IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M71 of 2016

BETWEEN:

REGIONAL EXPRESS HOLDINGS LIMITED
(ACN 099 547 270)
Appellant

and

AUSTRALIAN FEDERATION OF AIR PILOTS
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification for publication on the internet

1. The Respondent, the Australian Federation of Air Pilots (**AFAP**), certifies that this submission is in a form suitable for publication on the internet.

Part II: Statement of issue

2. The question before the Court is whether an industrial association is "*entitled to represent the industrial interests*" of an affected person for the purposes of the limitation on standing contained in s.540(6)(b)(ii) of the *Fair Work Act 2009* (Cth) (**FW Act**) only if the person is a member of the industrial association?

Part III: Certification in respect of s.78B of the *Judiciary Act 1903*

3. The AFAP certifies that it has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903* (Cth) and that no notice is required.

Part IV: Statement of the relevant facts

4. The AFAP agrees with the facts and chronology set out by the Appellant (**REX**), subject to the following additions.

5. The AFAP alleged that the effect of REX's letter to shortlisted applicants for its cadet program, referred to in Appellant's Submissions dated 16 June 2017 (**AS**) at [7], was to:

   (a) threaten that any of its employees who had completed the cadet program, and who insisted on their workplace right to appropriate accommodation during layovers

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Filed on behalf of: The Respondent

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under clause 58.1 of the *Regional Express Pilots' Enterprise Agreement 2011*, would not hold a position of command ('affected class one');

(b) require the recipients of the letter to provide a written undertaking that they would not, if offered employment, enforce this workplace right ('affected class two').[1]

6. The recipients are "*presently unidentified*" because REX has refused to identify them.[2] The basis for REX's application to dismiss the AFAP's claim in the Federal Circuit Court was that the AFAP was "*entitled to represent the industrial interests*" of the recipients, for the purposes of s.540(6)(b)(ii) of the FW Act, only if they were members (**REX's construction**).[3] The AFAP could not establish that the recipients of the letter were members, not knowing who they were.

7. Unsuccessful with its application, REX pursued the same argument on appeal to the Full Court.[4] It acknowledged during the running that the AFAP had identified one member in affected class one,[5] and modified the order sought to the dismissal of all parts of the proceeding save those relating to that member.[6] The Full Court dismissed the appeal on the basis that, in the case of an employee organisation like the AFAP, coverage of a person under its eligibility rules is sufficient for the purposes of s.540(6)(b)(ii) to give rise to an entitlement to represent the person's industrial interests (the **Full Court's Construction**).[7]

Part V: Statement of constitutional provisions, statutes and regulations

8. REX's statement of applicable constitutional provisions, statutes and regulations is accepted by the AFAP subject to the addition of the provisions in Annexure A.[8]

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[1] *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2016) 244 FCR 344 at [4], [5] and [7]. The majority judgment of North and Jessup JJ, with which White J agreed subject to the qualification at [66], is referred to hereafter as **AJ**.

[2] On 15 July 2015, the AFAP sought production of each letter sent: Exhibit JMW-9 to the affidavit of Jennifer Mary Winkworth affirmed 31 July 2015. REX produced redacted copies of the letter: Exhibit AZM-5 to the affidavit of Andrew Zoltan Molnar affirmed 6 October 2015. The AFAP's application for answers to interrogatories to the identity of the recipients of the letter has not been heard: AFAP Application in a Case dated 6 October 2015 at [1].

[3] See Federal Circuit Court Outline of Submissions in support of Application dated 5 November 2015 at [26].

[4] REX Outline of Submissions to the Full Federal Court dated 15 July 2016 (**FC AS**) at [1].

[5] In its Response to Order for Further and Better Particulars dated 19 June 2015 at [2], noting the Amended Statement of Claim dated 22 May 2015 (**ASOC**) paragraph 17(c).

[6] Appeal transcript dated 15 August 2016 (**T**) 35.4-37.21; T48.20-44; Amended Notice of Appeal dated 15 August 2016, Order 3.

[7] AJ[60].

[8] Where the AFAP and REX rely on the same provisions in different versions of an Act, and there is no difference between the provisions, they have not been included in Annexure A.

Part VI: The Respondent's argument

The proper construction of s.540(6) of the FW Act

9. Whilst the task of construction begins with the ordinary meaning of the words of the provision having regard to the Act as a whole,[9] the meaning of the phrase "*entitled to represent the industrial interests*" is not plain from the text, or otherwise defined.[10] Indeed, it was REX's case on appeal to the Full Court that the phrase was open to competing constructions.[11]

10. To determine Parliament's intent, the Full Court had recourse to the words used by the legislature in context.[12] For purposes of statutory construction, context is not limited to the context of the Act.[13] It includes legal and historical context.[14] The Full Court's consideration of historical statutory provisions and decided cases was not only supported by established principle, but also encouraged by REX.[15]

The case law

11. The starting point for the Full Court's analysis of the legal and historical context was the seminal case of *Dunlop Rubber*.[16] *Dunlop Rubber* was concerned with the capacity of a union to generate an industrial dispute, a necessary prerequisite for the making of

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[9] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at 389 [24] (French CJ and Hayne J) and 411 [88] (Kiefel J).

[10] Cf AS [26], [27] and [35]. The Full Court did not find or imply that that the phrase meant, literally, to have a member: cf AS [27].

[11] T22.6-25; 28.37-47.

[12] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.3-4 (Brennan CJ, Dawson, Toohey, Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381[69] (McHugh, Gummow, Kirby and Hayne JJ); *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 at 473[10] (French CJ, Kiefel, Nettle and Gordon JJ).

[13] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 230[124] (McHugh J).

[14] *Network Ten v TCN Nine Pty Ltd* (2004) 218 CLR 273 at 280-281[11] (McHugh A-CJ, Gummow and Hayne JJ), citing *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112.7-9 (McHugh J); *Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at 519[39] (French CJ, Hayne, Crennan, Bell, Gageler JJ). For an example relating to the FW Act: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay and Anor* (2012) 248 CLR 500 at 517-521[46]-[52] (French CJ and Crennan J) and 525-536[72]-[106] (Gummow and Hayne JJ). For another example, see *R v Lavender* (2005) 222 CLR 67 at 83[41] (also see 79-80[31], 81[33], 83-85[42]-[48] and 86[54]) (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[15] REX relied on both past cases and legislative history in support of the case brought on appeal to the Full Court, submitting that the history was "*instructive*": REX's FC AS at [14]; REX outline of submissions in Reply dated 1 August 2016 (**Reply**) at [15] to [18]; T3.36-38. Cf AS [32].

[16] *R v Dunlop Rubber Australia Ltd* (1957) 97 CLR 71 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) (***Dunlop Rubber***). See AJ[16].

an award or agreement under the then applicable provisions of the *Conciliation and Arbitration Act 1904* (Cth)[17] which relied on s.51(xxxv) of the Constitution.[18] It was already established, in *Burwood Cinema*,[19] that a union stood for an industrial group or represented its interests, such that any disagreement between it and the representatives or members of another industrial group would create an industrial dispute.[20] The question in *Dunlop Rubber* was how to define that industrial group.[21] A unanimous High Court held that a union's eligibility rules provided the "*criterion for ascertaining or defining the group or class in the place of which it stands for industrial purposes or which it 'represents'*".[22]

10 12. The case of *Dunlop Rubber* is important for two reasons. First, we see the inception of the phrase "*entitled to represent the industrial interests*". Whilst the Court did not use the phrase in terms, the notion that a union stands in the place of an industrial group is tantamount to an entitlement to represent it. A representational role for "*industrial purposes*" encapsulates the concept of representing industrial interests, or the common interests of employees in a particular industry by reference to the employees' vocation or the nature of the enterprise.[23] This is the way the test (or, as described by Jessup J, the *Dunlop Rubber* principle[24]) was thereafter understood.[25] It was considered "*trite*

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[17] Herein referred to as the **C&A Act**: ss.24, and 73 of the C&A Act (No 13 of 1904, as passed). At the time of *Dunlop Rubber* s.24 had been amended and renumbered as ss.16Q and 16R by s.7 of Act No 44 of 1956, with that Act (together with Act No 10 of 1947) also renumbering s.73 as s.172.

[18] *Commonwealth of Australia Constitution Act 1900* (Cth) (**Constitution**).

[19] *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees' Association* (1925) 35 CLR 528 (***Burwood Cinema***).

[20] *Dunlop Rubber* at 80.4-6 (the Court), citing *Burwood Cinema* (see 548.8-549.6 (Starke J)).

[21] *Dunlop Rubber* at 83.6 and 87.4 (the Court).

[22] *Dunlop Rubber* at 87.5 (the Court).

[23] In *Federated Engine Drivers' & Firemen's Association of Australia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, both Griffiths CJ (at 412.4-5, representing the majority) and O'Connor J (435.9-436.2, in dissent) considered that 'industrial interests' were the common, or community of, interests between workers in an industry, although they disagreed on the meaning of 'industry'. Parliament amended the definition of 'industry' in s.4 of the C&A Act (Act No. 6 of 1911, s.3) to include both the vocation of employees and the business of employers, consistent with O'Connor J's position: see; *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 470.1-4 (Dawson J). As a result of *Dunlop Rubber*, the delineation of the particular industry was determined by its eligibility rules: *Linehan v Transport Workers' Union of Australia* (1981) 76 FLR 328 (***Linehan***) at 337.1-3 (Northrop J); *Australian Education Union v Lawler* (2008) 104 ALD 258 at 341-342[254] (Jessup J).

[24] AJ[36].

[25] Cf AS [47]-[52]. See *R v Clarkson: Ex parte Victorian Employers' Federation* (1973) 131 CLR 100 (***Clarkson***) at 113.5-6 (Gibbs J), noting footnote 33; *R v Moore: Ex Parte Australian Workers' Union* (1976) 11 ALR 449 at 455.5-7 (Barwick CJ; Gibbs, Stephen, Mason and Jacobs JJ agreeing at 456.7-9); *Electrical Trades Union of Australia & Anor v Waterside Workers Federation of Australia & Ors* (1982) 42 ALR 587 at 589.9-590.2 and 591.2 (Bowen CJ, Evatt and Deane JJ); *Community and Public*

law" that an organisation was entitled to represent the group of employees that fell within its conditions of eligibility.[26]

13. Secondly, the *Dunlop Rubber* principle did not require that the employees in whose place the union stood **be** identified members under its rules.[27] The old doctrine to this effect had already been abandoned,[28] and was again disavowed in *Dunlop Rubber*.[29] The Court accepted, as had Courts before it in *Burwood Cinema* and *Metal Trades*[30], that a union represents both present and future members;[31] and the class of present and future members in whose place a union stands is an ever-changing body.[32] The union's representational role, extending to future members, meant, self-evidently, that existing membership was not required. Thereafter the right of an organisation to create an industrial dispute, irrespective of whether it had a member of not, remained uncontroversial.[33]

Sector Union & Ors v Pacific Access Pty Ltd (1998) 89 FCR 106 (***CPSU***) at 110.8-9 (Marshall J); *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia & Ors* (2001) 109 FCR 378 at 395[67] (Merkel J).

[26] *Co-operative Bulk Handling Ltd v Australian Workers' Union (WA Branch) Workplace Union of Workers* (1980) 32 ALR 541 at 554.7 noting 548.8 (JB Sweeney, Evatt and Northrop JJ). Cited with approval in *R v Williams: Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 408.2-4 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

[27] Cf AS [50].

[28] The doctrine was found in *R v Hibble; Ex parte Broken Hill Pty Ltd* (1921) 29 CLR 290 (***Hibble's case***) at 298.4 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). The related principle accepted in *R v President of the Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild of Australasia; Ex parte Holyman & Sons* (1914) 18 CLR 273, that a dispute must exist between particular members employed by particular employers before an organisation could claim, was overruled in *Burwood Cinema*: at 542.4 (Isaacs J); 544.1 (Powers J); 548.3 (Rich J); 551.3 (Starke J). Thereafter *Hibble's* case was no longer considered decisive: *R v Portus & Anor; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428 at 433.1-5 (Latham CJ).

[29] At 80.9-81.2 (the Court).

[30] *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 (***Metal Trades***).

[31] *Dunlop Rubber* at 81.7 (the Court), citing *Burwood Cinema* (see 538.5-8 (Isaacs J), 543.4-5 and 546.9 (Powers J) and 548.3-8 (Starke J)). This recognition provided the basis for the determination in *Burwood Cinema* that an organisation could make claims of an employer that did not presently employ any of its members (see Question (2) at 532.5; 538.5 (Isaacs J), 546.9 (Powers J), 547.2 (Rich J) and 551.5 (Starke J)). See also: *Metal Trades* at 404.4-6 (Latham CJ) and 418.7 (Rich and Evatt JJ); *R v Portus* (1949) 79 CLR 428 at 432.2 and 432.9-433.1 (Latham CJ).

[32] *Dunlop Rubber* at 81.8-9 and 83.1-2 (the Court); *Burwood Cinema* at 548.8 and 549.4 (Starke J). It was the unascertainable nature of the constituents of the class which gave rise to the need for the test, identified in *Dunlop Rubber*, to define the class on account of which it acts: at 83.6 and 87.4 (the Court).

[33] *R v Cohen* (1979) 141 CLR 577 at 584.8-585.1 (Mason J with Gibbs, Stephens and Aickin JJ agreeing at 581.4, 582.4 and 592.8); *R v Cohen; Ex parte Attorney General (Qld)* (1981) 157 CLR 331

14. *Financial Clinic*[34], to which REX refers,[35] does not depart from the principle that a union stands in the place of all eligible employees. A union's 'representation' of members both present and future was accepted in that case.[36] *Financial Clinic* was concerned only with the nature of the claim that could be made by a union in so doing. It was in this context that the majority distinguished *Metal Trades*, because the claims in question could **not ever** affect the industrial interests of the union's members, or those who became its members.[37]

The legislative history

15. Next the Full Court considered the legislative use of the phrase "*entitled to represent the industrial interests*", and its variants, in past industrial legislation.[38] This careful consideration of the legislative history illustrates that the *Dunlop Rubber* principle has been invoked through the use of the phrase.[39] The following examples from the legislative history demonstrate Parliament's intention that the phrase mean an entitlement to stand in the place of those eligible to become members:

    (a) Parliament delineated the right of an organisation to be heard on an application to the Commission to certify an agreement made for the settlement or prevention of an industrial dispute for the first time in the post reform *Industrial Relations Act*

(***Cohen 1981***) at 337.6 (Gibbs CJ with Aickin and Brennan JJ agreeing at 343.1 and 350.6) and 348.2-3 (Wilson J); *CPSU* at 110.8-9 (Marshall J).

Menzies J in *Clarkson* did not seek to limit the *Dunlop Rubber* principle to members that fall within an organisation's eligibility rules, but rather confirm in obiter dicta (109.5) that the principle could not be distinguished on the facts of case, which related only to existing members (at 110.5-8 and 111.2-3): cf AS [51].

[34] *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 (***Financial Clinic***).

[35] AS [50].

[36] At 361.9 (Mason CJ, Dean, Toohey and Gaudron JJ).

[37] At 363.5-364.1 and 364.6 (Mason CJ, Dean, Toohey and Gaudron JJ). It was held in *Metal Trades* that a union may make claims relating to non-member wages and conditions if they affect the industrial interests of its members: see 403.1-2, 411.2 (Latham CJ); 418.3-5 (Rich and Evatt JJ); 442.6-9 (McTiernan J). In *Financial Clinic* it was not contested that there was an industrial dispute relating to members; leaving for consideration only claims relating to employees who were not, and would never become, members.

A similar analysis applies to *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* (1956) 96 CLR 317 (cited in AS footnotes 29 and 35): see esp. 323.6 (Dixon CJ, McTiernan and Kitto JJ). The remaining cases cited by REX, at AS footnotes 10 and 12, were concerned with issues of procedural fairness, not union standing.

[38] AJ[18] to [47].

[39] Cf AS [54].

1988 (Cth).[40] Section 170MB(1)(c) allowed an organisation to be heard where it was entitled to represent the industrial interests of members employed by a party to the agreement. It may be reasonably inferred that the reference to an entitlement to represent industrial interests, in the context of the capacity of organisations to make agreements equivalent to those existing at the time of *Dunlop Rubber*,[41] was intended to encapsulate the *Dunlop Rubber* principle.

(b) Parliament chose to adopt the phrase in the *Workplace Relations Act 1996* (Cth)[42] to delineate the right of an organisation to make agreements relying on s.51(xx) of the Constitution,[43] which allowed the organisation to apply to be heard on any application to the Commission to certify such agreements.[44] A Full Bench of the Commission accepted in this context that it was the eligibility rules of an organisation that entitled it to represent the industrial interests of employees.[45] The phrase was thereafter adopted to delineate the right of an organisation to make agreements relying on s.51(xx) of the Constitution in the WR Act as amended by the *Workplace Relations (Work Choices) Act 2005* (Cth).[46] It may be presumed that the words were intended to bear the meaning previously attributed to them.[47]

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[40] The *Industrial Relations Act 1988* (Cth) (No. 86 of 1988), as passed (**pre reform IR Act**) was amended by the *Industrial Relations Reform Act 1993*, as at 18 February 1994 (**post reform IR Act**). Prior to the post reform IR Act an organisation was entitled to request certification from the Commission by reason of being a party to an industrial dispute: s.24(1) C&A Act (as passed; renumbered at the time of *Dunlop Rubber* as s.16Q by s.7 of Act No 44 of 1956); s.115(1) and (3) of the pre reform IR Act.

[41] See s.170 MA(1) of the post reform IR Act and footnote 40.

[42] The post reform IR Act as amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), as at 20 January 1997 (**WR Act**).

[43] Sections 170LJ(1)(b) and 170LL(2); based on the corporations power by reason that the employer had to be a Constitutional corporation: s.170LH. Agreements relying on s.51(xx) of the Constitution were introduced by the post reform IR Act: s.170NA; Australia, House of Representatives, *Industrial Relations Reform Bill 1993*, Supplementary Explanatory Memorandum at p. 26.9; *The State of Victoria & Ors v The Commonwealth* (1996) 187 CLR 416 (***Industrial Relations Act Case***) at 533.7-534.1, 539.3-5, 542.6 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). A variant of the phrase was relied on in that Act to delineate the role of organisations in negotiating such agreements: s.170RB(2).

[44] Section 43(2)(b), noting s.170M(2).

[45] *CSR Limited Officers' Association v CSR Limited* (1997) 76 IR 310 at 312.1-3.

[46] As at 31 March 2006 (**Work Choices Act**). See ss.328(b) and 329(2); based principally on the corporations power: *NSW v Commonwealth* (2006) 229 CLR 1 (***Work Choices* case**) at 59-60[8]-[10], 62[19] and 138[252] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[47] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106.7 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Whilst the presumption has been questioned in certain contexts, the principle is readily

(c) Parliament conferred standing on organisations based on an entitlement to represent industrial interests in various contexts outside of agreement-making, again commencing with the post reform IR Act. Standing was conferred on trade unions to apply for orders[48] and pursue contraventions in the Commission,[49] based on their entitlement to represent industrial interests in relation to minimum entitlements.[50] Similar provisions were carried over to the WR and Work Choices Acts.[51] The WR Act marked the first use of the phrase in relation to the standing of organisations to commence court proceedings to pursue contraventions, in this instance, in relation to breaches of certified agreements.[52] By the commencement of the Work Choices Act, the standing of organisations to pursue contraventions subject to, inter alia, an entitlement to represent industrial interests extended to prohibited conduct in the process of agreement making;[53] breaches relating to Australian workplace agreements;[54] contraventions relating to obligations on the transmission of business[55] and breaches of awards or orders of the Commission.[56] Critically, the basis of the organisation's entitlement to represent was expressly identified as its eligibility rules in each of these provisions,[57] putting beyond doubt Parliament's intent that the *Dunlop Rubber* principle be the determinant for any entitlement to represent.

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applied in the field of industrial relations: *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347[81] (McHugh J); 371[162] (Gummow, Hayne and Heydon JJ). Both cases were cited recently in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-503[15] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). The re-enactment principle may apply to a decision of a specialist tribunal ordinarily administering an Act: *Pagliacci v General Motors-Holdens Ltd* (1980) 23 SASR 126 at 140.2-4 (King CJ, with Sangster J agreeing at 141.7); *Vincent v Council of Shire of Johnstone* [1997] 1 Qd R 554 at 556.5-9 (Dowsett J, McPherson and Davies JJA agreeing at 555.5). Cf AS [55].

[48] Sections 170AD (noting s.170AC), 170BD(a) (noting s.170BC) and 170FB (noting s.170FA) of the post reform IR Act.

[49] Section 170EA(2) and s.170GB(b) (noting s.170GA) of the post reform IR Act.

[50] Minimum entitlements were introduced by the post reform IR Act in relation to minimum wages (Div 1 of Part VIA), equal remuneration (Div 2 of Part VIA) and termination of employment (Div 3 of Part VIA).

[51] WR Act: s.170BD(a) (noting s.170BC); s.170CE(3) (in relation to ss.170CK, s.170CM and s.170CN); s.170CE(4) (in relation to s.170CL); s.170FB (noting s.170FA); s.170GB(b), (noting s.170GA). Work Choices Act: s.616(4)(c) (noting s.615); s.625(a) (noting s.624); s.632(4)(c) (noting s.631); ss.643(3)&(4) (in relation to ss.659, 660 and 661, noting s.663(3)&(4)); s.669(b) (noting s.668).

[52] Section 178(5A)(d).

[53] Section 405(3) (in relation to ss.334(2), 365(1), 366(1), 392(6), 393(6), 400(1), (3)&(5), 401(1)).

[54] Sections 495(7)(b) and 718(5).

[55] Section 605(4)(b) (in relation to ss.599(4)) and s.605(5), items 1(b), 2(c) and 3(b).

[56] Section 718(1), items 3(d) and 5(c).

[57] Save for s.178(5A) of the WR Act.

16. The traditional meaning attributed to the phrase "*entitled to represent the industrial interests*" in industrial legislation cannot be differentiated on the basis that *Dunlop Rubber* was concerned with the capacity of an organisation to generate an industrial dispute, and statutory provisions reliant on s.51(xxxv) of the Constitution. The synopsis of historical legislation above demonstrates its use in various contexts, including standing to pursue contraventions, in provisions relying on various Constitutional powers.[58]

17. The legislative history demonstrates, additionally, that standing has been conferred on unions to pursue contraventions based on an entitlement to represent an affected person's industrial interests by reason of its eligibility rules, irrespective of whether the person was a member, since the pre-reform IR Act. Whilst in some instances the affected person had to be a member also,[59] in many others it was sufficient that the union have '*a*' member.[60] The member did not have to be the affected person. In other instances there was no membership requirement at all.[61]

18. REX's assertion that unions have never had standing to pursue freedom of association contraventions on behalf of non-members since 1904 is incorrect.[62] Unions (and indeed anyone) had standing to prosecute freedom of association contraventions prior to

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[58] For example, agreements reliant on the corporations power: see paragraph 15 (b). The minimum entitlement provisions introduced by the post reform IR Act (see footnotes 48, 49, 50) were supported by the external affairs power: ss.170AA, 170BA and 170CA; *Industrial Relations Act Case* at 492.9 and 503.9 (in relation to Div 1 of Pt VIA, minimum wages), at 505.2-3 and 510.4 (in relation to Div 2 of Pt VIA, equal remuneration) and at 511.6 and 518.6 (in relation to Div 3 of Pt VIA, termination of employment) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). The reasoning of the *Industrial Relations Act Case* applied to the minimum entitlement provisions carried over to the WR Act and the Work Choices Act (see footnote 51) to the extent they were based on the external affairs power: ss.170BA, 170CA((1)(e) and 170CK(1) of the WR Act; ss.620 and 635(1)(e) of the Work Choices Act. Provisions of the Work Choices Act that applied only to s.6(1) employers also relied on the corporations power: the provisions in Div 1, 2 and some parts of 3, relating to meal breaks, public holidays and terminations; *Work Choices* case at 135[240] and 138[252] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

In the Work Choices Act, the contravention provisions found in Parts 8 (footnote 53) and 9 (footnote 54) were based on the corporations power: *Work Choices* case at 59-60[8]-[10] (generally), 62[19], 135[240] and 138[252] (in relation to Part 8), 138[253] and 140[262] (in relation to Part 9) (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[59] Section 178(5)(d) of the post reform IR Act; s.170CE(4) of the WR Act; s.643(4) of the Work Choices Act.

[60] WR Act: s.178(5A)(d); Work Choices Act: s.718(1), items 3(d) and 5(c). Where a request from the affected person, in addition to 'a' member was required, see: s.405(3) (in relation to ss.334(2), 365(1), 366(1), 392(6), 393(6), 400(1),(3)&(5), 401(1)), s.495(7)(b), s.616(4)(c) (noting s.615), s.632(4)(c) (noting s.631), and s.718(5).

[61] Post reform IR Act: s.170EA(2), s.170GB(b); WR Act: s.170CE(3), s.170GB(b); Work Choices Act: s.605(5) item 3(b), s.643(3), s.669(b) (noting s.668).

[62] Cf AS [73].

1996.[63] The WR Act then confined the standing of organisations and industrial associations to prosecute freedom of association contraventions affecting members but, in contrast to s.540(6) of the FW Act, it did so in terms.[64] Whilst some provisions of the Work Choices Act precluded organisations and industrial associations from pursuing freedom of association contraventions on behalf of affected people, members or otherwise,[65] other provisions conferred standing provided an organisation was entitled to represent the industrial interests of at least one member under its rules.[66] The affected person did not need to be a member.

The current legislative scheme, as a whole

10 19. An employee organisation's entitlement to represent industrial interests understood by reference to its eligibility rules applies consistently with the provisions in the FW Act.[67] Further, the traditional meaning of "*entitled to represent the industrial interests*" gives the phrase meaningful content. The requirement that a union have an entitlement to represent industrial interests, understood by reference to eligibility rules, delineates its industrial coverage in relation to the work or workplace in question.[68] Membership alone will not necessarily achieve this. A member, having been eligible for membership through work or qualifications, will not necessarily be employed to perform work

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[63] Until 1996 freedom of association contraventions were offences: ss.9 and 50 of the C&A Act (as passed); s.5 C&A Act (as at 30 September 1986); s.334 of the pre and post reform IR Act. Offences were prosecuted by summons issued on information without indictment: s.191(2) of the C&A Act (as at 30 September 1986; introduced by Act No 18 of 1951 (s.15)); s.341 pre reform IR Act; Order 49.01 of the *Industrial Relations Court Rules 1994*. Any person could institute proceedings for the summary conviction of a person in respect of any offence against the law of the Commonwealth: s.13 of the *Crimes Act 1914* (Cth) (No. 12 of 1914); *Bowling v General Motors Holdens Ltd* (1980) 33 ALR 297 at 301.1-2 (JB Sweeney, Evatt and Northrop JJ).

[64] Section 298T(2)(b) and (c) of the WR Act.

[65] Section 807(4) (noting s.806) of the Work Choices Act relating to freedom of association contraventions.

[66] E.g. s.405(3) (in relation to ss.400(1),(3)&(5): coercion and duress in relation to a collective agreement; 401(1): false or misleading statements in relation to a workplace agreement); s.616(4) noting s.615 (prejudice for refusal to work on a public holiday); s.632(4) noting s.631 (prejudice in relation to application for an equal remuneration order). These provisions are comparable to ss.342, 343 and 345 (noting s.341(1)&(2)) found in Part 3-1 of the FW Act.

[67] For instance, a permit holder is conferred various rights of entry in relation to employees whose industrial interests the permit holder's organisation is entitled to represent: ss.481(1)(a), 483A(1)(a)(i) and 484(1)(b) of the FW Act. The permit holder must give the employer an entry notice that specifies "*the provision of the organisation's rules that entitles the organisation to represent*" that employee: s.518(2)(d) and (3)(c). According to the Australia House of Representatives, *Fair Work Bill 2008,* Explanatory Memorandum (**EM**), it is those *"rules which provide that coverage"*: EM at 313[2062]. Note also 306[2001].

[68] Noting footnote 23.

within the industry at all times.[69] Therefore, when the traditional meaning is attributed to the phrase, the dual requirements in a number of provisions of the FW Act for a union to have both a member, and an entitlement to represent that member's industrial interests, is explicable.[70]

20. Parliament has not expressly qualified the phrase "*entitled to represent the industrial interests*" in the FW Act by reference to eligibility rules, as it has sometimes done in the past. The absence of a qualifier does not undermine the traditional entitlement of unions accruing by reason of eligibility rules, but rather allows for other possibilities in different circumstances. As REX points out, standing is conferred on industrial associations in these terms, and all industrial associations do not necessarily have eligibility rules.[71]

21. Insofar as the FW(RO) Act is relevant as part of the legislative scheme,[72] the accepted meaning of the phrase "*entitled to represent the industrial interests*" sits harmoniously with the requirement that an organisation have rules that contain conditions of eligibility for membership;[73] the entitlement of a person who is eligible under those rules to become a member;[74] the requirement that an organisation seeking registration undertake to avoid demarcation disputes where there is an overlap between its eligibility rules and

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[69] Where a person who is qualified to be an employee of the type falling within an organisation's eligibility rules is entitled to become a member even if the person has never been employed in the occupation (s.166(3) of the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FW(RO) Act**)), and a person who ceases to be eligible to become a member may remain a member provided that the rules of the organisation permit it (s.166(2) FW(RO) Act).

[70] Cf AS [59] and [60]. Note that the requirement for an organisation to have an entitlement to represent a person's industrial interests, as well as the person being a member, also excludes the possibility of a member under a State based agreement who is not eligible pursuant to an organisation's eligibility rules (s.151(1) and (6) FW(RO) Act); a disentitling representation order (ss.133(1)(c) and s137A(1)(b) FW(RO) Act); or an exclusive right of representation conferred on another organisation (ss.133(1)(a) and 137A(1)(a) FW(RO) Act).

[71] Addressed further in paragraph 25. This explains, also, why the standing provisions throughout the FW Act which require an entitlement to represent industrial interests do so without reference to eligibility rules in contrast to other (unrelated) provisions of the FWRO Act that expressly refer to eligibility rules for content-related reasons: cf AS footnote 16.

[72] Where the operation of the Acts deal with related subject matter and each depends upon the other: *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 414[97]-[99] (Kiefel J). The subject matter addressed by the FW Act and FW(RO) Act was formerly addressed in the one Work Choices Act. See also Australia, House of Representatives, *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009,* Explanatory Memorandum at 115[699]-[700].

[73] Sections 140(1) and 141(1)(a) of the FW(RO) Act.

[74] Section 166(1) of the FW(RO) Act.

those of another organisation;[75] and, in the event of a dispute, representation orders conferring an exclusive right on an organisation to represent industrial interests of a particular group of employees who are eligible for membership.[76]

22. Section 19(1)(a)(ii) of the FW(RO) Act, which requires that an association applying for registration must further and protect the interests of members, does not confine the representational role of organisations because it relates not only to members existing at the time of registration, but those eligible to become members in the future.[77] The same requirement has existed since the time that *Burwood*, *Metal Trades* and *Dunlop Rubber* were decided.[78]

10 *Industrial associations*

23. Section 540(6) is concerned with industrial associations, rather than organisations. Industrial associations include not only employee organisations registered under the FW(RO) Act, like the AFAP, but other formal and informal associations.[79] The Full Court considered that the entitlement of an industrial association, which is also an employee organisation, should be construed consistently for the purposes of ss.540(6) and 540(2)(b).[80] Its standing to pursue different civil remedy contraventions on behalf

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[75] Section 19(2) of the FW(RO) Act, where a demarcation dispute, as defined in s.6, includes a dispute about the representation of the industrial interests of employees under the FW or FW(RO) Acts by an organisation of employees.

[76] Sections 133(1)(a) and 137A(1)(a) of the FW(RO) Act.

[77] Cf AS footnote 28. *Re Coldham; Ex parte Brideson* (1989) 84 ALR 165 at 172.3 (Wilson, Deane and Gaudron JJ), in relation to the same requirement under then reg.115(1)(b) of the *Conciliation and Arbitration Regulations* (Cth) incorporating amendments to 30 September 1986 (**C&A Regulations**); on remittal to the AIRC: *Teachers' Association of Australia* [1989] AIRC 1043, Coldham J and Smith C at 6.6-7. For a comparable analysis of other registration requirements, note *Australian Education Union v Lawler* (2008) 104 ALD 258, Jessup J at 344[261], in relation to s.18(1)(b) of Sch 1B of the WR Act (as at 2003).

[78] Reg. 15 of the *Commonwealth Conciliation and Arbitration Act Regulations* 1904-1909 (later becoming reg.115(1)(b) of the C&A Regulations); s.189(1)(a)(ii) of the pre and post reform IR Act; s. 189(1)(a)(ii) of the WR Act; ss.19(1)(a)(ii) and 20(1)(a)(ii) of Schedule 1, Chapter 2, Part 2, Div 2 of the Work Choices Act.

[79] Section 12 FW Act. Note, an informal association would not have legal capacity to sue as it is not a juridical entity: *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 at 576 [47] (Mason P). It is not conferred separate legal identity. Express provision is made for attributing conduct and liability only: ss.363(1)(e) and 364(2) of the FW Act; note EM at 236 [1474]. For an illustrative example, see EM at p.225.1.

Past industrial legislation conferred standing on 'trade unions', which were comparable to industrial associations, to pursue contraventions and apply for orders relating to minimum entitlements to the extent they had eligibility rules: see s.4 of the post reform IR Act, the WR Act and the Work Choices Act and footnotes 48, 49 and 51; cf AS [37] and [38].

[80] AJ[61]-[62]. The Full Court did not require evidence of the differing position of industrial associations that are employee organisations for it to reach this conclusion: cf AS [42] and [43]. It was REX's case on appeal that registered organisations such as the AFAP must have eligibility rules as a

of affected people under s 539(2) is thereby the same, whether that standing is conferred on an entity in its capacity as an employee organisation[81] or as an industrial association.[82] This construction gives effect to Parliament's objective to achieve consistent standing rules for employee organisations across the FW Act.[83]

24. Section 540(7) does not impact the validity of this reasoning.[84] The import of s.540(7), where standing is conferred on an employee organisation by reason of it being an industrial association, is directed towards the difference between the standing conferred on employee organisations and industrial associations. For instance, where conferred standing as an industrial association, an employee organisation may bring an application as an affected party under sub section (6)(a), whereas standing is not otherwise conferred on an employee organisation to do so.[85] Section 540(7) does not bear on the proper construction of the standing conferred, in relevantly identical terms, by ss.540(2) and 540(6)(b).

25. The approach of the Full Court leaves open the possibility that the phrase "*entitled to represent the industrial interests*" will have different meanings for different types of industrial associations. This possibility is inevitable, on either the Full Court's construction or REX's.[86] There is no sensible construction of the phrase that applies

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matter of law (FC AS at [11]), raising in reply and oral submissions that there is no legislative requirement that other industrial associations will have eligibility rules (Reply at [3]; T15.33-39; 30.45-31.3). Nor did the Full Court adopt a conclusion to which no argument was addressed: see T77.19-78.16, 78.34-79.2. REX did not reply.

[81] For eg, s.539(2) items 1(b), 2(c), 3(d), 5(c), 8(b), 9(b), 10(b), 13(b), 27(b), 30(b), 34A(c) and 34B(c).

[82] For eg, s.539(2) items 11(b), 12(b), 35(b), 36((b) and 38(b).

[83] EM at 326 [2133]: '*The standing rules in relation to an employee organisation or a registered employee association are designed to be consistent across the Bill to ensure consistency and simplicity in proceedings involving them'*. There is a presumption also that a phrase has the same meaning throughout an Act: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618.6 (Mason J, with Barwick CJ and Jacobs J agreeing at 616.1 and 621.2) and *Thirteenth Beach Coast Watch Inc v The Environment Protection Authority* (2009) 29 VR 1 at 6[10] (Cavanough J). The presumption should not be displaced on the basis of unidentified amendments to the FW Act (cf AS [36]) in circumstances where the phrase was used throughout the Act, including in s.540(2)(b) and (6)(b)(ii), from the time it was originally enacted.

[84] Cf AS [39(b)].

[85] Further, where conferred standing as an industrial association to bring an application on behalf of another affected person, the additional matters relevant to employee organisations under sub-section (3) and (4) do not apply.

[86] REX conceded, even on its own construction, membership may not give rise to an entitlement to represent industrial interests depending on the particular facts: Applicant's Argument in Reply to the High Court dated 23 December 2016 at [14]. It is impossible to reconcile REX's current assertion that any construction of s.540(6) must cater for the entire range of entities, whilst at the same time still contending other interpretations may be open: AS [28] cf [39(a)] and [40].

with uniformity. This is because the entitlement of industrial associations to represent the industrial interests of affected people, outside those registered under the FW(RO) Act, is fact specific. For this reason the Full Court was correct, with respect, to leave the operation of the subsection with respect to industrial associations that are not employee organisations to a case in which the question arises.

The reasons why REX's construction does not work

26. Until now, REX has prosecuted its application to dismiss or strike out parts of this proceeding on the basis that an industrial association is entitled to represent its members only.[87] Whilst REX promotes its construction with less enthusiasm in this appeal,[88] it remains the basis on which REX sought to dismiss this proceeding and the foundation of its argument.[89]

27. There are three fundamental difficulties with REX's construction. First, REX contends that the words "*entitled to represent the industrial interests*" mean "*to have a member who is affected*"[90], when this is not what the text says. Where the legislation requires membership, it says so. The exact turn of phrase "*to have a member who is affected*" is used in the preceding subsection of s.540, to circumscribe the standing of employer organisations. The express reference to a membership requirement for employer organisations in s.540(5) but not industrial associations in s.540(6)(b)(ii) is a compelling indication that if the legislature intended membership to be essential it would have said so.[91]

28. Secondly, the use of the phrase "*entitled to represent the industrial interests*" elsewhere throughout the FW Act, and its variants, demonstrates that the phrase does not equate to a requirement of membership. The phrase refers to a person who is not a member, or not necessarily a member, in various contexts. REX has conceded this.[92] Examples include:

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[87] See REX Amended Response dated 3 July 2015 at paragraphs 17(d) and 22(b)(ii); footnotes 3 and 4 above.

[88] AS [28] and [58].

[89] AS [27], [45], [50] and [51]. The Appellant should not be permitted to advance the possibility of a new and unidentified construction for the first time in this Court: *Coulton v Holcombe* (1986) 162 CLR 1 at 8.1-8 and 11.2-3 (Gibbs CJ, Wilson, Brennan and Dawson JJ) citing with approval *Metwally v University of Woolongong* (1985) 60 ALR 68 at 71.8 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

[90] REX application for special leave to appeal dated 23 November 2016 at [1] and [36]; AS at [2].

[91] *CFMEU v Hadgkiss* (2007) 169 FCR 151 at 160[53] and 161[55] (Lander J) and 164-165[77] (Buchanan J).

[92] Reply [11]; T30.45; T82.6-8.

(a) An employee organisation entitled to represent the industrial interests of an employee may act as a bargaining representative for a proposed enterprise agreement if the employee is a member **or** if appointed by the employee: s.176(1)(b)(i), (1)(c) and (3).

(b) An employee organisation entitled to represent the industrial interests of employees to be covered by a greenfields agreement may act as a bargaining representative, even though such employees have not yet been employed and are therefore unascertained: s.177(b)(i) read with s.172(2)(b)(ii), (3)(b)(ii) and (4).

(c) A permit holder has a right of entry to hold discussions with employees whose industrial interests the permit holder's organisation is entitled to represent, including "*potential members*": s.484(b) read with s.480(a).[93]

(d) Whilst a permit holder may ordinarily exercise a right of entry to investigate suspected contraventions affecting a member only, exception is made for workers in the textile, clothing and manufacture industry whose industrial interests the permit holder's organisation is entitled to represent, due to the low rate of union membership: s.483A(1) cf s.481(1).[94] For this reason, affected member certificates are not available for such investigations: s.520.

(e) A registered employee association may apply to the Fair Work Commission if an employer making 15 or more employees redundant fails to notify or consult as required by s.531, provided one of the employees is a member **or** it is entitled to represent the industrial interests of one of the employees: ss.533(b)&(c) noting ss.531(2)(a)&(3)(a).

29. Thirdly, an organisation's entitlement to represent the industrial interests of employees cannot sensibly require their membership in numerous provisions in the FW Act, because the provisions expressly require both.[95] The separate and express requirement of membership in each of these provisions would be superfluous.[96] This REX concedes

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[93] EM at 294[1918]. See also Second Reading Speech (*Fair Work Amendment Bill 2014*), House of Representatives, *Parliamentary Debates* (Hansard), 27 February 2014, p.1083.5.

[94] Australia, Senate, *Fair Work Bill 2008*, Supplementary Explanatory Memorandum at 33[171], [173] and [175] and 36[198] and [199].

[95] For example, ss.176(1)(b)(i)&(3), 481(1), 520(1)(a) and (b), 531(2)(a)&(3)(a).

[96] Where a court must strive to give every word of a provision meaning: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382[71] (McHugh, Gummow, Kirby and Hayne JJ); *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 266[39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

also.[97] More significantly, entire provisions would be rendered superfluous. For instance the special provisions for permit holders investigating suspected contraventions relating to textile, clothing and manufacture workers, which do not require that the contravention affect a member, would be unnecessary.[98]

30. Whilst all three of the above impediments to REX's construction have been advanced before,[99] REX has addressed only the third, which it seeks to overcome by relying on the possibility that an organisation may be "*entitled to represent the industrial interests*" of an employee, or precluded from doing so, by reason of a representation order.[100]

31. Representation orders were introduced premised on the industrial understanding that an organisation is "*entitled to protect the industrial interests of those groups of employees or employers who are within its conditions of eligibility*".[101] One of their functions was to demarcate the entitlements of different organisations to represent the industrial interests of employees arising by reason of their eligibility rules.[102] Unsurprisingly, having regard to their origin and function, representation orders do not resolve the anomalies arising from REX's construction, another fact that it has previously conceded.[103] Examples of anomalies which persist in the provisions addressed above include:

(a) The possibility that there will be no employee organisation covered by a representation order to act as a bargaining agent for a greenfields agreement is not contemplated by the legislative scheme, which requires an employee organisation as a party in order for a greenfields agreement to be made: ss.172(2)(b) and (3)(b), 177(b)(i).

(b) The right of entry notice provisions in s.518(2)(d) and (3)(c) identify explicitly that it is an organisation's rules which give rise to its entitlement to represent the

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[97] AS [58] to [59]. Insofar as REX asserts the Full Court's construction also results in superfluity, this is addressed in paragraph 19.

[98] See ss.483A to 483C; cf ss.481 to 483.

[99] Most recently in the Response to the Application for Special Leave dated 16 December 2016 at paragraphs [2] to [4].

[100] AS [61]. It is presumed REX is referring to ss.133 and 137A of the FW(RO) Act. The points in paragraph 31 apply equally to the regulation of agreements with State unions under s.151 of FW(RO) Act, previously raised by REX. Where s.151 applies, the organisation will never be entitled to represent the industrial interests of the particular member: s.151(6) FW(RO) Act.

[101] *Report of the Committee of Inquiry on Coordinated Industrial Organisations* (1974) authored by JB Sweeney J at p. 34.2. The Report recommended that a form of representation order be introduced into the C&A Act: Clause 11 of Schedule C at p. 53 & 54. Parliament adopted the recommendation and section 142A of the C&A Act was introduced by Act No. 89 of 1974.

[102] Addressed in detail in AJ[18]–[20], [24]-[30].

[103] T81.10-12.

industrial interests of the relevant employees for rights of entry pursuant to ss.483A and 484, not a representation order.[104]

(c) A State registered association, which may make an application under s.533(b) or (c) regarding an employer's failure to notify or consult on mass redundancies by virtue of being a registered employee association,[105] cannot be the subject of a representation order. Representation orders can only be made in relation to organisations registered under the FW(RO) Act: ss.133, 137A and 6 ("*organisation*") FW(RO) Act.

Consequences

32. The standing conferred on industrial associations by s.539(2)(item 11) read together with s.540(6) is standing as a party principal. It is separate standing allowing an industrial association to represent the "*industrial interests*" of a person, rather than the person or his or her legal interests.[106] The conferral of standing on industrial associations as party principals reflects the standing conferred on unions historically. It has long been accepted that unions stand in the place of the class whose industrial interests they represent, and are not mere agents.[107]

33. Conferring standing on unions as party principals allows them to advocate for employment conditions for the class of workers within their field of industry, which is devoid of legal personality, and to prosecute breaches of those conditions. The benefits of unions enforcing working conditions within the sphere of their industrial coverage include their ability to bring proceedings affecting large groups; the consequent reduction of the need for multiple proceedings; the facilitation of proceedings where

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[104] Where a representation order may confer a right to represent unrelated to eligibility rules: s.133(1)(b) FW(RO) Act.

[105] Section 12 FW Act.

[106] Similar to the standing conferred on the inspector to exercise his or her own statutory right to instigate proceedings: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 525[44], (French CJ, Bell, Gageler and Keane JJ) and 544 [114] (Nettle J), with respect to s.718(1)(item 3(e)) of the Work Choices Act.

[107] *Australian Workers' Union v Pastoralists' Federal Council* (1917) 23 CLR 22 at 26.5-7 (Higgins J); *Burwood* at 551.3 (Starke J); *Dunlop Rubber* at 81.8-9 (the Court); *Wiseman v Professional Radio and Electronics Institute of Australasia* (1978) 20 ALR 545 at 560.5-6 (Evatt and Northrop JJ); *Linehan* at 337.1-2 (Northrop J); *Cohen (1981)* at 346.8-347.2 (Wilson J); *Re Epitoma Pty Limited v the Australasian Meat Industry Employees' Union; Jack O'Toole; Dick Annear; Nelson Williams NSW G205 of 1984 Trade Practices* (1984) 2 FCR 439 (***Re Epitoma***) at 447.5-8 (Gray J); *Imlach v Daley* (1985) 7 FCR 457 at 462.2-5 (Evatt and Northrop JJ); *CPSU* at 110.8-9 (Marshall J); *Australian Meat Industry Employees Union v Belandra Pty Ltd* (2003) 126 IR 165 at 200[120], 201[126] (North J).

affected individuals may not be in a position to prosecute them; and the potential to set precedent for existing and future employees within an industry.

34. In the FW Act, and the associated FW(RO) Act, Parliament sought to recognise the role of employee organisations in both the establishment and enforcement of workplace conditions.[108] The Full Court's construction of the phrase *"entitled to represent the industrial interests of the person"* best facilitates the role of employee organisations, including under s.540(6) by reason of their being industrial associations, in these ways.[109]

35. On REX's construction, the capacity for employee organisations to participate in the workplace relations system would be confined, and conduct contravening Part 3-1 and other provisions less likely to be addressed. If REX were correct that an industrial association is restricted to prosecuting breaches affecting members only,[110] responsibility for pursuing contraventions would fall to individual non-members. Industrial associations would be precluded from recouping compensation and seeking other relief particular to non-members, even if it flows from the same conduct (such as in this case). Penalties would not be commensurate with the true extent of contravening conduct.[111] A successful prosecution of contraventions by an employer against members

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[108] The EM provides that "*the standing rules ... recognise the role employee organisations play in enforcement, particularly in relation to the safety net, and instruments that apply to them*" (at 326[2133]). Section 5(5) of the FW(RO) Act provides that "*Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system.*"

[109] For example, it allows them to make, vary and revoke modern awards for workers falling within the sphere of their eligibility rules under s.158(1) of the FW Act. In relation to enforcement, it allows them to pursue contraventions of the National Employment Standards, modern awards, minimum wage orders and equal remuneration orders for workers in the industry within which they operate under s.539(2)(items 1, 2, 3, 8 and 9) and s.540(2) of the FW Act.

[110] See paragraph 7. The AFAP contends that, even if REX's construction were correct, the Court's power to grant relief would extend to all persons affected by the relevant contravention subject to the discretion of the Trial Judge: see s.545 FW Act; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 224 ALR 467 at 472[15] and 473-474 [20]-[21] (Merkel J), in respect of an organisation's standing to pursue contraventions of s.298K(1), noting s.298L, pursuant to s.298T(2)(b) of the WR Act. Merkel J's relevant findings were upheld on appeal: *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2007) 157 FCR 329 at 361[178] (Branson J) and 371[238] (Marshall J).

[111] Where the extent of loss or damage sustained is relevant to the assessment of penalty: *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at 374-375 [57] and [58] (Branson and Lander JJ), citing *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18-19[14] (Tracey J).

would not necessarily provide a precedent for non-member claims, as it may not be necessary for the Court to consider all circumstances relevant.[112]

36. REX raises a number of concerns relating to the "*vexation*" of proceedings by an "*uninterested third party*".[113] The connection between a union and a person affected, and his or her employer, arises from the organisation's industrial coverage marked out by its eligibility rules. The so-called vexation caused to employers contravening Part 3-1 is a necessary corollary to the recognised role of unions in enforcing minimum standards.[114]

37. REX's remaining concerns are simply a reflex of the separate standing conferred on industrial associations as party principals, and arise whatever the construction of the phrase "*entitled to represent the industrial interests of the person*".

38. Parliament chose to confer standing on multiple parties in s.539(2)(item 11), like most of the items in the sub-section. It follows, by logical necessity, that multiple proceedings for general protections contraventions were contemplated by the legislature.[115] The capacity for unions to institute proceedings irrespective of the wishes of affected employees exists regardless of the construction of s.540(6).[116] REX's construction does not avoid the possibility of a multiplicity of proceedings and, for the reasons already advanced, may increase its prospects.

39. There are various ways in which the potential implications of multiple proceedings may be addressed, if need be. Courts have powers to consolidate existing proceedings,[117] control proceedings to prevent an abuse of process,[118] and give directions about the

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[112] For example, if standing is confined to the identified member in affected class one in this claim, all claims relevant to the recipients of the letter in affected class two will not be prosecuted: see paragraphs 15, 21 to 26, 28 to 30 and 31(b) and (c) of the ASOC.

[113] AS [62], [63], [68], [69], [71] and [72].

[114] See footnote 108. Noting that it is not for REX to construct the desirable reach of a union's standing: *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at 390[26] (French CJ and Hayne J), citing *Australian Education Union v Department of Education and Children's Service*s (2012) 248 CLR 1 at 14[28] (French CJ, Hayne, Kiefel and Bell JJ).

[115] Cf AS [71(c)]. See the illustrative example in the EM at p.401.2-7.

[116] Noting the question before the Court in *Burwood* was whether a union could create an industrial dispute even if its members were not dissatisfied (543.2), which the majority answered in the affirmative (Isaacs J at 542.4, Powers J at 546.9, Rich J at 548.3 and Starke J at 551.5); *Re Epitoma* at 447.7 (Gray J); cf AS [67], [69] and [71(a)].

[117] Eg. rule 30.11 of the *Federal Court Rules* 2011 (Cth) (**FCR**), noting rule 1.05(2) of the *Federal Circuit Court Rules* 2001 (Cth) (**FCCR**).

[118] *Walton v Gardiner* (1993) 177 CLR 378 at 392.9-393.6 (Mason CJ, Deane and Dawson JJ); *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75 at 93-94[27]-[28] (French CJ, Gummow, Hayne and Crennan JJ).

practice and procedure to be followed.[119] Principles of judicial comity ameliorate the risk of inconsistent judgments for proceedings concerning *"exactly the same conduct"*.[120] The Court has discretion in any orders it may make under the FW Act.[121]

40. Freedom of association is not impinged by the Full Court's construction.[122] The freedom of association provisions in Part 3-1 do not confer a right on people to be or not be represented. They prohibit certain conduct directed towards people where they are or are not. Moreover, the objective found in s.336(1)(b), like the provisions of Part 3-1, is concerned with the representation of particular individuals not their 'industrial interests'. It does not inform the operation of the standing provisions in Part 4-1 of the Act, which confer standing on industrial associations as party principals.

Part VII: Notice of contention or cross-appeal

41. The AFAP does not rely on any notice of contention or cross-appeal.

Part VIII: Estimate of hours required for the Respondent's oral argument

42. The estimate for the presentation of the AFAP's oral argument is 2.75 hours.

Dated: 7 July 2017

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[119] Eg. s.37P(2) of the *Federal Court of Australia Act* 1976 (Cth) and rule 1.32 of the FCR, noting rule 1.05(2) of the FCCR.

[120] Cf AS [71(c)] and footnote 50. A single judge will follow the decision of another single judge on the same issue or the same subject matter unless the earlier decision is plainly wrong: *Nezovic v Minister for Immigration (No 2)* (2003) 133 FCR 190 at 206[52] (French J, as his Honour then was); *BHP Billiton Iron Ore v The National Competition Council* (2007) 162 FCR 234 at 253[83]-[84] and 254[88] (Greenwood J, with whom Sundberg J agreed).

[121] Sections 545 and 546 of the FW Act.

[122] Cf AS [72].