post's superannuation liabilities were excised from the enterprise agreement and would be addressed separately, to the extent they needed to be and in the context of an assurance that the APSS would be retained. That is different from a representation concerning the content of a proposed enterprise agreement, such as a representation that an enterprise agreement would, if approved, include a clause that would secure employees additional superannuation entitlements. Such a representation might, in an appropriate factual context, be "about" the *effect* of exercising the right to approve or reject an enterprise agreement. That is not this case. If it had been necessary to decide I would have found none of the representations were "about" any of the three aspects located within s 345.

256 In particular, in relation to the ACTU representation that I have found was made (but was not misleading), I would have concluded that representation was not about the exercise of employees' rights to vote on the agreement. It was about how Australia Post would deal with its growing superannuation liabilities and how it would work with the ACTU on that matter. The fact that it was made by the employer during bargaining, for the purposes of reassuring employees on a matter outside the enterprise agreement, is not sufficient to make the representation "about" the exercise of the right to vote on the agreement.

"Knowingly or recklessly"

257 There is a mental element in s 345. No authorities have considered the scope or operation of that element in s 345. Given the findings I have made, it is not necessary for me to do so. One unresolved issue, barely addressed by the applicants, was *whose* knowledge or recklessness was to be assessed. In final submissions, after some questions from the bench, counsel for the applicants accepted it must be Mr Fahour's state of mind that was in issue, since he was the person identified as the maker of the communication. Given the findings I have made, I accept this is correct.

258 Mr Fahour was not called as a witness, in circumstances where the applicants bore the onus of proof on this element of s 345. Nor was there any other evidence about his state of mind, or from which inferences might be drawn about his state of mind. Despite Ms Rivers' evidence about the collective nature of the drafting of the 24 May 2013 communication, there was no cross-examination about whether she, or others drafting the document, knew or were reckless about the allegedly misleading nature of what was in the communication.

259 In those circumstances, and in the absence of the person himself or herself, it would be a significant step to infer a person had such a state of mind in circumstances such as those in this proceeding.

260 The applicants submit, in effect, that a *Jones v Dunkel* inference could supply proof of this element of s 345. I do not accept that submission.

261 It should be noted this is not put as a failure by a party with an onus of proof to call an important and material witness, thus giving rise to allegations about a lack of fairness in a trial: cf *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; 247 CLR 345.

262 In *Hellicar* at [165]-[167], the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) said:

> Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the *absence* of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC.
>
> Lord Mansfield's dictum in *Blatch v Archer* that '[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted' is not to be understood as countenancing any departure from any of these rules. Indeed, in *Blatch v Archer* itself, Lord Mansfield concluded that the maxim was not engaged for 'it would have been very improper to have called' the person whose account of events was not available to the court.
>
> This Court's decision in *Jones v Dunkel* is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used. The essential facts of the case, though well known, should be restated. The personal representative of a driver who had died in a collision with another vehicle brought an action for damages on her own behalf and on behalf of the deceased driver's dependants. The plaintiff's case depended upon demonstration that the other driver's negligence was a cause of the accident. The plaintiff sought to demonstrate negligence by having the tribunal of fact (in that case a jury) infer from facts concerning the road and the two vehicles involved that the collision had occurred when the defendant's vehicle was on the wrong side of the road. One of the defendants, the surviving driver, did not give evidence at the trial. The Court divided about whether the inference which the plaintiff sought to have the jury draw about where the collision occurred was an inference that was open on the evidence. But the Court held 'that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence'.
>
> (Emphasis in original; footnotes omitted.)

263 The finding, by way of inference, for which the applicants contend, is that Mr Fahour made the alleged representations knowingly or recklessly. That is an element of a contravention of s 345: it is not a collateral matter. It is correct that Mr Fahour was a person "able to put the true complexion on the facts relied on as the ground" (see *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 at 308 (Kitto J)) in the sense that he could have given evidence about his own state of mind at the time he endorsed (as I have found) the 24 May 2013 communication.

264 It is also true Mr Fahour's absence was unexplained, other than by an assertion from Australia Post that it was not required to call him. He was the CEO of the respondent, which has been found in some situations to be a reason to draw a *Jones v Dunkel* inference: see *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN (Pt 1) (NSW) 557 at 582 (Street J); *Powercor Australia Ltd v Perry* [2011] VSCA 239; 33 VR 548 at [26]-[28] (Warren CJ, Nettle, Tate JJA).

265 There is no basis in the evidence from which the Court could conclude, even by inference, that Mr Fahour would have given evidence adverse to Australia Post and supportive of the contention that he made the representations knowingly or recklessly: see *Hellicar* at [168]. There is no evidentiary basis to draw any inferences about Mr Fahour's state of mind concerning the allegedly misleading nature of the representations.

266 Heydon J explained this in *Hellicar* at [232]:

> As the Court of Appeal said, two consequences can flow from the unexplained failure of a party to call a witness whom that party would be expected to call. One is that the trier of fact may infer that the evidence of the absent witness would not assist the case of that party. The other is that the trier of fact may draw an inference unfavourable to that party with greater confidence. But *Jones v Dunkel* does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party.
>
> (Footnote omitted.)

267 Likewise, in *Hellicar* (at [166] the plurality's reasons; at [250] in Heydon J's reasons) there was reference to the decision of Lord Mansfield CJ in *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 970, where his Lordship said:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

268 Yet as Heydon J explained in *Hellicar* at [250] by reference to a number of authorities, this approach is usually applied to the party which bears the burden or onus of proof. I respectfully adopt what his Honour said at [256], which should be set out in its entirety:

> Fifthly, these cases, and *Shalhoub v Buchanan* [[2004] NSWSC 99] in particular, merely point out that the greater the failure of a party bearing the onus of proof to call available witnesses with valuable evidence to give, the harder it is to satisfy that onus. The Court of Appeal appeared to accept as much when it said that its rule 'takes matters beyond *Jones v Dunkel*, and beyond what was said in, for example, *Shalhoub*'. The cases illustrate nothing more than Dawson J's observation: 'When a party's case is deficient, the ordinary consequence is that it does not succeed' [*Whitehorn v The Queen* (1983) 152 CLR 657 at 682]. Counsel for the Hellicar respondents put the following submission about the principle stated in *Blatch v*

Archer:

> 'The underlying rationale for this principle can be simply put: a party with the burden of proof is expected to meet the requisite proof. If a party provides limited evidence when further evidence was available, a tribunal of fact is entitled to consider that failure when assessing whether the party has produced evidence to satisfy the standard of proof.'

That is correct. And counsel's submission that that rationale was recognised in *Ho v Powell* [[2001] NSWCA 168; 51 NSWLR 572] is also correct.

(Footnotes omitted.)

269 In *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361, Heydon, Crennan and Bell JJ said at [63]:

> The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn. These principles have been extended from instances where a witness has not been called at all to instances where a witness has been called but not questioned on particular topics...

(Footnotes omitted.)

270 In different ways, both *Hellicar* and *Kuhl* make the point that the approach in *Jones v Dunkel* can only operate where there is otherwise a probative evidentiary base from which an inference can be drawn. If there is, then the failure to call a witness of the kind to which the authorities refer may enable the Court to draw the inference with more confidence if the absent witness could have given evidence on the facts the subject matter of the inference.

271 Here, there was no evidentiary foundation established one way or the other which could enable the drawing of an inference about Mr Fahour's knowledge or recklessness as to the misleading character of the representation he made in the 24 May 2013. There was no evidence, even indirect or circumstantial evidence, on this matter at all. There was no foundation for an inference. In those circumstances, the failure by the respondent to call Mr Fahour (it having no onus of proof) could not be used by the Court as an evidentiary foundation enabling the applicants to prove an element of s 345 which they otherwise could not prove.

Third cause of action: breach of contract

272 It will be recalled that this cause of action, personal to Mr Farley, concerns whether, because of representations said to have been made to him shortly prior to him accepting a transfer to a

lower paid position, the AWOTE indexation of his salary for superannuation purposes became a term of his contract of employment. Mr Farley alternatively contends that Australia Post is estopped from denying that AWOTE indexation continues to apply to him.

273 Quite how this estoppel claim could sound in any relief against Australia Post was not much developed by the applicants. That is, there being no claim made by Australia Post against Mr Farley, what precisely by way of conduct, in 2017 (three years after AWOTE indexation ceased) was the estoppel to operate on?

274 At [96] to [106] above, I set out the facts and evidence as I have found them to be in relation to Mr Farley's claims. However, in this section I address in more detail the evidence and submissions made on his claim.

275 There is no dispute between the parties that there has at all material times been a contract of employment between Mr Farley and Australia Post. When Australia Post decided in 2011 to make Mr Farley's position redundant, the redundancy clause in cl 34.2 of the 2010 Enterprise Agreement was triggered. Clause 34.2 expressly incorporated the terms of the Australia Post Redundancy/Redeployment/Retraining Agreement 1995. The 1995 redundancy agreement was reproduced as Schedule K to the 2010 Enterprise Agreement. When the 2013 Enterprise Agreement came into force, the 1995 redundancy agreement continued to apply and was reproduced as Annexure K to that Agreement. Under the redundancy agreement, an affected employee could choose between voluntary retrenchment, redeployment and/or retraining: (cl 6.5, 6.6) and if she or he elected to stay with Australia Post, cl 9.1 required salary maintenance of the previous position for a period of at least two years. Since Mr Farley made that election, the redeployment process in cl 6.7 was the process applicable to his circumstances. The applicants made something of the fact that under the 1995 redundancy agreement, Mr Farley had a choice whether to remain with Australia Post or not, and subsequently, a choice whether or not to accept the lower paid position. This, they submitted, was important because of what they submitted weighed on Mr Farley's mind in making these choices: namely, his understanding that AWOTE indexation would continue to apply to the calculation of his superannuation entitlements.

276 When, in August 2011, Mr Farley was offered the temporary position of Processing Officer (Overpayments), it is clear, and I find, that Mr Farley had a number of concerns. He was concerned about the lower salary; but he was also concerned about being made forcibly redundant, so being moved to a position with the prospect of permanency was a better option

than involuntary redundancy. In this new position he reported to Mr Neil Robinson, whom he liked and whom he considered a work friend. I accept that in an early meeting with Mr Robinson and Ms Connie Coleiro, Human Resources Officer, Mr Farley raised his concerns about his superannuation entitlements, and how they would be affected if he accepted the new position. I accept his evidence, which was agreed by Mr Robinson, that he specifically asked how AWOTE indexation would work with his new position. I have set out above at [96] to [106] Mr Farley's understandable concerns about his superannuation. He was referred by Mr Robinson and Ms Coleiro to Mr Kinsey and Mr Richard Moore, who Mr Robinson accepted were the persons responsible for dealing with employees' queries about their superannuation. Although as Australia Post submitted, and Mr Farley agreed in cross-examination, Mr Kinsey held a position located within Australia Post's payroll department, in my opinion it is clear on the evidence that Mr Kinsey was indeed seen by employees such as Mr Farley as a "go to" person to understand their situation in relation to superannuation, at least as a first port of call.

277 This was Mr Kinsey's evidence-in-chief:

> My team is also responsible (along with the APSS and other areas of the business) for answering queries that come from APSS members about their superannuation, including queries relating to their superannuation salary calculations, contribution amendments and cessation-related concerns... Calls are escalated from Shared Services or the APSS to my team if necessary. This may be if the question is particularly complex or technical. In the event that we need further direction on a query, we will seek advice from Bridget Sebire in the Corporate Superannuation team.

278 This evidence clearly recognises the role Mr Kinsey plays in advising employees about their superannuation entitlements, and indeed doing so on "escalation" from the APSS itself.

279 What Mr Kinsey told Mr Farley is central to his claim in contract and his estoppel argument. Mr Kinsey's evidence-in-chief accepted that he had a conversation with Mr Farley about AWOTE indexation, how it worked, and how it would apply to Mr Farley. It should be recalled that this conversation occurred in early 2012, well before the enterprise negotiations and any suggestions by Australia Post to its workforce that it needed to curb or constrain its superannuation liabilities. Mr Kinsey deposed that he gave Mr Farley the following explanation:

> I explained that my understanding was that AWOTE Indexation rates vary from year to year, but that the rate was around 5% at the time. This meant that the salary on which Glenn's superannuation would be calculated would be the AO5 salary plus the applicable indexation rate (in this example, 5%). At the time, the percentage pay

> increases under the applicable enterprise agreement were around 2%. Overall, that would mean that his superannuation salary would in fact be slightly higher if he took the AO4 role than if he remained in the AO5 position, because of the impact of the AWOTE Indexation on his superannuation salary.
>
> That is, for the purposes of the APSS, Glenn's superannuation would remain at the rate paid to him in his previous role. It would then be indexed in accordance with the AWOTE Indexation. It would continue to be indexed until his actual salary was greater than or equal to the superannuation salary as indexed.

280 Mr Farley is, in my impression, a careful man. Consistently with this characteristic, he asked Mr Kinsey to put something in writing, in part so he could show his wife. I have set out at [100] above what Mr Kinsey wrote to Mr Farley. It is correct that one of the matters he stated was that:

> Assuming you stay on the A4 pay rate, you will get an AWOTE increase each year.

281 At the time Mr Kinsey made this statement in January 2012, on the evidence, there were no plans to remove AWOTE indexation. What Mr Kinsey said to Mr Farley was accurate at the time he said it. Mr Kinsey's evidence was that he did not anticipate the situation with AWOTE indexation might change, and that is perfectly understandable, particularly given that AWOTE indexation had been in place for some time, and the decision to remove it was recommended and made within the space of two months in the middle of 2013.

282 While Mr Farley gave evidence that he understood Mr Kinsey's reference to "each year" to be "each year for the rest of [his] career at Australia Post, provided that [he] stayed on the AO4 rate", I do not consider Mr Kinsey made any such unqualified representation. No doubt Mr Farley hoped that might be the case, but I do not consider Mr Farley could reasonably have expected such a cast iron assurance from a person in Mr Kinsey's position. Similarly, although Mr Farley's evidence, which I accept, was that he had several conversations with Mr Robinson around this time, as part of deciding whether to take the AO4 position, and that in those conversations he raised the issue of what his superannuation entitlements would be going forward, I do not consider Mr Robinson, any more than Mr Kinsey, gave any assurances to Mr Farley of what his position would be for the remainder of his career with Australia Post.

283 I accept Mr Farley's evidence that Mr Robinson said words to the effect of "I'll look after you". Mr Robinson could not clearly recall saying those words, but fairly accepted he may have. I find a phrase like that, used in the context it was, should be seen as no more than a general assurance by Mr Robinson to Mr Farley that he (Mr Robinson) would do his best to

see that Mr Farley's position at Australia Post was as a secure as it could be. However Mr Farley could not reasonably have understood that to be an assurance that could negate or withstand changes by Australia Post in its policies, nor other vicissitudes which could affect, amongst other things, Mr Farley's superannuation entitlements. Mr Farley well understood Mr Robinson's place at Australia Post. While it was in a hierarchical sense above that of Mr Farley, I find Mr Farley as a long-term Australia Post employee well understood that decisions which could affect the salaries and entitlements of Australia Post employees were made at levels well above Mr Robinson. It was not, contrary to the applicants' submissions, a matter for Mr Robinson (or Mr Kinsey) positively to warn Mr Farley that AWOTE indexation may or may not remain in place for the duration of Mr Farley's career with Australia Post. They were not responsible for setting (or removing, or modifying) employee's entitlements. They were responsible for providing, and expected to provide, accurate information about employees' current entitlements, which in my opinion they did.

284 The applicants rely on Mr Farley's evidence that he did not think "in [his] wildest dreams" that AWOTE indexation would be changed because "there were so many people on the AWOTE" and "everyone had received that entitlement". I accept Mr Farley may have found it hard to believe AWOTE indexation could, or would, be removed. However it is a large step from that to a situation where Australia Post is to be legally held to a position which is consistent with Mr Farley's belief. That is not a step the applicants have persuaded me can be taken.

The contract claim

285 I accept Australia Post's submissions that the representations made by Mr Kinsey and Mr Robinson were representations only as to Mr Farley's current, ongoing entitlements and situation, in circumstances where there was no indication to either Mr Kinsey or Mr Robinson that the situation might change in the near future. In early 2012, neither had any basis to expect that AWOTE indexation would be removed. The evidence reveals such a suggestion had not even been made within Ms Sebire's team, or anywhere else within Australia Post's management group.

286 As the applicants' submissions recognised, the applicants' case had been put on the basis that what occurred through the alleged representations by Mr Kinsey and Mr Robinson was a variation to Mr Farley's contract. Clearly there was a variation in the sense of the variation in writing constituted by the offer of the new AO4 position and its acceptance by Mr Farley.

However, the applicants contend there was a further variation, an oral one, which occurred (it would seem to be submitted) more or less contemporaneously with the written variation constituted by the offer and acceptance of the new AO4 position. There is nothing in the written letter of offer, dated 27 January 2012, or in the acceptance form, dated 15 February 2012, which reflects any agreement in relation to superannuation entitlements.

287 Before the character of the representations can be addressed (the applicants' submission being that they were promissory in character), the question of the authority of Mr Kinsey and Mr Robinson to make the alleged representations must be addressed. I address this on the basis that contrary to my finding at [285] above, the representations contained some entrenched future element and were not merely representations of Mr Farley's current, ongoing entitlements.

288 Australia Post submits that if a company acts as though an individual has authority or holds someone out as being in a position of authority, then by reason of s 129(3) of the *Corporations Act 2001* (Cth) the company will be held or bound by that representation. A similar provision exists in s 793 of the FW Act.

289 Relying on *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 per Diplock LJ at 503-510, Australia Post submits the approach to whether a corporation can be said to have held a person out as having authority to bind it requires satisfaction of three matters:

> First, there must exist a representation made to the third party that the officer had authority to enter a contract of the kind which the third party seeks to enforce on behalf of the company. Second, the representation as to the authority of the officer must be made to the third party by a person or persons who have actual authority to manage the business of the company, either generally or in respect of matters such as contracts with the third party. Third, the third party must have been induced by the representation to enter into the contract.

290 The principles set out by Diplock LJ, summarised at 506 of his Lordship's judgment, were followed and applied by the High Court of Australia in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* [1975] HCA 49; 133 CLR 72 at [78] (Gibbs, Mason, Jacobs JJ), and reaffirmed in *Northside Developments Pty Ltd v Registrar-General* [1990] HCA 32; 170 CLR 146 at 159 (Mason CJ), 172-174 (Brennan J), 198-199 (Dawson J), 207 (Toohey J). These principles were recently applied in the context of the FW Act by this Court in *Australian Nursing and Midwifery Federation v Kaizen Hospitals (Essendon) Pty Ltd* [2015] FCAFC 23; 228 FCR 225 at [95], [122] (Buchanan and Jagot JJ).

291 The applicants have not established that Mr Robinson or Mr Kinsey had any actual, or even apparent, authority to enter into employment contracts, or vary employment contracts, on behalf of Australia Post. At the time the representations were made by Mr Kinsey, he was one of six "Application Controllers" within the "People Data Management" section, which in turn reported to the Manager of "Payroll Services", which in turn reported to the Manager of "Shared Services" within Australia Post. In that position, Mr Kinsey was an AO5, the same level as Mr Farley before Mr Farley accepted the AO4 role. Without any disrespect to Mr Kinsey, it is inconceivable a person in such a position would be given this kind of authority.

292 The same holds good for Mr Robinson. At the relevant time, he held the position of Payroll Quality Manager (previously known as Manager, Employee Services). There is no basis to infer he had any authority to vary an employment contract on behalf of Australia Post with someone such as Mr Farley. Although, Mr Farley's written offer in January 2012 was signed by Mr Robinson, the evidence is entirely unclear why he signed the letter. It is unlikely that any such authority to contract would be given to Australia Post employees in the position of Mr Robinson. He had authority to communicate an offer – the letter establishes as much. Beyond that, the evidence says nothing about his authority to add, subtract or vary terms of an employment contract for an Australia Post employee. I note also that, as Australia Post submits, the Australia Post General Delegations document in evidence states that only the Group Manager, Human Resources has the delegation to determine the conditions of employment that apply to staff.

293 Nor, might I add, is there anything in the evidence to point to direct conduct taken by either Mr Kinsey or Mr Robinson to vary Mr Farley's contract, or communicate a variation to him about the retention of AWOTE indexation on his superannuation salary. All they did was answer his questions, in as sympathetic and complete way as they could, with the information available to them at the time.

294 The applicants relied on the decision of *Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33; 242 FCR 505 in which Buchanan J said (at [257]) that in the case of a variation to an employment contract it was necessary to look for an "imputed *mutual* intention that such a change in the contractual landscape has occurred" (emphasis in original). It will be apparent from what I have said that I do not consider any such mutual intention to be apparent from the evidence about what passed between Mr Farley on the one hand and Mr Kinsey and Mr Robinson on the other in early January 2012, even if the issue of authority

were to be determined in favour of the applicants. This is simply another way of expressing my finding that I do not accept Mr Kinsey and Mr Robinson were making a representation of the kind the applicants allege – that is, a representation about AWOTE indexation being applicable to Mr Farley's salary for the duration of his employment at Australia Post, or even for the duration of his new employment contract.

The estoppel claim

295 I begin by referring to the findings I have made above concerning the nature of the representation made, and the absence of any authority (actual or apparent) of Mr Kinsey and Mr Robinson to bind Australia Post in relation to the terms and conditions of employment for another employee.

296 Again, I accept Australia Post's written submissions concerning why this claim must fail. It is apparent that Mr Farley, even on his own evidence, made no assumptions about any legal relationship which was to come into existence between him and Australia Post in relation to the continuation of AWOTE indexation on his salary for superannuation purposes. Rather, he assumed the then current situation would continue to apply. It does not appear Mr Farley knew how, or under what terms, AWOTE indexation had been applied to his superannuation salary in the past. Although he was concerned about his own employment position, I do not understand his evidence to suggest he assumed he was negotiating any terms that were different to those of his co-workers who were also the (then) beneficiaries of AWOTE indexation. In that sense, he was not asking the questions he did on the basis that the answers would form the basis for a separate and distinctive legal relationship created between him and Australia Post.

297 For the reasons I have set out above, neither Mr Kinsey nor Mr Robinson on behalf of Australia Post induced Mr Farley to make any such assumptions. They gave him as much of the information he sought as they could, as sympathetically and fully as they could, based on the then state of affairs as they knew it to be within Australia Post. In particular in relation to Mr Kinsey, that was what he was expected to do: assist employees in understanding their superannuation entitlements. It was no part of his role to set, entrench or change those entitlements. No other conduct on behalf of Australia Post was relied on by the applicants except what Mr Robinson and Mr Kinsey said and did.

298 If the very same conversations had occurred between Mr Kinsey, Mr Robinson and an employee like Mr Farley in, say late 2013 (after the decision to remove AWOTE indexation

but before its implementation), then a closer examination of what ought to have been known by Mr Kinsey in particular may have been called for. That is not this case.

299 I accept Mr Farley gave evidence (which I have extracted at [102] above) that he would not have taken the lower paying job were it not for the assumption he made about AWOTE indexation continuing for the rest of his time at Australia Post. It was not suggested to him during cross-examination that was his belief only with the benefit of hindsight, several years after he had accepted the lower paying job. Whether or not his decision was as clear cut as that in January 2012 is, in my opinion, rather more difficult to determine. He was facing the threat of involuntary redundancy from an employer he had worked for over the last 26 years. I have no doubt the assurance about AWOTE indexation continuing to apply to him assisted him in deciding to take the new position. However I am not prepared to find his belief was as absolute as the way he put it in the witness box. In my opinion, the absolute nature of his belief was affected by hindsight, and by the circumstances of this proceeding.

300 The detriment to Mr Farley occurred after his salary maintenance period finished and he was paid the salary for an AO4. At that time his salary for superannuation purposes had dropped, and from 1 July 2014 there was no AWOTE indexation to increase it. Although, as Australia Post submits, he received, as the price of taking a lower position, a job and stable income, it is nonetheless accurate to describe the non-availability of AWOTE indexation for him in this new position as a detriment. If, contrary to my findings, the other elements of estoppel had been made out, it seems to me this would be sufficient detriment to rely on in an estoppel claim.

CONCLUSION

301 The application must be dismissed. The parties will be given an opportunity to agree costs, in accordance with the Court's stated preference for lump sum costs orders if that is possible. Directions will be given for evidence and submissions if the parties cannot agree.

302 This outcome may appear to give Australia Post some impunity for the way in which, without direct consultation with its own employees, it removed a superannuation entitlement of considerable financial benefit to a large number of employees, and which had been in place for a long time. The timing of Australia Post's decision-making, so soon after the approval of the enterprise agreement, could certainly have been seen by employees as involving some deliberate withholding of information from them. At the least, it was far from good industrial

practice. However, it was not a contravention of the law in any of the ways alleged by the applicants in this proceeding.

I certify that the preceding three hundred and two (302) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

Dated: 15 September 2017