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

10 **APPELLANT'S REPLY**

Part I: Certification

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

Part II: Argument in reply

2. The respondent's incorrect statement of the issue in paragraph 2 of the Respondent's Submissions (**RS**) is also reflected in later paragraphs[1] regarding the appellant's proposed construction. As noted in paragraphs 28-29 of the Appellant's Submissions (**AS**), the only relevant question before the Federal Circuit Court on the summary judgment application was whether the respondent's sole identifier of its entitlement to represent the industrial interests
20 of the affected classes (capacity to be enrolled as members under its eligibility rules)[2] was correct.

3. The Federal Circuit Court held that this was correct.[3] The appellant's only relevant ground of appeal to the Full Court was that the primary judge erred in

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1 See for example, paragraphs 6, 26-31 and 35 of the RS.

2 Paragraph 1 of the respondent's Response to Order for Further and Better Particulars dated 19 June 2015.

3 Primary Judgment at [29].

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reaching this conclusion.[4] The Full Court dismissed the appeal by concluding that the primary judge was correct to conclude that eligibility for membership conveyed the necessary entitlement.[5] That asserted error is now reflected in the appellant's Notice of Appeal in this Court.

4. Accordingly, the issue for this Court is not whether actual membership of the industrial association conveys the relevant entitlement, but rather, whether mere eligibility for membership (alone) conveys the relevant entitlement.

5. Paragraph 6 of the RS is somewhat misleading. The respondent's primary position was that it did not need to identify the persons because they were all eligible for membership (and thereby, the respondent was so entitled with respect to all of them).[6] The respondent's interlocutory application was stated to be made "*as a fallback*".[7]

6. Paragraph 12 of the RS is the first of several occasions where the respondent takes a different turn of phrase or collection of words, and moulds or asserts its consistency of meaning with the relevant statutory language in section 540(6) of the FW Act.[8] It is this process, repeated on several occasions (a process also adopted by the Full Court), which the appellant criticises in paragraphs 32-36 of the AS.

7. Further as to paragraphs 12-14 of the RS, the underpinning rationale for the holdings in *Burwood Cinema* and *Dunlop Rubber* regarding the role of unions, namely the settlement and prevention of industrial disputes by means of effective, enduring awards whose purpose is to create future rights,[9] has no

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4 Ground 2 of the Amended Notice of Appeal dated 15 August 2016.

5 Judgment at [60], [63] and [66]. See also paragraph 7 of the RS.

6 Transcript before the primary judge on 7 September 2015 at 8.6-8.13; Transcript before the primary judge on 12 November 2015 at 6.17-7.5.

7 Transcript before the primary judge on 12 November 2015 at 6.20-21.

8 "*[D]id not use the phrase in terms*" and "*tantamount to*". The crucial word upon which the appellant fixes ("entitled") is not relevantly used at all (nor is any related variant) in either *Burwood Cinema* or *Dunlop Rubber*, let alone as part of the relevant composite phrase used in section 540(6) of the FW Act.

9 And hence, the desirability of the unions acting as party principals making demands with respect to the employment of an ever-changing class of workers, who may (or may not) be

connection to the fundamentally different concept of affording standing to "industrial associations" to pursue alleged contraventions of civil penalty provisions in the FW Act, based on accrued rights.

8. As to paragraph 14 of the RS, there is no principle that a "*union stands in the place of all eligible employees*", nor did *Financial Clinic* hold that a union "represents" (let alone is entitled to represent) non-members. This Court has said that "*[a union] as a registered organisation does not 'represent' persons who are not and do not become members. They 'represent' those who are members from time to time, present and future members*".[10] In any event, this case is not about "representation" *per se*, but about the entitlement to represent a person's industrial interests (and its source).

9. Paragraphs 15-20 of the RS reflect paragraph 12 of the RS. In this regard, the appellant refers to and reiterates the criticism of this approach in paragraph 6 above. Further, paragraph 15 of the RS reflects the assumptions and presumptions of Jessup J below (which the appellant has addressed in paragraph 54 of the AS).[11]

10. In paragraphs 15(c), 17-18 and 20 of the RS, the respondent refers to a wide range of varying provisions, in different contexts, dealing with different topics across different statutes, which themselves use different phraseology. The respondent seeks to draw sustenance from numerous "variants" of the relevant phrase in historical statutes and in other judicial/administrative decisions.

11. Exemplifying the respondent's departure (and that of the Full Court) from the text of section 540(6), the respondent identifies three related but different statutory phrases[12] and asserts a consistency of meaning among all of them

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current or future members. See also paragraph 32 of the RS to the same effect.

10 *R v Graziers' Association of New South Wales; Ex parte Australian Workers' Union* [1956] HCA 31; (1956) 96 CLR 317 at 323.5 (Dixon CJ, McTiernan and Kitto JJ), cited in *Financial Clinic* at 361.9 (footnote 24).

11 "*It may be reasonably inferred…*" and "*It may be presumed…*"

12 Section 170AD of the IR Act: "*a trade union whose rules entitle it to represent the industrial interests of employees*" (a "trade union" was defined (in section 4(1)) in a similar fashion to that of "industrial association" in the FW Act, including both registered organisations and unregistered associations of employees, who may not have eligibility rules); section 616(4)(c) of

(and with section 540(6) of the FW Act), which meaning itself is expressly reflected in a fourth (and fifth) statutory phrase.[13] A forceful persuasive case would be required to justify such a significant departure from the legislature's chosen language, and in particular, to gloss over the differences in that chosen language. Ordinarily, it would be presumed that different phrases mean different things.[14]

12. As to paragraphs 17-18 of the RS (and further to paragraph 7 above), previous legislation granting standing to unions to initiate Court process, has on the whole, required more of the union than mere eligibility for membership.[15]

10 13. Paragraphs 20 and 25 of the RS attempt, unsuccessfully, to explain why the posited source of the "entitlement" does not apply to the subject of section 540(6) itself, being "industrial associations". In each case, the respondent merely asserts that this must be so because it suits its argument.[16] The respondent inevitably ends up promoting a meaning of the relevant phrase as a matter of legal construction, which somehow means different things for differently constituted bodies.

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the WR Act (post *Work Choices*): "*an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of the employee*"; section 178(5A)(d) of the WR Act "*an organisation that is entitled to represent the industrial interests of the member*".

13 Footnote 16 in the AS: "*eligible to become a member*" or "*eligible for membership*".

14 *Commissioner of Taxes (Vic) v Lennon* [1921] HCA 44; (1921) 29 CLR 579 at 590.5 (Higgins J, in dissent); *King v Jones* [1972] HCA 44; (1972) 128 CLR 221 at 266.3 (Gibbs J). Indeed, the respondent would ask the Court to presume that the same words are used consistently in different places (footnote 83 of the RS), whilst at the same time presuming that different words are also used consistently in different places.

15 Written request of an employee (sections 616(4)(c) and 632(4)(c) of the WR Act (post *Work Choices*)), some other form of request (sections 405(3), 495(7)(b) and 605(4)(b) of the WR Act (post *Work Choices*)), actual membership (s.170CE(4)(b) of the WR Act) or some other form of authority or support (section 170EA(2) of the IR Act; section 170CE(3) of the WR Act; section 643(3) of the WR Act (post *Work Choices*): "on behalf of" connotes authority or support from the employee (*R v Toohey; Ex parte Attorney-General (NT)* [1980] HCA 2; (1980) 145 CLR 374 at 386 (Stephen, Mason, Murphy and Aickin JJ)).

16 In paragraph 20 of the RS, the respondent again (like paragraph 11 above) seeks to gloss over as insignificant, changes in statutory language by the removal of what it describes as a "qualifier". For reasons the appellant has already identified, the reference to the so-called "*traditional entitlement*" of unions is also misplaced. In any event, "*An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it.*": *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Company Ltd* [1936] HCA 64; (1936) 57 CLR 610 at 625-6 (Dixon, Evatt and McTiernan JJ); *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 246 CLR 379 at 435 [147] (Heydon J).

14. Paragraph 22 of the RS is wrong. *Brideson's Case* does not stand for any such proposition.[17]

15. Paragraph 27 of the RS is the selective inverse of the last sentence of paragraph 32 of the AS, whereas paragraph 29 of the RS is the selective inverse of paragraph 60 of the AS. It is hard for the respondent to have it both ways.

16. Paragraph 40 of the RS contradicts paragraph 12 of the RS. In the former, the concept of "representation" does not extend to the representation of "industrial interests", whereas in the latter, it does.

10 Dated: 21 July 2017

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17 Firstly, its reference to the future is expressed as an "if", and secondly, the future relationship is not between the organisation and potential future members, but the organisation and other organisations.