HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Mar 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S153/2022
File Title:	Qantas Airways Limited & Anor v. Transport Workers Union o
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions
Filing party:	Intervener
Date filed:	03 Mar 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S153 OF 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

SUBMISSIONS OF THE MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS (INTERVENING)

PART I FORM OF SUBMISSIONS

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

PART II INTERVENTION

2. The Minister for Employment and Workplace Relations (**Minister**) intervenes in these proceedings to make submissions in relation to the construction of ss 340 and 341 of the *Fair Work Act* 2009 (Cth) (**FW Act**).[1] The Minister is responsible for the administration of the FW Act and the Fair Work Ombudsman (**FWO**).[2] The FWO has responsibility for enforcement of the FW Act, including the power to investigate breaches of the Act and to bring civil remedy proceedings for such breaches.[3]

3. The Minister has a right of intervention under s 569(1), which provides:

> (1) The Minister may intervene on behalf of the Commonwealth in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if the Minister believes it is in the public interest to do so.

---

1 References are to the 27 November 2020 compilation of the FW Act unless otherwise indicated.
2 Administrative Arrangement Order 13 October 2022 pg 14 (Part 6); Part 5-2, Division 2, Subdivision A and B of the FW Act.
3 See s 539 (Item 11) and Part 5-2.

4. The appellants (together, **Qantas**) contend the right of intervention is not enlivened. Relying upon what occurred at the hearing before the Full Court in earlier proceedings of this Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 (***Barclay***), Qantas says that this proceeding is "not in relation to a matter arising under [the FW Act]" but instead arises "under s 73 of the *Constitution*".[4]

A. Intervention under s 569(1) of the FW Act

5. In short, Qantas is wrong because the words "in relation to a matter arising under this Act" in s 569(1) refer to the *subject matter* of a dispute, not to the source of the Court's jurisdiction to determine that dispute in a particular proceeding. Section 73(ii) of the *Constitution* is the source of this Court's jurisdiction to determine the appeal. Section 569(1), by contrast, is directed to the nature of the justiciable controversy which falls to be determined. This appeal "relates to" a matter arising under the FW Act, being the matter which was before the Full Court. This is confirmed by the text, context, history and purpose of s 569(1).

6. ***Text***: The Minister can intervene in any "proceedings before a court". While not defined, "proceedings" can be readily seen to be used here in the ordinary sense of the action or means by which a party moves a court to grant the desired relief; it is distinct from the "matter" which is the subject of the proceeding.[5] A "court" plainly includes the High Court.

7. The phrase "a matter arising under this Act" invokes the ordinary concept of a "matter" as being "the subject matter for determination in a legal proceeding rather than the legal proceeding itself".[6] There will be "a matter arising under this Act" where the right or duty sought to be enforced owes its existence to the provisions of the FW Act.[7]

---

4 See s 78B Notice and Affidavit of Leon Chung dated 14 February 2023 at [5]-[8], Exhibit LC2 (12-13).

5 See *Melbourne Stadiums Ltd v Sautner* (2015) 229 FCR 221 at 253-254 [156]-[158] (Tracey, Gilmour, Jagot and Beach JJ); *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 (***Crouch***) at 37 (Mason, Wilson, Brennan, Deane and Dawson JJ).

6 *Palmer v Ayres* (2017) 259 CLR 478 (***Palmer***) at 490-491 [26] (Kiefel, Keane, Nettle and Gordon JJ); and *Crouch* at 37 (Mason, Wilson, Brennan, Deane and Dawson JJ).

7 See *Re McJannet; Ex part Australian Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654 at 656 (Brennan, McHugh and Gummow JJ). In the specific context of s 570 of the FW Act see *Joseph v Parnell Corporate Services Pty Ltd* 284 FCR 546 (***Joseph***) at 566-567 [92]-[93] (Logan, Snaden and Katzmann JJ).

8. The proceedings need only be "in relation to" such a matter. Absent any contrary indication this phrase is one of wide import which requires no more than a relationship between two subject-matters: it can encompass direct and indirect connections; and one subject matter can "relate to" another, even if it also relates to other things: *Minister for Home Affairs v DMA18*.[8] Here, as with the provisions in *DMA18*, there is no reason to construe "in relation to" as requiring a confined connection between the "proceedings" in question and the subject matter to which they relate. The connection can exist where one proceeding, not arising under the FW Act, relates to another proceeding which does arise under the FW Act.[9] So too, there can be a connection where, although the source of jurisdiction to decide a proceeding is found outside the FW Act, the "matter" in respect of which that jurisdiction is exercised is a dispute about rights and liabilities under the FW Act.[10]

9. ***Context and history***: The statutory context is instructive. Section 570, as enacted, was worded differently to s 569 because it excluded costs in proceedings where the court was "exercising jurisdiction under this Act". The Explanatory Memorandum introducing the FW Act made clear that "under [s 569] the Minister has a right to intervene in a proceeding in any court".[11] By contrast, it was stated in respect of s 570 that it "is not appropriate that the limitation on costs orders apply to matters … which do not involve the exercise of jurisdiction under the FW Act".[12]

10. In *Barclay*, the Minister had sought to intervene in reliance on s 569(1). An issue arose in the hearing as to whether there was a matter arising under the FW Act (as opposed to s 73 of the *Constitution*). However, that issue was not ultimately addressed because the Court considered it expedient to "sidestep" the issue by giving the Minister leave to intervene.[13] The parties later agreed that s 570 (in its then form) did not preclude orders for costs.[14] This was consistent with the decision earlier that year of the Full Court of the Federal Court in

---

8 *Minister for Home Affairs v DMA18 as Litigation Guardian for DLZ18* (2020) 95 ALJR 14 (***DMA18***) at 26 [43] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).
9 *Joseph* at 571-572 [117]-[121] (Logan, Snaden and Katzmann JJ).
10 *Palmer* at 490-491 [26] (Kiefel, Keane, Nettle and Gordon JJ).
11 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 338 [2223] (emphasis added).
12 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 339 [2229] (emphasis added).
13 [2012] HCATrans 083 at lines 13-36 and 3043-3063.
14 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 (***Barclay (Costs Decision)***).

Construction, Forestry, Mining and Energy Union v CSBP Limited (No 2),[15] which held that (former) s 570 did not apply to the appeal because the Court was not exercising jurisdiction under the FW Act but rather s 24 of the *Federal Court of Australia Act 1976* (Cth).

11. Subsequently, Parliament amended s 570 so that the operative phrase became, consistently with s 569, "in relation to a matter arising under this Act". The purpose of this change was to ensure that s 570 "operates in relation to a matter arising under the FW Act, rather than in relation to courts exercising jurisdiction under the FW Act", and so to reverse the effect of the decision in *CSBP*.[16] That is, when Parliament amended s 570 to make clear that it *would* apply to appeals, and was concerned with the *subject-matter* of the proceeding (not the source of jurisdiction being exercised), it adopted the very language already used in s 569(1).[17] The same words appearing in different parts of a statute should be given the same meaning unless the context requires a different result.[18] There is nothing in the context here that suggests the words used in s 569(1) should bear any different construction to those identical words used in s 570. Nor do the events in *Barclay* offer any particular assistance in light of this changed statutory context.[19]

12. ***Purpose***: The evident purpose of the right to intervene is to afford the Minister an entitlement to be heard about issues relevant to the operation of the FW Act whenever she or he considers it is in the public interest to do so. This is unsurprising given the object of the FW Act and the centrality of that legislation to Australian employment, quality of life and economic prosperity. It is difficult to see how this purpose could be furthered by a partial exclusion of the right to intervene, at the very apex of the judicial hierarchy, and thereby in decisions most likely to fundamentally shape the operation of the FW Act.

13. Further, such an exclusion would not cohere with the Minister's right to be heard as a party in any High Court appeal where the Minister has intervened below: see s 569(2). There may be various reasons for not having intervened below. It may be that the Minister was unaware

---

15 (2012) 202 FCR 149 (***CSBP***).
16 Explanatory Memorandum, Fair Work Amendment Bill 2012 (Cth) at 56 [306]-[307].
17 The amendment to s 570 has been recognised as having broadened the scope of the no-costs jurisdiction: *Joseph* at 569-571 [105]-[114] (Logan, Katzmann and Snaden JJ).
18 *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 559-660 [32] (French CJ, Crennan, Kiefel and Bell JJ).
19 Cf Affidavit of Leon Chung dated 14 February 2023 at [5], Exhibit LC2 (pp 12-13).

of the issue, or the significance of the issue, until the High Court appeal. It may be that the Minister had not seen any realistic need to intervene, but then the decision below delivered a startling or unpredictable result. It may be that the issue of significance was only raised for the first time, with leave, at the hearing of the proceedings below (as seems to have been the case here): FC[90]-[91]; CAB 182-183. The entitlement to be heard could not be intended to turn upon such circumstances: that would simply encourage otherwise unnecessary interventions in proceedings below, to preserve the Minister's position on appeal.

14. ***Proper construction****:* It follows from the above that s 569(1) is enlivened. The Minister is intervening in "proceedings in a court" (being appeal proceedings in the High Court). That appeal is from a decision of the Full Court of the Federal Court, exercising its appellate jurisdiction, in respect of "a matter arising under this Act", namely a dispute about the liability of Qantas for a breach of s 340 of the FW Act. This appeal is "in relation to" that matter because of the connection between this appeal and the *subject-matter* that was before the Full Court, being a dispute as to the liability of Qantas for a breach of s 340(1)(b).

15. ***The "constitutional" issue****:* So understood, no constitutional issue in fact arises. Nonetheless, the supposed question as framed in the s 78B Notice is addressed for completeness. The argument made by Qantas appears to have three steps (s 78B Notice [4]-[7]). Each of these has difficulties.

16. ***Step 1****:* The first step is that the words "in relation to a matter arising under this Act" in s 569(1) must be construed identically to s 76(ii) of the *Constitution.* This pre-supposes that "in relation to a matter arising under this Act" in s 569(1) is intended to have the same meaning as "in any matter … arising under any laws made by the Parliament" in s 76(ii). But that is not correct. Parliament has used a very different form of words to ensure that the right to intervene is *not* limited by reference to the source of jurisdiction that is being exercised, but rather turns upon the subject-matter of the justiciable controversy (irrespective of the source of jurisdiction that is exercised to determine that controversy).

17. It is worth noting in passing that if Qantas was correct, that s 569(1) refers to the source of jurisdiction, rather than the subject-matter of the justiciable controversy, then it would follow that the equivalent language in ss 78A and 78B of the Judiciary Act would be enlivened by every appeal in this Court. That would follow because the fact that s 73 of the Constitution

is the source of this Court's appellate jurisdiction would mean that every appeal would be a "matter arising under the Constitution".

18. ***Step 2****:* The second step in Qantas' argument is that once special leave is granted the "matter" is correctness of the judgment of the court from which the appeal is brought. However, the "matter" is not so limited. The fact that the High Court has *jurisdiction* by operation of s 73(ii) of the *Constitution* to hear and determine this appeal does not extinguish the "matter" which arises under the FW Act within the meaning of s 569(1). The "matter" – the justiciable controversy – before the Federal Court was about rights and liabilities under the FW Act. That "matter" exists independently of the proceedings in relation to it, because a "matter" "is not co-extensive with a legal proceeding".[20]

19. Before this Court, it is correct to say that the "matter" *includes* the question of the correctness of the judgment of the Full Court. But that is simply to recognise that – having regard to the stage of the proceedings that has been reached – the resolution of the justiciable controversy concerning the rights and liabilities of the parties under the FW Act now requires attention to be directed to the orders of the Full Court. However, the fact that the "matter" still involves the underlying controversy concerning the FW Act is made evident by the fact that this Court is ultimately asked to make orders which determine the rights and liabilities of the parties under that Act (**CAB 2**).

20. ***Step 3****:* The third step is that because the proceedings are in in the appellate jurisdiction of the High Court, the "matter" does not arise under the FW Act but under s 73(ii) of the *Constitution.* This third step does not follow from the second. As explained, the "matter" is constituted by the whole of the justiciable controversy between the parties,[21] which includes the determination of their rights and liabilities under the FW Act. It is distinct from the source of the jurisdiction that is exercised to resolve the "matter".

---

20 *Palmer* at 491 [26] (Kiefel, Keane, Nettle and Gordon JJ).

21 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 586 [142] (Gummow and Hayne JJ). See also *Palmer* at 490-491 [26] (Kiefel, Keane, Nettle and Gordon JJ); *Fencott v Muller* (1983) 152 CLR 570 at 603 (Mason, Murphy, Brennan and Deane JJ) quoting with approval *South Australia v Victoria* (1911) 12 CLR 667 at 675 (Griffith CJ).

B. Leave to intervene

21. In the event the question of intervention is resolved against the Minister, leave to intervene is sought consistently with r 42.08A of the *High Court Rules 2004.* A grant of leave is appropriate for the following reasons.

22. ***Minister's interests****:* The Minister has an interest in the outcome of the Appeal, because the Minister, and the FWO as public regulator, will be required to administer and enforce the general protections provisions of the FW Act in accordance with the construction of key provisions as determined by this Court.[22] The Minister also has a broader interest because of his responsibility for the public interests sought to be served by the nationally important general protections provisions of the FW Act. Such interests can properly warrant government regulators being heard in relation to important questions of construction.[23]

23. ***A contribution which is different from the parties****:* The parties have, quite properly, addressed the issues by reference to their particular interests. The decision of the Full Federal Court reflects this. The Minister seeks to make submissions about the "civil remedy" character of the provisions and without repeating the parties' submissions.

24. ***No unreasonable interference****:* The Minister's submissions would not create an undue burden for the parties. Should the Minister be permitted to make oral submissions they will be confined and would, of course, remain within the control of the Court.

PART III ISSUE PRESENTED BY THE APPEAL

A. Introduction and summary

25. The provisions at issue in this appeal sit within Part 3-1 of the FW Act, which creates the "general protections" provided by the legislation. Those protections are secured through civil regulatory remedies enforceable by the regulator (the FWO) and affected parties.

---

22 *Levy v Victoria* (1997) 189 CLR 579 at 601; *Hua Wang Bank Berhad v Commissioner of Taxation* (2013) 296 ALR 479 at 493-494 [54]-[57] (the Court).

23 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001) 116 FCR 490 at 492 [9], 494-495 [15]-[16] (Sackville J); *Sharman Networks Ltd v Universal Music Australia Pty Ltd* (2006) 155 FCR 291 at 293 [8]-[9] (Conti J); and see also the Commonwealth's intervention on questions about the construction and operation of civil penalty regimes in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 492 [13]-[15] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

26. Within that Part, ss 340-345 specifically protect "workplace rights" and the free exercise of those rights. Qantas's argument, while specifically directed at s 340(1)(b), depends upon a narrow reading of when a person has a "workplace right", as defined in s 341. If that reading is correct, it would equally narrow the reach of the other workplace rights protections.

27. The Full Court's construction of ss 340 and 341 was correct, largely for the reasons it gave. However, that construction is reinforced by a consideration of s 340 as a civil regulatory provision. This warrants closer attention than it has yet been given in this matter. It is the primary focus of these submissions.

28. Parliament's choice to use a civil regulatory mechanism in this context is informative. It underscores the protective purposes sought to be secured, particularly compliance through effective deterrence. The choice of that mechanism also assists in understanding the drafting of the civil remedy provisions. It highlights that Parliament has taken the familiar approach of casting the protections in a wide and overlapping way and entrusting courts to apply them to a wide variety of factual circumstances and to fashion any relief accordingly.

29. To read down those provisions in ways not required by their text and structure, and in ways that leave room for adverse action to be taken for purposes relating to a person's workplace rights, would undermine the parliamentary intention which is manifested through the implementation of a civil regulatory regime.

B. Section 340 as a civil remedy provision

30. The civil remedy provisions of the FW Act are "essentially similar" to many statutory regimes which secure public protections through civil regulation and have the key features of such regimes explained in *Commonwealth v Director, Fair Work Building Industry Inspectorate*.[24] They are included as part of a statutory regime involving a regulator (here, the FWO) with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest: ss 681 - 682. As such, the FWO (through "an inspector") may bring an action for a breach of any of the civil remedy provisions: s 539(2). The provisions provide for a range of

[24] (2015) 258 CLR 482 (***Commonwealth v Director, FWBII***) at 494-495 [23]-[24] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

enforcement mechanisms, including injunctions, compensation orders, and civil penalties: ss 545 and 546. That necessitates the regulator choosing the enforcement mechanism or mechanisms which they consider to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence and, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings: ss 549 and 551.

31. As explained further below, general protections were originally secured through criminal offence provisions. Over time, these offences came to be replaced by civil regulatory provisions, of a kind that had always been used in workplace relations laws and which gave affected persons the ability to bring proceedings. Consistent with this, the civil remedy regime of the FW Act provides significant scope for affected persons, not just the regulator, to bring proceedings for breaches of most of the civil remedy provisions: ss 539(2) and 540. In practice this now forms an important means by which civil remedy provisions are enforced. In many cases proceedings for breaches of general protections are brought by the regulator.[25] In others, such as the present, they are brought by an interested party.

32. The fact that persons other than a regulator can bring proceedings to enforce civil remedy provisions does not change their underlying character. They remain civil regulatory proceedings and the question whether relief of the kind sought should be granted at all, and if so, in what amounts or forms, are always questions for the court.[26] In deciding those matters courts will have regard to the primary objective sought to be secured by the particular form of relief, and how that objective is informed by all of the facts and circumstances of the particular case. Well-established principles govern this.

---

[25] In the Federal Court see, for example, *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* [2013] FCA 509 (Bromberg J); *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467 (Gilmour J); *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064 (Logan J); *Fair Work Ombudsman v Australian Workers' Union* [2017] FCA 528 (Bromberg J); *Fair Work Ombudsman v Australian Workers' Union* [2020] FCA 60 (Snaden J); *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034 (Katzmann J); *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129; *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)* [2012] FCA 30 (Cowdroy J); *Fair Work Ombudsman v Maritime Union of Australia (includes Corrigendum dated 2 July 2014)* [2014] FCA 440 (6 May 2014) (Siopis J). There are many other such cases in the Federal Circuit and Family Court.

[26] So much was made clear in respect of a regime which also permitted civil penalty proceedings to be brought by a party other than the regulator in *Commonwealth v Director, FWBII*.

33. In particular, s 546 empowers the court to make an order for such pecuniary penalties as it considers appropriate: s 546(1). It is well settled that the purpose of such penalties is to promote the public interest in compliance through deterring contraventions; a penalty appropriate to achieving this purpose will be set by the court having regarding to all relevant facts and circumstances.[27]

34. Additionally, by s 545(1) the court is given a broad discretion to grant an appropriate remedy in respect of any contravention or proposed contravention of a civil remedy provision.[28] This discretion must be exercised judicially and with regard to the facts and circumstances of each case. It includes, but is not limited to, power to grant injunctions, order compensation and in appropriate cases, reinstatement of an employee who was dismissed: s 545(1)-(2)(a)-(c).

C. Construction of s 340 as a civil remedy provision

(i) Statutory text in its statutory context

35. Section 340(1)(b) prohibits a person taking adverse action against another person "to prevent the exercise of a workplace right by the other person". The focus of the provision is on the reasons which actuate the person who takes the adverse action. Neither the language of s 340, nor the language of s 341, points to this protection being limited to action which (only) seeks to prevent the exercise of some kind of "presently existing" right (in the sense of an immediately, or at least imminently, exercisable right). It is convenient to first address s 340, and then s 341.

36. ***Section 340:*** Two aspects of the drafting of s 340(1)(b), read in the context of the general protections, speak against a construction of the kind for which Qantas contends. *First,* even if "workplace right" meant a right which was capable of immediate exercise, a person could take action to "prevent" that fully vested right from being exercised by taking adverse action to prevent it from becoming fully vested. This point was addressed by the Full Court

---

27 *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426 (***Pattinson***); *Commonwealth v Director, FWBII*; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 (***ABCC v CFMEU***) at 173 [42]-[44] (Kiefel CJ), 185 [87], 195-6 [116] and 199 [125] (Keane, Nettle and Gordon JJ).

28 *ABCC v CFMEU* at 190-1 [103] (Keane, Nettle and Gordon JJ).

(FC[127]; CAB 194), and is addressed in the TWU submissions (RS[12]). For this reason, it is identified for context, but not further developed here.

37. *Second*, no narrow meaning of "prevent" is suggested by the structure or content of s 340. The various parts of that provision provide broad and overlapping protections against a wide array of conduct, taken for a wide array of purposes, in the nearly limitless variety of circumstances attending workplace rights.

38. Each prohibition is centrally concerned with two actors; the person taking the action and the person against whom it is taken. The first person is prohibited from taking adverse action (which includes threatening to take, or organising, such action)[29] for purposes relating to the second person's workplace rights. Many such potential purposes are proscribed: they include adverse action taken because another person has, or has exercised, or has not exercised, or proposes to exercise, or proposes not to exercise, or has at any time proposed to exercise, or has at any time proposed not to exercise, a workplace right (s 340(1)(a)) or because a third person has exercised, or has not exercised, etc, a workplace right (s 340(2)). In that context, the proscription on taking adverse action in order to *prevent* the exercise of a workplace right (s 340(1)(b)) captures a further array of circumstances in which the adverse action may be actuated by another person's workplace rights. Plainly each limb must be construed in such a way that it has work to do. But it would be an error to approach a provision of this kind as if each limb were directed to a tightly confined and separate concern, or to "parse" each limb so as to minimise overlap.

39. This aspect of s 340 is underscored by other provisions of Part 3-1 which go on to proscribe yet further conduct which might be injurious to a person's enjoyment of their workplace rights. For example, s 343 prohibits the first person from organising or taking (or threatening to organise or take) action against the second person with intent to coerce them in relation to their workplace rights. The prohibitions in this provision, like that of s 340, are broad and overlapping, such that the same coercive conduct could contravene that provision in more than one way. Moreover, that provision might in some cases overlap with various proscriptions in s 340, such that the same conduct might breach different parts of both provisions. Similar observations can be made about s 345 which deals with

---

[29] See s 342(2).

misrepresentations by the first person as to the workplace rights of a second person, or their exercise of those workplace rights. Likewise, though more broadly, similar observations can be made about the protections in respect of industrial activities (ss 346 to 350) and other protections (ss 351 to 356).

40. In this respect, the drafting and context of s 340 is typical of many regulatory regimes in which, to ensure a protective coverage for a nearly limitless variety of possible circumstances, Parliament uses multiple provisions and verbal formulae to express proscribed conduct in a range of ways. This necessarily, and by design, involves significant overlap and the typical result is that the same conduct may breach multiple provisions.[30]

41. This does not mean that the provisions are to be read down so as to narrow the coverage of each limb and to reduce areas of overlap. Nor does it suggest any Parliamentary intention that one is intended to be "primary" and the other "complementary". Any breaches of the general protections provisions will be liable to attract the same penalty (see s 539, Item 11 and 546) and the same forms of relief (see s 545). Further, as with other civil regulatory regimes, the provisions are drafted and enforced in ways which ensure that contravenors are dealt with fairly by reference to the actual facts and circumstances of their conduct, and not by reference to "accidents of legislative history".[31] These rules and principles include: the requirement that where the same conduct breaches multiple provisions it is not penalised more than once;[32] the common analytical tool of penalising closely related contraventions as a course of conduct;[33] the requirement to ensure that the final total penalty is moderated

---

30 See eg the overlapping contraventions in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq)(No 5)* [2019] FCA 1544 (Gleeson J); *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412 (Jacobsen J).

31 To adopt the colourful phrase used in the criminal sentencing context in *R v Pearce* (1998) 194 CLR 610 at 623 [40] (McHugh, Hayne and Callinan JJ).

32 See s 556 of the FW Act. See also the like provision explained in *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (***Yazaki***) at 293-294 [217]-[224]. Equivalent provisions are found in many regimes.

33 See s 557 of the FW Act. More broadly see *Pattinson* at [45], citing *Yazaki* at 296 [234] and *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 at 447-448 [421]-[424].

when necessary through the totality principle,[34] and the moderation of injunctive relief to ensure that it bears an appropriate nexus to the actual or anticipated conduct.[35]

42. The nature and reach of s 340 as a civil remedy provision, as explained above, answers some more specific submissions made by Qantas about that provision which are not addressed in the TWU's submissions. *First*, contrary to what appears to be suggested in AS[38], to read "prevent" as the Full Court did does not drive a court into strange or unlikely enquiries about a respondent's state of mind. Section 340 is centrally focussed on deterring adverse action being taken for purposes referable to another person's workplace rights and, in that context, s 340(1)(b) specifically deters action taken in order to prevent the exercise of such rights.

43. This requires the court to consider *why* the action was taken. In some cases, it might be quite clear that the action is taken to prevent a person from being in a position, in the future, to enjoy the benefits of such rights: e.g. when this can be seen or inferred from the history of dealings between the parties, the particular arrangements governing their relationship, the timing and circumstances of the action, and so on. It will then be caught by s 340(1)(b). In other cases, the adverse action may be so remote from any prospect that the person will exercise a workplace right that the respondent has no difficulty at all in showing that the action was not directed at preventing such an exercise. In yet other cases the respondent may persuade the court, despite the existence of, or likely imminent vesting of, a particular workplace right in a person, that they took adverse action against the person for reasons which did not include the prevention of the other person's exercise of that right. None of these results is absurd and none requires a narrow or constrained conception of "prevent".

44. *Second*, contrary to AS[44] the Full Court's construction does not create a disharmony in which some kind of intended "primacy" of the limb in s 340(1)(a) yields to the merely "complementary" limb in s 340(1)(b). As explained, the same conduct may breach s 340 in a number of ways and, for that matter, may breach other provisions as well. All are available and all are alike so far as relief is concerned. This is a common phenomenon in regulatory statutes and is routinely dealt with by courts. In contrast, where the FW Act does intend certain provisions or processes to have primacy, this is made clear: see e.g. the primacy of

---

34 See *Pattinson* at [45]; and *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at 397 [43] and 408 [90]-[91] (Stone and Buchanan JJ).

35 *Foster v Australian Competition and Consumer Commission* (2006) 149 FCR 135 at 149-150 [35]-[38].

criminal proceedings over civil proceedings (ss 549-555) and the prevention of multiple actions (ss 723-732).

45. *Third,* contrary to what is suggested in AS[50], s 340(1)(b) cannot sensibly be read down because of a concern that it would otherwise provide "even stronger remedies than those available under the unfair dismissal provisions". Again, this fails to recognise the fundamentally different purposes served by the different provisions. Moreover, it assumes an alignment which is denied by the statutory text: adverse action involves an entirely different legal test, it extends well beyond dismissal, it is not limited to employers, is not constrained by the statutory preconditions for unfair dismissal and it may lead to quite different forms of relief, not least civil penalties.[36] Most fundamentally, it ignores the express parliamentary stipulation of how multiple proceedings of those kinds are addressed by putting applicants to an election: see ss 725, 728 and 729.

46. *Finally*, and contrary to AS[55], there is no textual, contextual or purposive support for reading down s 340 on the basis that this is necessary to prevent "a whole new body of future possible rights". Again, this misunderstands the fundamental deterrent and protective purpose of s 340 as a civil remedy provision. The fact that conduct proscribed by such provisions may also enliven different action or remedies is no reason to detract from the obvious parliamentary intention to deter certain conduct, and to remedy it when a breach occurs. This proposition is further undermined by the absence of any apparent basis for Qantas's classification of some selected parts of the FW Act into what it calls "primary" and "secondary" remedies. It is not clear on what basis Qantas omits the "Core provisions" of Part 2-1 from its classification. Nor is it clear what is meant by "primary" and "secondary", nor what the consequences of that are thought to be. In contrast to the provisions referred to in paragraph 44 above, the FW Act does not require that what is asserted to be the "primary" remedies be sought before, or instead of, or even at the same time, as a remedy for a contravention of s 340 or any other part of Division 3. Indeed, many of its "primary" remedies are themselves civil remedies and so have precisely the same status as s 340.

47. ***Section 341:*** Turning then to s 341, the use of the present tense in that provision ("has" and "is") does not indicate a statutory intention that the only workplace rights which are to be

---

[36] Compare s 340 with Part 3-2 'Unfair Dismissal', particularly ss 381-385.

protected are those which are capable of being exercised immediately. What follows is not determinative of the construction of s 340(1)(b) because, as already noted, an exercise of rights can be prevented even by action that prevents the rights being acquired in the first place. However, as Qantas's construction of s 341(1) would serve to greatly constrain other general protections referable to a person's workplace rights, it is important to be clear why that construction is wrong.

48. Section 341 does not focus on workplace rights *in vacuo*, but on a *person* in their capacity as a holder of such right. This coheres with the statutory focus on the two relevant actors. "Adverse action" is defined by reference to the circumstances in which the first person takes adverse action (s 342(1)) and "workplace rights" are defined by reference to the second person as a holder of such rights (s 341). When the definition is picked up in ss 340, 343 and 345 it is by reference, not simply to "workplace rights", but to the workplace rights of "another person", "the other person" or "a third person". In this way the provisions focus on the person as a rights holder, and the taking of adverse action against them in that capacity. This is underscored by the opening words of s 341(1) – "A person has a workplace right if the person…".

49. In this setting it is a distraction to focus on the present tense of "has" and "is" (AS[34]-[35]) as conditioning the nature of the rights. What a person has (in the present) is the right, entitlement or ability to do things in the future. Qantas emphasises that a person cannot have a right to do something that is unlawful: AS[19]-[23], [46]. No doubt this is so. However, to express the matter this way is to obscure the fact that holding a right has both a present and a future dimension. Plainly, a person does not have a "right" to do something if it is unlawful *at the time <u>they</u> act*. However, they can still have a right, *at the time when <u>another person</u> takes adverse action against them*, to act in that way in the future if conditions and circumstances permit.

50. The ordinary language of a "right" (or the statutory synonyms of "entitled to" and "able to") comfortably applies to action which is, at the present moment, potential, prospective or conditional. For example, a person *has* a right (or *is* entitled, or *is* able) to strike another in self-defence. If the person is never attacked the occasion for the exercise of that right will never eventuate; and if it does not eventuate, the striking will be unlawful. Nonetheless, it

remains natural to speak of the person having that right.[37] For similar reasons it is natural and conventional to describe other legal protections as "rights" even though the occasion for their exercise has not arisen and may never arise: such is the case for legal professional privilege,[38] and the privilege against self-incrimination.[39]

51. Section 341 has this future directed, forward looking dimension which is natural when speaking of "rights". For example, s 341(1)(a) speaks of a person who "is entitled to the benefit" of a workplace law etc. It does not say the benefit must be capable of immediate realisation or without conditions being satisfied. This is unsurprising given that such benefits are so often conditioned on particular events and circumstances, and so frequently confined by notice/evidence requirements[40] or by employers/employees making a reasonableness assessment.[41] If Parliament had intended to exclude or limit such benefits in the definition of "workplace right" it would have made this clear. Plainly, it did not intend to do so. As much is confirmed by the Explanatory Memorandum which states that benefits "include benefits that are contingent or accruing (e.g., long service leave)."[42] Equivalent observations can be made about a person who "is able" to initiate or participate in a process or proceeding, or to make a complaint or inquiry: s 341(1)(b) and (c).

---

37 See eg the suggested direction in relation to self-defence in the NSW Criminal Trial Courts Bench Book at [6-460]: "As you might expect, the law recognises the right of a person to act in self-defence…".

38 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 565; *Baker v Campbell* (1983) 153 CLR 52 at 117, 120 (Deane J).

39 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 136–137 [104] (Hayne and Bell JJ).

40 Examples include: (i) the notice and evidence requirements for unpaid parental leave or flexible unpaid parental leave at s 74(5)-(7), (ii) unpaid pre-adoption leave at s 85(4)-(7), (iii) paid personal/carer's leave accrues under s 96(2) but must meet the notice and evidentiary requirements of s 107(1)-(4), (iv) s 107(1)-(4) also provides the evidence and notice requirements for unpaid carer's leave, compassionate leave and what was at the time of the conduct in this matter unpaid family and domestic violence leave, (v) s 110 provides the notice and evidence requirements for community service leave, (vi) s 111 establishes the evidence requirements concerning the right to pay whilst on jury service, (vii) s 81(1) and (6) sets out the evidence required to obtain the right for the right to transfer to safe job whilst pregnant, (viii) s 80(2)-(6) sets out the notice and evidence requirements for unpaid special maternity leave, (ix) s 413(4) and 414(1)-(6) set out the evidence requirements for industrial action, (x) s 430(1)-(3) provides the preconditions for an employee claim action, (xi) s 471(1)-(8) sets out the conditions in which an employer can reduce the payments of an employee upon if the employee engaged or engages in a partial work ban as protected industrial action.

41 Examples include: (i) the right not to be requested or required to work more certain hours in s 62, (ii) an employee may make a request for flexible working arrangements which if it meets certain conditions may only be refused on certain 'reasonable business grounds' in accordance with s 65(1)-(5A).

42 Explanatory Memorandum, Fair Work Bill 2008 (Cth), p 216 [1363].

52. None of this is to deny that "rights" can mean different things in different contexts. However, it is to deny that there is some settled technical conception of "presently existing rights" which differs from the ordinary meaning just described and which Parliament must be taken to have intended when enacting s 341(1). So much is clear when considering the breadth of meanings available, even just within a legal context. The Oxford English Dictionary includes various definitions referring to legal, equitable or moral entitlements or claims, as well as privileges or immunities.[43] The Encyclopaedic Australian Legal Dictionary notes that it is generally a benefit or claim "entitling a person to be treated in a certain way" but that exact definitions vary according to the theoretical frameworks of the jurisprudential schools.[44] Black's Law Dictionary quotes from Roscoe Pound, stating "It has come to be well understood that there is no more ambiguous word in legal and juristic literature than the word "right"' which is said to cover interest, liberties, privileges and immunities.[45]

53. Accordingly, Parliament has avoided a highly prescriptive or technical delineation of rights. Instead, consistent with its approach to the general protections, it has framed the concept of a person's workplace rights broadly. This leaves the question in any given case for specific adjudication by a court having regard to the particular, and highly varied, combination of facts and circumstances, understood against the myriad benefits, roles, responsibilities, processes, proceedings, complaints and inquiries which may exist or be available.

54. This does not mean the general protections are unbounded, much less that respondents will be penalised indiscriminately for adverse action. Such liability will *only* arise if a substantive purpose of the conduct is to derogate from a person's workplace rights. It may be that the person does not, on the facts, have a particular right. Alternatively, if the right exists but is highly remote or contingent, a respondent may be expected to more easily demonstrate that the adverse action was not in any way directed at such a right. And in all cases where a contravention is shown, the court will tailor any penalties or other relief having regard to the particular right and how it was affected.

---

43 *Oxford English Dictionary* (Online, Accessed: 23 February 2023), 'right, n', II 'Legal, moral or natural entitlement and related uses', see 8, 9a. 9b, 9c, 9d, 9f, 10a, 11).

44 *Encyclopaedic Australian Legal Dictionary* (Lexis Nexis, Accessed: 23 February 2023) 'right',

45 *Black's Law Dictionary* (11th ed, 2019) (Westlaw Classic, Accessed: 23 February 2023) 'right'.

(ii) History

55. For the reasons explained by the Full Court at FC[106]-[112]; CAB 187-190 the legislative history provides no support for a suggestion that s 340 and 341 should be read more narrowly than is otherwise suggested by the text, context and purpose. As noted at FC[106]; CAB 187 the legislative history has been largely summarised in *Cummins South Pacific Pty Ltd v Keenan*.[46] As there explained, the historical arc of the adverse action protections has, generally speaking, been one of expansion as to what workplace rights, adverse action and persons are covered by the provisions. This has culminated in the broad protection afforded by s 340 of the FW Act. This is supported by the statement at p 212 [1336] of the Explanatory Memorandum to the Fair Work Bill 2008 (set out at FC[112]; CAB 190) and also the following at p 221:

> 1386. The consolidation of the existing specific WR Act provisions into generally applicable prohibitions means that the new provisions protect persons against a broader range of adverse action.

56. Two further points can be made from the statutory history. *First*, from the initial prohibition on adverse action contained in s 9 of the *Conciliation and Arbitration Act 1904* (Cth) (**CA Act**) through to s 340 of the FW Act, the protections have taken the form of a prohibition sanctioned by a penalty. From 1904 until the commencement of the *Workplace Relations Act 1996* (Cth), the penalty provisions required a criminal prosecution,[47] although the courts variously had discretion as to whether to pay the penalty to consolidated revenue or another person or organisation.[48] The *Workplace Relations Act 1996* (Cth) first instituted a civil penalty regime, which remains the current approach.[49] This aspect of the statutory history reinforces that the public protective purposes of the prohibitions on adverse action have been central from its inception, and that they are not some kind of complementary or secondary "add on" to a more substantive set of remedies.

---

46 281 FCR 421 at 431-432 [23]-[30] (Bromberg J).

47 *CA Act* as made, s 9(1) and s 45; *CA Act* as amended by the *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cth), s 2 (in so far as it repealed and substituted s 9, in particular s 9(1)); *Industrial Relations Act 1988* (Cth), s 334(1)-(5).

48 *CA Act* as made, s 45; as amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth), s 2 (in so far as it repealed and substituted s 9, in particular 9(5)); *Industrial Relations Act 1988* (Cth), s 356.

49 *Workplace Relations Act 1996* (Cth), see ss 407 and 616(1).

57. *Second*, the legislative history reinforces the public protective purpose through the introduction of a specific regulator as protector of the public interest in the administration of the industrial relations regime. The *Industrial Relations Act 1988* (Cth) empowered the Minister to appoint inspectors[50] the functions of whom were to secure the observance of the Act, and who had power to institute prosecutions for the breach of it.[51] The *Workplace Relations Act 1996* (Cth) provided workplace inspectors with standing to seek civil remedies,[52] and established the Workplace Ombudsman who was granted a range of regulatory powers and functions.[53] The FW Act subsequently established the Fair Work Ombudsman and the Office of the Fair Work Ombudsman.[54]

(iii) Purpose and consequences

58. For the reasons it gave, and for the further reasons set out above, the Full Court's construction can readily be seen to advance the statutory purpose of protecting workplace rights (s 336(1)(a)) and to do so as part of the "balanced framework" established by the FW Act (s 3). That construction affords a person wide scope for adverse action to achieve any number of objectives, as long as it is not substantively actuated by a purpose inimical to a person's workplace rights. Whether or not adverse action has been taken for a proscribed purpose is a question that falls to be assessed by courts in the ordinary way by reference to evidence and inferences. And if a contravention is found, any relief will be as large or as confined as is found by the court to be appropriate in the particular circumstances, within the bounds set by Parliament.

59. Contrary to the submissions at AS[20], [49], [51], [73]-[81] the construction found by the Full Court does not give rise to any absurdity or unworkability. Those submissions are addressed by the TWU, so are not addressed here.

60. By contrast, Qantas's construction departs from the statutory purpose and leads to absurdity, unfairness and incoherence. Rather than providing a "balanced framework for cooperation and productive workplace relations", it introduces chronic imbalance by allowing a person

---

50 *Industrial Relations Act 1988* (Cth), s 84.
51 Explanatory Memorandum, Industrial Relations Bill 1988 (Cth), p 2.
52 *Workplace Relations Act 1996* (Cth), s 405.
53 *Workplace Relations Act 1996* (Cth), s 166A – s 166B and s 167(2).
54 ss 681 to 682 and 696.

to take adverse action against another to unilaterally prevent a workplace right becoming exercisable, including by interfering with the conditions necessary for that to occur. Some examples of why this is so are given at RS [43]-[47] and it is unnecessary to amplify them.

PART IV ESTIMATED HOURS

61. The Minister seeks no more than 30 minutes to present oral argument.

PART V COSTS

62. In accordance with the established practice in this Court respecting interveners, no order for costs should be made against the Minister.[55]

Dated: 3 March 2023

Tim Begbie Australian Government Solicitor T: (02) 6253 7061 E: tim.begbie@ags.gov.au	**Irene Sekler** Australian Government Solicitor T: (02) 6253 7155 E: irene.sekler@ags.gov.au	**Naomi Wootton** Sixth Floor Selborne/ Wentworth T: (02) 8915 2610 E: nwootton@sixthfloor.com.au

[55] *Barclay (Costs Decision)* at [2] (French CJ, Gummow, Hayne and Crennan JJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S153 OF 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

ANNEXURE TO THE INTERVENOR'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the intervenor sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provision(s)
1.	*Conciliation and Arbitration Act 1904* (Cth)	Act No 13 of 1904	ss 9, 45
2.	*Commonwealth Conciliation and Arbitration Act (No 2) 1914*	Act No 18 of 1914	s 2
3.	*Constitution*	Compilation No. 6, dated 29 July 1977	ss 73, 76
4.	*Fair Work Act 2009* (Cth)	Act No 28 of 2009	ss 569, 570, 681-682, 696
5.	*Fair Work Act 2009* (Cth)	Compilation dated 5 December 2012	ss 569, 570
6.	*Fair Work Act 2009* (Cth)	Compilation No. 41 dated 27 November 2020	ss 3, 62, 65, 74, 80, 81, 85, 96, 107, 110, 111, 334-378, 379-405, 413-414, 430, 471, 539-540, 545-546, 549-557, 569, 570, 679-718A, 723-732
7.	*High Court Rules 2004*	Compilation No. 26, dated 1 January 2023	r 42.08A
8.	*Industrial Relations Act 1988* (Cth)	Act No. 86 of 1988	ss 84, 334, 347, 356
9.	*Workplace Relations Act 1996* (Cth)	Compilation dated 6 January 2009	ss 166A-166B, 167, 405, 407, 616, 824