IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M71 of 2017

BETWEEN:

REGIONAL EXPRESS HOLDINGS LIMITED
(ACN 099 547 270)
Appellant

and

AUSTRALIAN FEDERATION OF AIR PILOTS
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: The Issue

2. This appeal concerns the standing of "industrial associations" to bring civil penalty proceedings for alleged contraventions of the *Fair Work Act 2009* (Cth) (**FW Act**), in circumstances where the contraventions do not affect the association. This, in turn, raises one question for determination: is an industrial association "*entitled to represent the industrial interests of*" persons who are merely eligible to be members of the association pursuant to a set of "eligibility rules" which the association has, despite not being actual members of that association?

3. The appellant contends that the answer to that question is "no".

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The appellant certifies that it has considered whether a notice should be given under section 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

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Part IV: Judgments Below

5. The judgment of the Full Court of the Federal Court of Australia is reported as *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2016] FCAFC 147; (2016) 244 FCR 344 (**Judgment**).

6. The judgment of the primary judge is reported as *Australian Federation of Air Pilots v Regional Express Holdings* [2016] FCCA 316 (**Primary Judgment**).

Part V: Facts

7. The appellant is in the business of providing commercial aviation services. On 5 September 2014, the appellant sent a letter to presently unidentified persons who had applied and been shortlisted for its cadet employment program. The respondent, a registered organisation of employees under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**), alleges that the letter contravened various "civil remedy provisions" of the FW Act (being sections 340(1), 343(1) and 345(1)) in relation to two separate groups of persons (called "affected class one" and "affected class two").

8. On 15 April 2015, the respondent applied to the Federal Circuit Court of Australia for (*inter alia*) the imposition of pecuniary penalty orders for these alleged contraventions, pursuant to item 11 of section 539(2) of the FW Act.

9. As an "industrial association" as defined in section 12 of the FW Act, the respondent's standing to bring the proceeding was constrained by sections 540(6) and 540(7) of the FW Act. The respondent did not (and does not now) allege that it is (or was) affected by any of the alleged contraventions within the meaning of section 540(6)(a) of the FW Act.

10. Rather, the respondent needed to demonstrate the two matters identified in section 540(6)(b) of the FW Act, the first of which is presently uncontentious (that the persons in the affected classes were themselves affected by the contraventions). This left the question now before this Court, as identified in section 540(6)(b)(ii) of the FW Act: is the respondent "*entitled to represent the industrial interests of*" the affected persons?

11. The appellant applied to the Federal Circuit Court for orders that the respondent's application be summarily dismissed or struck out. The appellant argued that the respondent lacked standing to bring the proceeding because it could not demonstrate that it was "*entitled to represent the industrial interests of*" the affected persons under section 540(6)(b)(ii).

12. Other than one person in "affected class one" who the respondent contends is one of its members, the respondent does not (and did not) allege that any of the other persons in either "affected class one" or "affected class two" are members of it.

13. Rather, as each of the unidentified affected persons were capable of becoming a member of the respondent by virtue of falling within the scope of its membership eligibility rules (a proposition which is not presently contentious), the respondent argued that it was thereby "entitled" to represent their industrial interests, despite them not actually being its members. The appellant argued that eligibility for membership under the respondent's eligibility rules was not sufficient to provide an entitlement to the respondent of which section 540(6)(b)(ii) of the FW Act spoke.

14. The primary judge, and subsequently the Full Court (Jessup J, with whom North and White JJ relevantly agreed), each concluded that the respondent was "*entitled to represent the industrial interests of*" the unidentified affected persons, simply because these persons were capable of becoming members of the respondent under its membership eligibility rules.

15. It is this proposition which is challenged in this appeal.

Part VI: Argument

16. The FW Act establishes various norms of conduct for the participants in the industrial relations system. Many of these norms of conduct are described in the FW Act as "civil remedy provisions". Chapter 4 of the FW Act is headed "Compliance and Enforcement" and Part 4-1 is entitled "Civil Remedies".

17. Within Part 4-1 are various provisions identifying, *inter alia*, what orders various courts can make in relation to contraventions of these civil remedy provisions

and on whose application those orders can be made. Relevantly for present purposes, one form of relief identified in section 546 of the FW Act, is "pecuniary penalty orders".

18. Section 539 of the FW Act identifies the various civil remedy provisions and who may apply for orders in relation to alleged contraventions of those provisions. Each of the alleged contraventions in this case relate to civil remedy provisions listed in item 11 of section 539(2) of the FW Act.

19. Three entities are identified as having potential standing to make an application to a court for relief in relation to alleged contraventions of those provisions: a person affected, an inspector or an "industrial association".

20. Section 540 of the FW Act goes on to identify further limitations on the circumstances in which the various entities identified in section 539(2) of the FW Act have standing to apply to a court for relief in relation to alleged contraventions.

21. Section 540(7) of the FW Act provides that if the "industrial association" in question happens to be an "employee organisation" (which the respondent is), that organisation has to be entitled to apply for relief under section 540(6) of the FW Act.

22. Section 540(6) of the FW Act, in turn, provides two alternative means of standing for all industrial associations:

    (a) being itself a person affected by the contravention(s) (not this case); or

    (b) being entitled to represent the industrial interests of the person who is affected by the contravention(s) (this case).

23. This appeal concerns the proper construction of the phrase "*entitled to represent the industrial interests of*" as it appears in section 540(6)(b)(ii) of the FW Act. The question of construction is to be answered by reference to "*the text, context and purpose of the Act*".[1]

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[1] *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19; (2016) 257 CLR 468 at 473 [10] (French CJ, Kiefel, Nettle and Gordon JJ). See also *North Australian Aboriginal*

The proper construction: text

24. The starting point for the constructional exercise is the natural and ordinary meaning of the actual text of the provision itself.[2] That is not necessarily the end point for the exercise, but it may be, depending upon the meaning conveyed by the ordinary or grammatical meaning of the text and the extent to which obvious or apparent discord with that construction can be identified in context and purpose.[3] Context and purpose can assist in fixing a meaning of the text, but they cannot displace it.[4]

25. The text of the FW Act is especially paramount, as it is a ready example of a legislative scheme where compromise between competing interests is employed.[5] In such a situation, *"it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling."*[6]

26. The natural and ordinary meaning of the word "entitled", when coupled with the concept of "represent" or "representation", is synonymous with "title, right or claim."[7] This is in contrast to being "able" to do something, or the mere lack of a prohibition on doing that thing.[8]

Justice Agency Ltd v Northern Territory [2015] HCA 41; (2015) 256 CLR 569 at 581 [11] (French CJ, Kiefel and Bell JJ).

2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

3 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

4 *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

5 In the sense identified in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 224 CLR 193 at 230-1 [125]-[126] (McHugh J).

6 *Carr v The State of Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at 142-3 [5]-[7] (Gleeson CJ). See also *CFMEU v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619 at 632-3 [40] (Crennan, Kiefel, Bell, Gageler and Keane JJ); *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at 233 [43] (Gleeson CJ, Hayne and Heydon JJ); *Nicholls v The Queen* [2005] HCA 1; (2005) 219 CLR 196 at 207 [8] (Gleeson CJ).

7 If the insertion in 1974 of section 142A into the *Conciliation and Arbitration Act 1904* (Cth) was related to, or a reflex of, the *Dunlop Rubber* line of cases (to which the appellant will return) (Judgment at [19]), the word "right" was used as a synonym for "entitled" even then.

8 An "interest" is not to be equated with a "right" or "entitlement" either: *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 at 530.7-531.1 (Gibbs J),

27. If this is the natural and ordinary meaning of "entitled", what then provides the right or entitlement "to represent the industrial interests of" the person? As the Full Court at least implied,[9] membership of the industrial association, at least in the context of a registered organisation (such as the respondent), provides that entitlement or right.[10] It is the members of an association who associate.

28. The appellant need not establish nor identify the complete spectrum of circumstances or sources which might provide the right or entitlement. Nor does the appellant need to establish that membership confers the entitlement in the case of every industrial association.[11]

10 29. The respondent here only advanced one source of the entitlement (its eligibility rules) and the appellant was entitled to succeed on its summary judgment application before the Federal Circuit Court if that source was held not to provide any such entitlement.

30. If the text of section 540(6)(b)(ii) of the FW Act is to be read as contended for by the appellant, it is difficult to identify how an industrial association accrues a right or entitlement to represent the industrial interests of a person, simply because the person could become a member of the association if they chose to do so (by reason of being eligible to be a member). The Full Court effectively identified as much.[12] Such a proposition was described as "*involving a legal*
20 *fiction to a degree*".[13]

31. It was this conclusion which led the Full Court to assert that the constructional

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539.1-539.7 (Stephen J) and 548.1-548.3 (Mason J); *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* [1993] HCA 34; (1993) 178 CLR 352 at 364 (Mason CJ, Deane, Toohey and Gaudron JJ). The primary judge was led into error by making this equation: Primary Judgment at [24] and [29].

9 Judgment at [49].

10 See also, *Re Harrison; Ex parte Reid* (1995) 62 IR 280 at 286 (Wilcox CJ, Keely and Beazley JJ); *Pryor v Coal & Allied Operations Pty Ltd* (1997) 78 IR 300 at 305-6 (McIntyre VP, Boulton J and Cargill C). There may also be other examples, such as express request and authorisation by the person affected.

11 Although it likely would.

12 Judgment at [54]. See too in a different context, *Transport Workers' Union of NSW v Australian Industrial Relations Commission* [2008] FCAFC 26; (2008) 166 FCR 108 at 131 [45] (Gray and North JJ).

13 Judgment at [60].

process here, for reasons not fully explained, was "*not a conventional one*".[14] With respect, this was wrong. The constructional task here, like every other constructional task, must be a conventional process subject to the same broad principles carefully developed over a considerable period of time.[15]

32. The Full Court was wrong to abandon conventional construction processes where the logical conclusion of those processes led to a result which was different from that already reached through prior analysis of other historical statutory provisions and decided cases on unrelated issues. This was a case of contentious historical context displacing the ordinary meaning of the text, rather than fixing a meaning to it. If the legislature really wanted to refer to eligibility for membership as the relevant criterion for standing, it could have said so.[16]

The proper construction: context

33. Context, in its very broadest sense, was what drove the Full Court to the construction of the relevant phrase at which it arrived. Rather than starting with the natural and ordinary meaning of the text,[17] the Full Court commenced with and then used an analysis of statutory and jurisprudential history to control the interpretive exercise, neither of which had any direct bearing upon the relevant phrase and its meaning within section 540(6)(b)(ii) of the FW Act.

34. The way in which statutory and jurisprudential history was deployed led to error. "*Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text.*" The

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14 Judgment at [55].

15 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at 49 [57] (Hayne, Heydon, Crennan and Kiefel JJ).

16 Like it has in numerous other places in the FWRO Act: for example, sections 12, 18B(3)(c), 18C(3)(c)(ii), 20(1)(g), 43(5)(a), 55(1)(b), 112, 133(1)(a) and (c) and 137A(1)(a) of the FWRO Act. There are others. These provisions are part of the relevant constructional context. Why would the Parliament choose for two different phrases to refer to the same concept, one in direct speech and one in contentious, non-direct language?

17 After explaining the background and the issue (Judgment at [2]-[14]), identifying that there was no statutory definition or other direct extrinsic assistance (Judgment at [15]), Jessup J moved straight to jurisprudential and legislative history and context (Judgment at [16]-[53]), before eventually considering the text and its ordinary meaning (Judgment at [54]). After identifying that this (conventional) textual process yielded a different result to the historical one, his Honour asserted that the approach must be "*unconventional*" (Judgment at [55]).

history was "*no substitute for giving attention to the precise terms in which [the] provision is expressed*" and cannot "*stand in the place of the words used in the statute*".[18]

35. Ultimately and in error, the Full Court appears to have identified and then applied what it thought the Parliament may have meant, rather than the true meaning of what it said.[19]

36. The use of contentious and ambiguous history infected the Full Court's analysis of more immediate context, being the use of the same phrase throughout the FW Act itself. Assumptions made about statutory and jurisprudential history were multiplied and used to interpret how the same phrase should be understood elsewhere in the FW Act.[20] The disparate pedigrees of, and piecemeal amendments to, various aspects of the legislative scheme over time, left open the very real (and perhaps even likely) prospect that the phrase took on different meanings in different contexts, making any reliance on how the phrase may have been deployed elsewhere unsafe.[21]

Context: industrial associations, not registered organisations

37. In confronting the construction task, the Full Court's attention was diverted from the language of the provision to judicial and legislative history regarding trade unions (as a form of registered organisation). This had some immediate consequences which provide a powerful indication that the Full Court erred.

38. Item 11 of section 539(2) and section 540(6)(b) of the FW Act, each refer to "industrial associations". Industrial associations are similar to, but at the same

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18 *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

19 *Corporate Affairs Commission (NSW) v Yuill* [1991] HCA 28; (1991) 172 CLR 319 at 321 (Brennan J); *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 at 283-4 [97] (Heydon and Crennan JJ); *R v Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ); *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 264-5 [31]-[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See relatedly, *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74; (1993) 178 CLR 477 at 505-6 (Mason CJ and Toohey J).

20 Judgment at [50]-[53].

21 *Thirteenth Beach Coast Watch Inc v The Environment Protection Authority* [2009] VSC 53; (2009) 29 VR 1 at [10]; Pearce and Geddes, *Statutory Interpretation in Australia*, 7th edition, 2011, at [4.7].

time markedly different from, trade unions or other registered organisations. Sections 539 and 540 of the FW Act recognise the distinction between these different types of representational associations/organisations and provide different standing regimes and rules for each.[22]

39. Two things follow from this:

(a) any legal construction placed on section 540(6)(b) of the FW Act has to cater for and be consistent with the entire range of entities which may be industrial associations; and

(b) section 540(7) of the FW Act expressly identifies that if an industrial association is conferred with standing, no special or different rules apply if the industrial association happens to be a registered organisation.

40. Contrary to each of these propositions, the Full Court's construction adopted a "special meaning"[23] (and special rule) for registered organisations which does not work for a number of other kinds of industrial associations. The Full Court even concluded that the "special meaning" does not apply to industrial associations.[24] That is to say, that in construing the relevant phrase for the purpose of identifying the standing of an industrial association, the Full Court reached a conclusion which does not even apply to industrial associations generally.

41. The appellant submitted below that adopting an eligibility test based on eligibility rules was necessarily flawed, because not all "industrial associations" (as defined in section 12) would necessarily have rules, let alone rules with eligibility criteria within them. Indeed, Jessup J had earlier in his reasons noted the apparent weakness in adopting a rules-based test for industrial associations who may not have rules.[25]

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22 Section 539(2) confers standing on differently described entities, including industrial associations, employee organisations, employer organisations and registered employee associations. The limitations in section 540 are expressed and apply differently also.

23 Judgment at [62].

24 "*I would not hold it to apply to industrial associations, as defined, generally*": Judgment at [62].

25 Judgment at [34].

42. This flaw was, in essence, avoided, by the Full Court expressing the ultimate conclusion as some form of fact-based conclusion derived from some asserted differing factual position of a registered organisation (a case never ran by either party), based upon some other unstated construction of the relevant phrase. This was despite the Full Court dealing with the question in the preceding 50 odd paragraphs as a wholly legal construction exercise.

43. The Full Court devoted considerable attention to construing the relevant phrase from the legal point of view. At no stage did the Court consider it at the factual level on the basis that there was some legislative or other feature about the nature or constitution of registered organisations generally, or with this particular registered organisation, which made it "*entitled to represent the industrial interests of*" the affected persons, where other industrial associations would not be. There was no evidence before the Court which would have enabled that exercise to be undertaken and no argument was directed towards it.

44. Moreover, the Full Court based its analysis on one form of registered organisation (an employee organisation), without even considering whether the same rationale applied to employer organisations. At no stage does the Full Court consider whether (and when) an employer organisation is "*entitled to represent the industrial interests of*" affected persons who might be eligible members of it.

45. These are strong, textual and contextual considerations supporting a construction of the relevant phrase consistent with the ordinary meaning of the language. They should be favoured instead of contentious and unpersuasive judicial and legislative history.

Context: the Dunlop Rubber line of cases

46. The Full Court misstated or misunderstood the meaning and effect of a line of authority in this Court regarding the capacity of registered organisations to generate "industrial disputes" within the historical constitutional and statutory setting. This misstatement accorded with the conclusion ultimately reached by the Full Court about the meaning of the relevant phrase.

47. The proposition (in the opening sentence of paragraph [16] of the Judgment) that the Full Court states as being "*established in a line of cases*", does not accord with those (or any other) authorities. The misstatement is repeated in the last sentence of paragraph [30] of the Judgment and repeated again in the second sentence of paragraph [49] of the Judgment.[26]

48. The *Dunlop Rubber* line of cases involve incremental reasoning in large part associated with various policy rationales.[27] They stand for the proposition that a union could create an "industrial dispute" for the purposes of the *Constitution* and associated legislation, by making unmet demands on employers with respect to the terms and conditions upon which those employers can employ non-members of the union, provided that those non-members are eligible to be members of the union according to its eligibility rules.

49. From there, the respondent (and the Full Court) asserts that this means that in so doing, the union is *representing*, or is *entitled to represent*, those non-members, including their industrial interests. The cases do not say this. In fact, they say the opposite.

50. When making demands regarding the terms and conditions of non-members, a union is doing one thing: representing its members.[28] The demand is made and advanced for the interests of its members.[29] The fact that it relates to non-members does not mean that the union seeks to, or does, represent those non-members or their industrial interests, far less that it is entitled to. As explained in *Financial Clinic*, the union does not claim for or on behalf of non-members,

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26 It is noteworthy that the Full Court (Judgment at [24]-[25]) drew sustenance from the Commission decision in *Federated Ironworkers Association v Comalco Aluminium Ltd* (1989) 30 IR 241, which also misstates what it suggests is "*accepted legal principle*".

27 Most prominently, the enduring and effective settlement of industrial disputes.

28 This is consistent with the present regulatory regime, under which it is a requirement for registration under the FWRO Act that the union "*is an association for furthering or protecting the interests of its members*": section 19(1)(a)(ii) of the FWRO Act.

29 Dealing, as it does, with competitive labour: *Metal Trades Employers' Association v Amalgamated Engineering Union* [1935] HCA 79; (1935) 54 CLR 387; *R v Graziers' Association of New South Wales; Ex parte Australian Workers' Union* [1956] HCA 31; (1956) 96 CLR 317 at 334; *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* [1993] HCA 34; (1993) 178 CLR 352 at 364.1.

but merely claims *in respect of* their employment.[30]

51. Justice Gibbs' dictum in *Clarkson*[31] does not represent this Court's reasoning on the issue[32] and the one line in *Dunlop Rubber* which the respondent relies upon,[33] is taken out of context and is not consistent with the reasoning of the Court or the cases which had gone before it.[34] No prior or subsequent judgment of this Court has reasoned along these lines: they have all reasoned as contended for by the appellant.[35]

52. The Full Court tied the relevant phrase (or variants of it) to its conception of this line of jurisprudence, from which it concluded that the legislature had adopted
10 the principle from those judgments as the Full Court explained it. For the reasons explained above, the Full Court was wrong to do so and the construction exercise miscarried accordingly.

Context: constitutional underpinnings

53. After departing from a conventional approach to statutory construction, the Full Court provided two reasons in particular for why it favoured the respondent's

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30 *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* [1993] HCA 34; (1993) 178 CLR 352 at 363.7 (Mason CJ, Deane, Toohey and Gaudron JJ).

31 *R v Clarkson; Ex parte Victorian Employers Federation* [1973] HCA 57; (1973) 131 CLR 100 at 113.5-113.6 ("*I regard it as established by [Dunlop Rubber] that for the purposes of the Act an organization is entitled to represent a group or class comprising all those persons who are eligible to be its members…*"). This reflects the Full Court's error.

32 This Court's reasoning is accurately described by Menzies J (at 110.5-110.8 and 111.2-111.3), with whom Barwick CJ and Stephen J agreed.

33 "*A test which the industrial law approves or allows for determining who are eligible as members of an organised body registered under its provisions surely may in such circumstances be adopted as a sufficient criterion for ascertaining or defining the group or class in the place of which it stands for industrial purposes or which it 'represents'.*": *R v Dunlop Rubber Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* [1957] HCA 19; (1957) 97 CLR 71 at 87.

34 Ibid at 81.8, 82.5, 83.1 and 85.5.

35 *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* [1925] HCA 7; (1925) 35 CLR 528 at 542.6, 543.4, 546.1 and 549.5; *Metal Trades Employers' Association v Amalgamated Engineering Union* [1935] HCA 79; (1935) 54 CLR 387 at 404.4-404.6, 419.7; *R v Portus; Ex parte Federated Clerks Union of Australia* [1949] HCA 53; (1949) 79 CLR 428 at 432.9 and 439.5; *R v Graziers' Association of New South Wales; Ex parte Australian Workers' Union* [1956] HCA 31; (1956) 96 CLR 317 at 323, 334, 335.7-336.1; *R v Clarkson; Ex parte Victorian Employers Federation* [1973] HCA 57; (1973) 131 CLR 100 at 110.5-110.8 and 111.2; *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* [1993] HCA 34; (1993) 178 CLR 352 at 360.1, 361.9, 363.7 and 364.6.

contention,[36] the first of which was not well explained.

54. From paragraphs [36]-[39] of the Judgment, Jessup J refers to the historical introduction of certified agreements to settle industrial disputes and makes a number of assumptions or presumptions about the metes and bounds of those provisions to support his Honour's (and ultimately the Full Court's) ultimate conclusion, which are not self-evidently correct.[37] His Honour then returns to these matters (Judgment at [55]-[56]) as providing one of the two particular reasons for favouring the respondent's construction.

55. The suggestion made in paragraph [39] of the Judgment that the legislature was aware of, took notice of and then "re-enacted" legislation with the same phrase intending to reflect the reasoning of one Full Bench decision of the Commission, provides no sound basis for any departure from the text of the provision.[38]

Context: the separate mention of membership and "entitled to represent the industrial interests of"

56. This was the second of the two principal reasons provided by the Full Court for favouring the respondent's construction.[39] It also found voice in the reasoning underpinning the first reason.[40] It attracted much attention from the respondent below.

57. It is and was, with respect, somewhat of a false issue and does not provide the type of support for the Full Court's conclusion as is stated. As is noted in paragraph 28 above, it was not for the appellant to establish the correctness of its suggested construction, but rather for the respondent to establish the

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36 Judgment at [55].

37 The last sentence of paragraph [36] is a large question, as are the assumptions inherent in paragraph [37] ("*would have been*", "*would have been*").

38 Assuming the re-enactment principle applies to non-judicial pronouncements, this is an example of the type described as follows: "*No doubt there are circumstances in which it is artificial, and unpersuasive, to attribute to Parliament a consciousness of a judicial interpretation which might have been placed upon an expression, perhaps years before, and in some different context.*" (*Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at 324-5 [8] (Gleeson CJ). See also 346-7 [81] (McHugh J) and 371 [162] (Gummow, Hayne and Heydon JJ); *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; (1996) 187 CLR 310 at 329 (Toohey, McHugh and Gummow JJ) and 351 (Kirby J).

39 Judgment at [58].

40 Judgment at [36].

correctness of its. On appeal, the appellant needed to only establish that the primary judge's conclusion was wrong, not that the appellant was right.

58. The separate mention of membership and "*entitled to represent the industrial interests of*" might be a reason for regarding the appellant's construction as questionable, but is no reason for regarding the respondent's construction as correct. There are other alternatives than these two.

59. Importantly and in any event, if this is a reason for regarding the appellant's construction as wrong, it is equally a reason for regarding the respondent's construction (and that of the Full Court) as wrong. In that sense and in light of paragraphs 57-58 above, it was a neutral consideration.

60. For the purposes of the FW Act, a person cannot be a member of a union unless they are eligible to be a member of that union.[41] The FW Act refers to *de jure* membership, not *de facto* membership.[42] That being so, why would the legislature separately refer to membership and a phrase which has been interpreted to mean eligibility for membership, if the former necessarily covers the latter? Relying on this aspect of the Full Court's analysis, on either the appellant's preferred construction or that adopted by the Full Court, one of these references is superfluous and unnecessary.[43]

61. What this tends to suggest is what the appellant submitted below about these matters. In light of the operation of "representation orders" within the legislative scheme (which enables the decoupling of membership from the right to represent), the references to both membership and the entitlement to represent are explicable as a policy choice by the Parliament, that certain aspects of the scheme require both membership and the absence of a disentitling representative order, or more than the mere existence of an entitling representative order. This is illustrated by sections 520(1) and 531(2) and (3) of

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41 Section 166(1) of the FWRO Act.

42 *R v Hibble; Ex parte Broken Hill Proprietary Company Ltd* [1921] HCA 15; (1921) 29 CLR 290 at 298.2 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *R v Portus; Ex parte Federated Clerks Union of Australia* [1949] HCA 53; (1949) 79 CLR 428 at 432.6-433.8 (Latham CJ).

43 Either the reference to "member" is superfluous (on the appellant's argument) or the reference to the relevant phrase is superfluous (on the Full Court's reasoning).

the FW Act.[44]

Context: expansive construction of provisions with penal effect

62. Sections 539 and 540 of the FW Act confer standing on industrial associations not affected by a contravention of the FW Act, to institute civil penalty proceedings against the alleged contravener. They expose the alleged contravener to the vexation of civil penalty litigation in a no costs regime (section 570), from an uninterested third party.

63. Confronted with constructional choices, this is part of the context which should favour a narrower construction of section 540(6)(b)(ii) of the FW Act,[45] consistent with the language actually employed.

The proper construction: purpose

64. Purpose resides in the text and structure of the provisions in question.[46] It is uncontroversial that the substantive purpose of sections 539 and 540 of the FW Act, when read together, is to identify the persons who have standing to bring proceedings in relation to alleged contraventions of the FW Act and the circumstances in which those persons have that standing.

65. The difficulty lies in identifying beyond this broadly stated purpose, how far (as a matter of purpose) the legislature sought to go in terms of identifying who has standing and when (see paragraph 25 above).

66. By being identified in section 539(2) of the FW Act itself, industrial associations are intended to have standing at least in some cases. The limitations on industrial associations in section 540, on the other hand, show that this standing does not extend to every contravention or every circumstance.

67. The construction adopted by the Full Court and contended for by the

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44 Based on the Full Court's reasoning, the drafting of these provisions is unnecessary and superfluous, unless the separation and use of the two concepts relates to the possibility of "representation orders".

45 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at 49 [57] (Hayne, Heydon, Crennan and Kiefel JJ).

46 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 389-90 [24]-[26] (French CJ and Hayne J).

respondent, makes the choice or view of the individual person affected by the contravention irrelevant. The express approval or conferral of authority to represent the industrial interests of the person in court proceedings would be irrelevant (the person still needs to be eligible to be a member of the association), as would the express withholding of consent or approval.

68. In the context of conferring standing on persons to bring civil penalty proceedings, the Parliament specifically avoided conferring an unfettered right on an industrial association to bring proceedings as a quasi-industrial regulator in relation to contraventions which do not affect them (unlike inspectors).[47] It introduced specific limitations through sections 540(6) and (7) requiring a level of connection between the industrial association and the person affected.

69. In that context, adopting a connection which ignores the views or preferences of the person affected and which essentially returns the industrial association to the position of a quasi-industrial regulator within a certain sphere of its own operations/activities (based on its eligibility rules), is not the most immediate or obvious of choices for the Parliament to have made when deciding between competing interests. In essence, it involves the taking away with one hand (by introducing a limitation to avoid regulator status) and the giving with the other (adopting a limitation which essentially confers regulator status).

70. Relatedly (and whether this be a point of context or a point of purpose), is the consequences of the construction adopted by the Full Court and the consistency of those consequences with the broader objectives of the FW Act. A lack of consistency suggests that such a construction was unlikely to have been intended by the legislature.[48]

71. If it is the case that the affected person need only be eligible to be a member of the industrial association for that association to have standing, then:

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47 The conferral of standing on an inspector in section 539(2) is not subject to any further limitations of the kind introduced in section 540 of the FW Act.

48 *Cooper Brookes (Wollongong) Pty Ltd v FCT* [1981] HCA 26; (1981) 147 CLR 297 at 320.8-321.5 (Mason and Wilson JJ); *Public Transport Commission of NSW v J Murray-More (NSW) Pty Ltd* [1975] HCA 28; (1975) 132 CLR 336 at 350.6-350.8 (Gibbs J); *FCT v Smorgon* [1979] HCA 67; (1979) 143 CLR 499 at 508-9 (Stephen J).

(a) a unilateral statutory right to represent the industrial interests of affected persons is created. As noted above, this right exists regardless of whether or not the affected person wishes to associate with the association or wants to litigate or participate in the litigation at all. The association could be said to be "*entitled to represent the industrial interests of*" a person with no pre-existing or other relationship with it, even where the person expressly seeks to avoid this;

(b) factual situations may arise where not only is there no relationship between the affected person and the industrial association, but there is no relationship between the industrial association and the activities of the contravening constitutional corporation;[49] and

(c) respondents can be subjected to the vexation of multiple proceedings[50] involving exactly the same conduct, one brought by the affected person and one brought by the industrial association who is said to "represent" that person's industrial interests.[51]

72. The legislative policy of "freedom of association", disclosed within the attendant objects of Part 3-1 of the FW Act,[52] is compromised by such a construction. Persons are free to join, participate in and be members of industrial associations and have their interests (industrial or otherwise) represented by them. Equally, persons are free to not join, not participate in and not be members of industrial associations, and hence, not have their interests represented by them. These objectives[53] are undermined by a construction of section 540(6) of the FW Act that permits an industrial association to interfere

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49 That is, the union may have no members in and have no active or historical presence in the industrial affairs of the employer.

50 And the potential for inconsistent judgments.

51 And a potential third brought by an inspector: *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507.

52 Section 336(1)(b) of the FW Act.

53 Notably different to the objectives of previous federal industrial legislation which, until 1996, empowered the Australian Industrial Relations Commission (and its predecessors) to make awards or orders granting preference to union members: section 40(b) of the *Conciliation and Arbitration Act 1904* (Cth) (as made); section 56 of the *Conciliation and Arbitration Act 1904-1950* (Cth); section 47 of the *Conciliation and Arbitration Act 1904-1973* (Cth); section 122 of the *Industrial Relations Act 1988* (Cth).

with and "represent" an affected person's industrial interests, absent their instructions and potentially contrary to their wishes.

73. In that context, it is perhaps not surprising that insofar as "freedom of association" contraventions are concerned, industrial associations (or unions) have not previously had such standing since the provisions were first introduced in 1904.[54]

Part VII: Applicable Constitutional and Statutory Provisions

74. See attached Annexure 1 to these submissions.

Part VIII: Orders Sought

75. The appellant seeks orders conformably with its Notice of Appeal.

Part IX: Time for Oral Argument

76. It is estimated that 1.5 hours will be required for the presentation of the oral argument of the appellant.

Dated: 16 June 2017

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[54] Prior to 1996, freedom of association contraventions were offences prosecuted on information: section 9(1) of the *Conciliation and Arbitration Act 1904* (Cth) (as made); section 5(1) of the *Conciliation and Arbitration Act 1904-1973* (Cth); section 334(1) of the *Industrial Relations Act 1988* (Cth) (pre and post 1993). From 1996 to 2005, see section 298T(2) of the *Workplace Relations Act 1996* (Cth). From 2005 to 2009, see section 807(4)(b) of the *Workplace Relations Act 1996* (Cth) (there were no persons prescribed by regulations (section 807(4)(c))).