IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S216 of 2019**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **Franz Boensch as trustee of the Boensch Trust**

Appellant

and

Scott Darren Pascoe

Respondent

RESPONDENT'S SUBMISSIONS

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Part I: Certification

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

Part II: Concise statement of issues

2. The issues presented by the appeal and the Notice of Contention of the respondent (**Mr Pascoe**) are logically ordered as follows.

3. Where there is a question under s 74P(1) of the *Real Property Act 1900* (NSW) (**Act**) whether a person without reasonable cause lodged a caveat or refused or failed to withdraw such a caveat after being requested to do so:

   (a) whether the person's honest belief based on reasonable grounds is irrelevant to that question; and

   (b) whether in determining that question, it is mandatory to consider the value of any interest in the land that the person holds.

4. The issues referred to at [5], [2], [3] and [7] of the Appellant's Submissions (**AS**).

5. Whether Mr Pascoe without reasonable cause refused or failed to withdraw a caveat after being requested to do so by the appellant (**Mr Boensch**).

Part III: s 78B notice

6. No notice is required to be given in compliance with *Judiciary Act 1903* (Cth), s 78B.

Part IV: Factual background

7. The factual background is not always accurately or neutrally stated in AS or in the Appellant's Chronology (**AC**) and neither are references to evidence or findings. The following aspects, although all relatively minor, warrant short mention. The Memorandum of Trust is at AFM1/29 and its text extracted at SC[12] (CAB 9-10). There is some glossing of its terms in AS[12]. There is no evidence or finding about the length of the discussion referred to in AS[18]. As to the last sentence in AS[23], the evidence and the finding addressed Mr Pascoe's state of mind as at *September 2009*, at which time he was of the view that a trustee's right of indemnity was likely to be of only *limited* value: SC[86] (CAB 29), [130] (CAB 43). As to AS[24] and AS[25], these communications were not pressed as requests within the meaning of

s 74P(1) and there was never any examination of whether they were. As to AS[28], no evidence addressed whether there was any 'complaint' about the documents. What appears above is also applicable to corresponding entries in the AC. AC, pp 5-6 records what is stated at SC[27]-[29] (CAB 13-14), albeit not all the matters referred to are aptly described as 'Mr Pascoe's reasons'. As to subparagraph (e) on p 5, this 'assertion' was found as a fact: SC[109]-[110] (CAB 37). As to the '23 Feb 2006' entry on p 10, the document at AFM1/271 was undated (as recognised in the AFM index) and there was no evidence of when it was received (see also 'promptly responded' at AS[30]).

10 **Part V: Argument**

Proper construction and application of *Real Property Act 1900* (NSW), s 74P(1)

8. The logical starting-point for consideration of the issues presented by the appeal is with the proper construction and approach to the application of s 74P(1) of the *Real Property Act 1900* (NSW) (**Act**). Mr Boensch's 'Issue 3' (AS[4], [58]-[60]) and 'Issue 5' (AS[6], [65]-[72]) raise such issues. Section 74P(1) has been in materially the same form since 1 February 1997. Between 31 August 1988 and 1 February 1997, s 74P(1) included an additional element, requiring a plaintiff to also show that a caveator had acted 'wrongfully'. That legislative history was recounted at SC[93] (CAB 31). Between 1900 and 1988, a statutory cause of action for the lodgment of a
20 caveat 'without reasonable cause' was contained in s 98 of the Act.

9. Mr Boensch's argument on 'Issue 3' (AS[4], [58]-[60]) is to the effect that 'reasonable cause' within the meaning of s 74P(1) may be absent if the *value* of an interest in land does not warrant the lodgment or maintenance of a caveat. In substance, this challenges an aspect of the decision in *Beca Developments Pty Limited v Idameneo (No 92) Pty Limited* (1990) 21 NSWLR 459 ***(Beca Developments)*** at 474G-475A, holding that a caveatable interest of itself provides the reasonable cause for a caveat. Mr Boensch's argument on 'Issue 5' (AS[6], [65]-[72]) is that the language of s 74P(1) excludes as irrelevant any consideration of whether a caveator had an honest belief in what was claimed by the caveat. This challenges a different aspect of the decision in *Beca*
30 *Developments*. What is described (at AS[68]) as *"the* Beca *two-step subjective-and-objective" interpretation"* of s 74P(1) is said to be erroneous.

10. On his appeal to the Full Court, neither of these challenges were made to the decision in *Beca Developments*; Mr Boensch accepted that he had to discharge what he then described as a *"two-step onus"*.[1] The position was the same at hearing.[2] The Full Court nevertheless addressed these arguments as if they had been put (FC[109]-[111], [116]-[117] (CAB 102-104)), possibly by reference to submissions Mr Boensch had made on his application for an extension of time to appeal.[3]

11. It is accepted that 'Issue 5' is at least a pure question of law. 'Issue 3' is not of that character, although there is a question of the construction of s 74P(1) implicit in the issue. Moreover, because the case was disposed of on an independent basis that did not depend on a finding of a caveatable interest, without more 'Issue 3' cannot support the orders sought in the appeal (CAB 136-137). And in any event, the absence or paucity of evidence of a value for the caveatable interests found or contended for means that, even if Mr Boensch's argument of principle on 'Issue 3' were accepted, he would have failed to discharge his onus under s 74P(1).

12. 'Issue 3'. The following brief submissions are made if this issue is entertained. For the reasons given in *Beca Developments* (at 474G-475A), the existence of a caveatable interest itself constitutes reasonable cause for the lodgment or maintenance of a caveat. No further enquiry is necessary into the value of that interest and none is mandated by s 74P(1). The statute should not be construed or applied in a way that could have an *"undesirable chilling effect"* on the proper lodgment of caveats believed to be necessary to protect legitimate interests.[4] Persons with modestly-valued interests in land are and should be as entitled to safeguard those interests as, and to do so without more exposure under s 74P(1) than, persons with more valuable interests. As the primary judge pointed out at SC[134] (CAB 44-45), under the statutory scheme a registered proprietor of land has remedies available to them if a caveat is causing inconvenience.

13. 'Issue 5'. The genesis of the 'subjective and objective' approach taken in *Beca Developments* (and adhered to by the Full Court) can be traced to the statement of

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[1] RFM/148-149 ([35]-[37]), 153([52]).
[2] See, for example, AFM2/522.14-.18, 523.31-.32.
[3] *Boensch v Pascoe (No 2)* [2017] FCA 146 at [49], [67]-[77], [93]-[98], [105]-[112], per Gleeson J.
[4] *Beca Developments* at 463B, per Kirby P.

Wootten J in *Bedford Properties Pty Limited v Surgo Pty Limited* [1981] 1 NSWLR 106 ***(Bedford Properties)*** at 108C, that the *"foundation"* for 'reasonable cause' referred to in the former s 98 of the Act must be an honest belief based on reasonable grounds. As explained at SC[93] (CAB 31), that approach was approved by at least a majority of the Court in *Beca Developments*, as being applicable to the s 74P(1). It has also been followed in the application of similar legislation in other States, as well as in New Zealand.[5]

14. In *Beca Developments*, Clarke JA noted (at 470D-E) that the same approach was taken to absence of reasonable and probable cause in the area of law concerning civil claims for malicious prosecutions and their analogues.[6] At 470F-471D, his Honour gave various reasons for concluding that the statutory phrase was to be given the same meaning as had been attributed to the like phrase in the tort of malicious prosecution. In *Kaihu Valley Railway Company Ltd v Kauri Timber Company Ltd* (1889) 11 NZLR 403, Connolly J had observed (at 405) that the corresponding provision of the *Land Transfer Act 1885* (NZ) used *"the same words used in the case of malicious prosecution"*. Both Wootten J (at 107G, 108C) and Clarke JA (at 470A) had cited that decision, albeit on different points.

15. As mentioned above, s 74P(1) was amended and re-enacted with the expression 'without reasonable cause' some years after the decision in *Beca Developments*. The stability of the law demands that the legislature should be taken to have intended that expression to bear the meaning already judicially attributed to it in *Beca Developments*.[7]

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[5] *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419 at 434, per Malcolm CJ (Pidgeon and Seamen JJ agreeing); *Bolton v Excell* (unreported, 22 February 1993, BC9301130), per Malcolm CJ at 3; per Owen J at 10-11 (Ipp J agreeing); *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589 at 600, per Hayne J; *Farvet Pty Ltd v Frost* [1997] 2 Qd R 39 at 44-45, per Demack J (legislation amended after 1997; see *Brooks v Brooks* [2015] 1 Qd R 105 at 108 [16]-[17], per Henry J); *Holmes v Australasian Holdings Ltd* [1988] 2 NZLR 303 at 311, per Wallace J; *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 at 287-288, per Tipping J.

[6] *A v New South Wales* (2007) 230 CLR 500 at 503 [1], 527 [77]-[79], 529 [83]-[84] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

[7] *Brisbane City Council v Amos* [2019] HCA 27 at [45], per Gageler J (also [25]-[26], per Kiefel CJ and Edelman J, [48], per Keane J; [55], per Nettle J); *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* (2015) 254 CLR 489 at 502 [15]; *Carter Holt Harvey Wood Products Pty Ltd v The Commonwealth* (2019) 368 ALR 390 ***(Carter Holt Harvey)*** at 411 [58], per Kiefel CJ, Keane and Edelman JJ, at 422 [96], per Bell, Gageler and Nettle JJ.

16. AS[69]-[71] rely on the decision of this Court in *New South Wales v Taylor* (2001) 204 CLR 461 ***(Taylor)*** to contend that this was an erroneous construction of s 74P(1). For the reasons which the Full Court gave at FC[116]-[117] (CAB 103-104) and which Buss JA gave in *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* (2007) 35 WAR 27 at 48 [80], the decision in *Taylor* does not assist in the construction of s 74P(1). The provision construed in *Taylor* spoke of reasonable cause for a belief. The state of mind referred to was not that of the claimant. That points to two distinguishing features of s 74P(1). First, s 74P(1) connects reasonable cause not with a state of mind but with acts or omissions. Secondly, the acts or omissions are those of the caveator. Moreover, in *Taylor* it was not the phrase 'reasonable cause' which produced the conclusion that the state of mind referred to was not that of the claimant; it was the words around that phrase.[8] In other words, *Taylor* does not establish the proposition which Mr Boensch seeks to derive from it.

17. *Taylor* at 468 [15] does provide a reminder that there is a causal conception in the expression 'without reasonable cause'.[9] The 'honest belief' aspect of the approach approved in *Beca Developments* is directed to that causal conception, in as much as the identified belief 'causes' a person to lodge a caveat; or to procure the lapsing of one; or to refuse or fail to withdraw one. The question then becomes whether there were reasonable grounds for acting (or omitting to act) on the basis of that belief. It can thus be seen that the approach in *Beca Developments* does no violence to the language of s 74P(1).

18. If assistance in construing s 74P(1) is to be drawn from statutory analogues, there are much closer analogues than the legislation considered in *Taylor* (cf AS[71]). Both at first instance and in the Full Court, Mr Pascoe referred to industrial statutes providing that costs of proceedings thereunder may only be awarded if the proceeding was commenced vexatiously or without reasonable cause.[10] As with s 74P(1), those provisions are concerned with whether a person *acted* without reasonable cause.

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[8] *Taylor* at 466-468 [10]-[16], per Gleeson CJ, McHugh and Hayne JJ.
[9] Also, *Struthers (in his capacity as liquidator) of PACI Pty Ltd* [2005] NSWSC 864 at [44], per Brereton J, applied in *Meninsk v Parbery* (2018) 128 ACSR 480 at 516 [153], 522 [172], per Besanko, Wigney and Bromwich JJ.
[10] *Conciliation and Arbitration Act 1904* (Cth), s 197A; *Workplace Relations Act 1996* (Cth), s 347; also *Fair Work Act 2009* (Cth), s 570(2).

However, the analogy goes further, because in both s 74P(1) and the industrial statutes the act (or omission) is associated with the making or maintenance of a claim. In *Beca Developments*, Clarke JA's reasons for construing s 74P(1) as he did included reference (at 471B) to the statement of Griffith CJ in *Municipal District of Concord v Coles* (1905) 3 CLR 96 at 108, that the *"lodging of a caveat is really in the nature of the initiation of litigation"*. When lodging a caveat in New South Wales (and elsewhere), the caveator 'claims' to have an estate or interest: Act, s 74F(1). The caveat, when lodged, operates as a form of statutory injunction in aid of preserving the subject-matter of that claim.

10 19. In the industrial context, it has been said is that a party did not commence a proceeding 'without reasonable cause' simply because its argument proved to be unsuccessful.[11] In the context of the lodgment of a caveat, the failure of an argument corresponds with a failure to make out the claimed interest in land. It has also been said that an industrial proceeding is instituted without reasonable cause if it has no real prospects of success or was doomed to failure.[12] There is not an absence of reasonable cause if an unsuccessful proceeding involved one or more arguable points of law; but where, on the moving party's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.[13] It is thus clear that subjective matters are not irrelevant to the application of these provisions.

20 20. There are also costs provisions outside the industrial context using the phrase 'without reasonable cause'. Section 99(1)(b) of the *Civil Procedure Act 2005* (NSW), authorising costs indemnity orders against legal practitioners is such a provision. In *Keddie v Stacks/Goudkamp Pty Ltd* (2012) 293 ALR 764 at 798 [180], it was concluded by Beazley JA (Barrett JA and Sackville AJA agreeing) that costs of proceedings were incurred without reasonable cause because the legal practitioners did not believe they

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[11] *R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia* (1978) 140 CLR 470 at 473, per Gibbs J; *Construction, Forestry, Maritime, Mining and Energy Union v DP World Sydney Ltd (No 2)* [2019] FCAFC 114 at [3], per Rares ACJ, Jagot and Bromwich JJ.
[12] *Council of the Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission* (2006) 156 FCR 275 at 289 [60], per Black CJ, North and Mansfield JJ.
[13] *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 at 264-265, per Wilcox J.

had reasonable prospects of success. The *subjective belief* of the practitioners was therefore taken into account.[14]

21. The construction contended for by Mr Boensch would not only exclude from consideration what a defendant believed at relevant times, but also what a defendant knew or ought to have known at those times (AS[69]-[70]). That could never be the correct construction of s 74P(1). An enquiry concerned with whether a person's conduct was unreasonable cannot sensibly be undertaken by ignoring what the person knew or ought to have known. If such matters are wholly excluded, it is difficult to see how the enquiry under s 74P(1)(a) and (c) does not simply collapse into an examination of whether there was in fact a caveatable interest. The unworkability of this construction is perhaps illustrated by Mr Boensch's own submissions purporting to apply it; they are replete with assertions about what Mr Pascoe knew and about his state of mind (AS[74]-[89]).

The Caveat (Issue 4 (AS[61]-[64]))

22. The caveat lodged by Mr Pascoe (**Caveat**) is at AFM1/117-118. The primary judge found:

    (a) it is clear from the Caveat, read as a whole, that the estate or interest claimed consists of the property of Mr Boensch, the registered proprietor, which vested in Mr Pascoe pursuant to s 58(1)(a) of the *Bankruptcy Act 1966* (Cth) when he became Mr Boensch's trustee in bankruptcy and that this claim extended to whatever interest arose by virtue of s 58(1)(a) (SC[106], CAB 35-36); and

    (b) the Caveat claimed an interest in the land by virtue of s 58(1)(a) of the *Bankruptcy Act* (SC[107], CAB 36).

23. The reasons for these conclusions were set out in SC[106] (CAB 35-36). The Caveat claimed a *"Legal Interest pursuant to the Bankruptcy Act"* and the identified grounds for that claim referred to s 58(1)(a). The primary judge concluded that the words 'legal interest' were not used in opposition to equitable interests but as apt to describe an

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[14] See also *Criminal Procedure Act 1986* (NSW), s 214(1); *Hallaby v Local Court of New South Wales* [2019] NSWSC 840 at [54]-[57], per Emmett AJA.

interest that arises as a matter of law pursuant to statute. The Full Court affirmed these findings at FC[107]-[108] (CAB 101). These findings were addressing a submission (SC[102] (CAB 35)) of Mr Boensch the claimed *"Legal Interest"* did not cover the vesting in *equity* found by the primary judge.

24. As found by the primary judge, the claimed interest extended to any interest of *Mr Boensch* which had vested in Mr Pascoe in equity by virtue of s 58(1)(a). The nature of Mr Boensch's interest in the land might vary according to whether he was found to be a trustee or not. But the interest claimed by Mr Pascoe would remain the same, namely an interest by virtue of s 58(1)(a) of the *Bankruptcy Act*. On the primary judge's findings, the claim made by the Caveat covered a vesting by reason of Mr Boensch's registered proprietorship of the land (whether the title was held on trust or not) as well as a vesting by reason of any right of indemnity enjoyed by Mr Boensch as trustee.

25. It is accordingly necessary to be careful with the use of expressions such as 'legal interest' or 'legal estate' (cf AS[55], [62]). No one suggested that legal title had vested in Mr Pascoe. The issue was whether the content of Mr Pascoe's claimed interest under s 58(1)(a) was an equitable vesting of Mr Boensch's legal estate or some other interest of Mr Boensch in the land. The confusion that can arise is evidenced by AS[62] ("The primary judge concluded that "legal interest" [as used in the Caveat] means *both* the bare legal estate ... *and* the equitable interest referable to the trustee's right of indemnity"). That is not what the primary judge concluded. He concluded that the words *"Legal Interest"* in the Caveat meant an interest pursuant to statute.

26. AS[62] asserts that the primary judge read the Caveat by reference to a subjective intention and erred in doing so. The major premise of that submission is not made good. It is clear from SC[106] (CAB 35-36) that the Caveat was being read objectively. So much is also clear from the later findings about what Mr Pascoe subjectively believed, namely that at all relevant times he believed he had a caveatable interest in the land that was referable to Mr Boensch having *"more than a bare legal title"* (SC[109], [112] (CAB 37-38)). Objectively construed, the claim in the Caveat had a broader ambit.

27. It is not correct that the primary judge's reading of the Caveat was partly (and impliedly) *"reversed in the Full Court"* (AS[63]-[64]). There is no *"inescapable inference"* (AS[64]) that the Full Court did not accept so much of the primary judge's findings as decided that the interest claimed in the Caveat extended to an interest founded upon a trustee's right of indemnity. At FC[107]-[108] (CAB 101), the Full Court accepted, without qualification, the primary judge's finding that the claimed *"Legal Interest"* was Mr Pascoe's interest by virtue of statute, which extended to any interest that Mr Boensch had in the land at the time of sequestration. FC[142] and [158] (CAB 111, 114) merely recognise that the Caveat did not refer to a right of indemnity in terms.

Caveatable interest by reason of Mr Boensch's registered proprietorship of the land (Issue 1)

28. The primary judge and the Full Court accepted that Mr Pascoe had a caveatable interest in the land because s 58(1)(a) of the *Bankruptcy Act* operated, in equity, to vest Mr Boensch's interest in the land (as the proprietor of an estate in fee simple), in Mr Pascoe notwithstanding the ultimate finding in other proceedings that Mr Boensch held the land as trustee: SC[103]-[104] (CAB 35); FC[97]-[106] (CAB 97-101). These holdings relied expressly on the statement by Leeming JA in *Lewis v Condon* (2013) 85 NSWLR 99 at 120-121 [100] (McColl JA and Sackville AJA agreeing), that the bankruptcy trustee in that case plainly had a caveatable interest as a result of the vesting under s 58(1)(a), in corresponding circumstances. This was also supported by a considered judgment of Powell J (as his Honour then was) to the same effect in *Official Trustee in Bankruptcy v Ritchie* (1988) 12 NSWLR 162 at 164G-165B, 173B-174F, 175B. Powell J reasoned that the statutory language was to be read in the context of long understandings of the meaning of materially the same provisions in historic bankruptcy legislation. The principle relied upon was that the trustee in bankruptcy takes property *"subject to ... equities"* affecting it in the bankrupt's hands (at 174D).

29. In the recent decision in *Carter Holt Harvey*, Bell, Gageler and Nettle JJ at 421 [94] (Gordon J agreeing at 424 [106]) confirmed that a trustee in bankruptcy *"takes the bankrupt's property subject to equities"*. Their Honours at 421 [94] referred to the further principle followed by courts of law that if the bankrupt had even the *"most remote possibility"* of beneficial interest in property, then the property would pass to

assignees in bankruptcy.[15] If it was uncertain whether any part or the whole of the property was held as trustee for others, it would pass by the assignment.[16]

30. The *Bankruptcy Act* should not be construed literally but in a manner that will best achieve the purpose of the statute,[17] having regard to the historical setting of the provisions as appropriate,[18] and any material consequences of a particular interpretation.[19] An essential purpose is the appropriation and equitable distribution of assets in the interests of creditors generally.[20] The principles referred to above best achieve that purpose, having regard to the real practical difficulties that might otherwise be presented to trustees in bankruptcy where it cannot be readily or immediately ascertained what, if any, property may be held on trust.[21] The interests of beneficiaries are protected by s 116(2)(a) and the principle that the bankruptcy trustee takes subject to equities; or as Leeming JA put it in *Lewis v Condon* at 119 [92], trusts are not destroyed by the statutory vesting.

31. On the facts of this case, Mr Boensch had much more than a remote possibility of an interest in the land (see [36] below). He owned and occupied the land. He had all the rights of an absolute owner in fee simple, subject to his obligations as trustee.[22] Theoretically his legal title could have been sold, even though subject to trust.[23] The primary judge and the Full Court were not wrong to conclude that by virtue of s 58(1)(a) of the *Bankruptcy Act*, Mr Boensch's interest in the land (as the proprietor of an estate in fee simple) vested in Mr Pascoe in equity.

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[15] *Carpenter v Marnell* (1802) 3 Bos & Pul 40 at 41 (127 ER 23 at 24); *Carvahlo v Burn* (1833) 4 B & Ad 382 at 393; *The Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271 at 277, per Cozens-Hardy MR.
[16] *Carvahlo v Burn* (supra) at 393; *The Governors of St Thomas's Hospital v Richardson* (supra) at 277.
[17] *Acts Interpretation Act* 1901 (Cth) s 15AA; *Pyramid Building Society (in liq) v Terry* (1997) 189 CLR 176 at 195.2-.4, per McHugh J.
[18] *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 410, per Samuels JA.
[19] *Cooper Brookes (Wollongong Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320.
[20] *Storey v Lane* (1981) 147 CLR 549 at 556.8, 557.4, per Gibbs CJ.
[21] *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at 312D, per McClelland J.
[22] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 519D-G per Hope JA; affirmed in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 (referred to by the Full Court at FC [102] (CAB 100)).
[23] *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) ACSR 401 at 406 [17].

Reasonable cause for the lodgment and maintenance of the Caveat (Issues 6 and 7)

32. If Mr Boensch succeeds on appeal ground [8], there is no further ground that the Full Court should have found that there was no objective reasonable cause for the lodgment and maintenance of the Caveat; although it is implicit in the orders sought by Mr Boensch that he makes that contention (CAB 135-137). Determining whether there was or was not reasonable cause requires a detailed factual inquiry. That is so whatever be the correct way to apply s 74P(1) of the Act. If Mr Boensch fails on ground [8], then it will follow that the primary judge and the Full Court applied the correct law. On a literal reading of ground [7], there is by this appeal to be a third hearing on the application of the same (correct) principles to the same set of facts. However, Mr Boensch has made no submissions on that footing and advances no reasons why, on the principles they applied, the concurrent findings of the primary judge (SC[109]-[131], CAB 37-44) and the Full Court (FC[119]-[141], [156]-[158], CAB 105-111, 113-114) were in error. No basis has been shown for disturbing those findings.

33. The submissions that follow are made in the event Mr Boensch succeeds on ground [8] and this Court embarks on a detailed factual inquiry into whether 'objective reasonable cause' was absent. Some preliminary matters should be noticed. First, as the Full Court stated at FC[132] (CAB 108), it is important to avoid the dangers involved in the use of hindsight.[24] AS[77], [81] do not avoid that danger. Secondly, for the reasons stated at [21] above, these submissions continue to address what was known to Mr Pascoe — or, more neutrally, information of which he was aware — at relevant times. Thirdly, most of the findings going to whether it had been shown Mr Pascoe did not have reasonable grounds for his beliefs,[25] can be readily transposed into an inquiry into whether 'objective reasonable cause' was absent. They would produce no different conclusion about whether it would be affirmatively found that Mr Pascoe lodged or maintained the caveat without reasonable cause.

34. Lodgment of the Caveat. It should be noted that before the Full Court, there was a quite limited challenge to the primary judge's findings as at the time of lodgment: FC[124] (CAB 106-107). That aside, Mr Pascoe had been appointed the trustee in

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[24] See also *Edmonds v Donovan* (2005) 12 VR 513 at 549-550 [93], [95]-[96], per Phillips JA (Winneke P and Charles JA agreeing).
[25] SC[115]-[131] (CAB 38-44); FC[120]-[141], [156]-[158] (CAB 105-111, 113-114).

bankruptcy of a person who was the registered proprietor of land, an asset of substance. Only a matter of days before his appointment on 23 August 2005, a Registrar-General's caveat had been recorded noticing what was said to be a trust of the land and preventing Mr Pascoe becoming the registered proprietor: SC[19] (CAB 11). The 1999 Memorandum of Trust stated that the trust which it purported to create was *"for the benefit of the Boensch family"* (AFM1/29), of which the bankrupt was a member (cf AS[76]). It was not until March 2004 that Mr Boensch had the Memorandum of Trust stamped and had a more detailed document produced as had been contemplated therein; this occurred some months after the service of a bankruptcy notice on Mr Boensch: SC[13]-[15] (CAB 10).

35. AS [75] is inconsistent with the facts as found. Mr Pascoe did not affirmatively know about the existence of the trust. It was found that he was aware of the existence of a *claim* that the land was held on trust and the existence of some documentation purporting to support of that claim; and that he was not satisfied by Mr Boensch's claims of a trust: SC[115] (CAB 38).

36. As both the primary judge and the Full Court recognised,[26] it was Mr Boensch who was making a claim and had the burden of persuasion. Mr Boensch had an undoubted interest in the land; he was claiming that his legal estate had engrafted onto it a restriction on the manner in which he could deal with the land.[27] At the time of lodging the Caveat, it was reasonable for a bankruptcy trustee to act on the basis that the bankrupt registered proprietor had beneficial ownership of the land in the absence of a reliable, even compelling, demonstration to the contrary. From the day of Mr Pascoe's appointment, there was legal advice that setting aside the trust was a *"lay down misère"*: SC[21]-[22], [115] (CAB 12, 38). In the circumstances, that would reasonably be understood as advice that the bankrupt's claim of a trust was unreliable.

37. Further, as the Full Court stated FC[122] (CAB 106), while there may be cases where there is a substantial issue whether there is an interest and a caveatable one, this was not such a case. If Mr Boensch had what the Full Court described as *"full legal ownership"* of the land, that interest was clearly one which could be the subject of a

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[26] SC[115]-[116] (CAB 38-39); FC[124] (CAB 106-107).
[27] *Carter Holt Harvey* at 416 [82], per Bell, Gageler and Nettle JJ (Gordon J agreeing at 424 [106]); at 404 [32], per Kiefel CJ, Keane and Edelman JJ.

caveat. Mr Pascoe also had a solicitor acting for him who made the statutory declaration required by the caveat form declaring belief in the validity of the estate or interest claimed: SC[25] (CAB 13).

38. AS[74], [80] proceed on a hypothesis involving Mr Pascoe accepting that the land was held on trust. For the reasons stated above, that is both contrary to fact and the incorrect premise on which to objectively assess Mr Pascoe's conduct in lodging the Caveat. AS[83] is an unsound argument that makes good the submission made at [21] above.

39. The first request (15 November 2005). The submissions at [34]-[38] are repeated. The following further matters had occurred by 15 November 2005. Mr Pascoe had received two different versions of the Memorandum of Trust dated 23 August 1999: SC[39] (CAB 17); AFM1/155-156. He had discussed with his lawyers the need to see the original documents: SC[42] (CAB 18). He had received a copy of a letter dated 17 March 2004 written to Mr Boensch by a solicitor acting for him indicating that Mr Boensch had sought to be nominated as a beneficiary of the trust: SC[39] (CAB 17); AFM1/157-158. He had received stamped forms of Transfer for the land from both 1999 and 2004, neither of which had been registered: SC[39] (CAB 17). He had received communications from two different solicitors, each claiming to speak for the trust and saying quite different things about it: SC[37], [47] (CAB 16-17, 19). He had received copies of deeds apparently constituting two further family trusts in September 2003: SC[40] (CAB 18). One of them was described as relating to *"Rentals"*, in circumstances where the land was the only real property held by Mr Boensch. Of the material produced to Mr Pascoe, there was an absence of documentary evidence to suggest that the asserted trust had actually been carried on as such: SC[116] (CAB 39).

40. Mr Pascoe also had in his possession a title search showing there was a registered mortgage on the land: SC[23] (CAB 12); AFM1/87. He had been forwarded an email written by Mr Boensch stating *"I have the property with the liabilities"*: SC[33] (CAB 15); RFM/7.35. He had received Mr Boensch's sworn Statement of Affairs, stating that the mortgagee bank was a creditor, with approximately $70,000 said to be owing: SC[35] (CAB 16); AFM1/134, 141, 223. Even if Mr Boensch made good his trust claim, objectively there was not an absence of reasonable cause for thinking that he had a prima facie right of indemnity from the trust asset.

41. The second request (10 December 2007). On 19 July 2006, Mr Pascoe had commenced proceedings in the Federal Magistrates Court, seeking relief including declaratory relief to the effect that the 1999 Memorandum of Trust was no force or effect. The existence of contested litigation between caveator and registered proprietor concerning the subject-matter of the caveat is relevant context for determining questions under s 74P(1).[28] On 6 December 2007, Raphael FM held that the 1999 Memorandum of Trust constituted a valid declaration of trust or otherwise created a valid interest in the land: SC[70] (CAB 25).

42. The fact that a contested question is lost at first instance does not, without more, deprive a caveator of any reasonable cause to maintain a caveat.[29] After November 2005 and before proceedings were commenced, the following had occurred. Mr Pascoe had examined Mr Boensch's former wife (SC[58] (CAB 22)) and at that time had in his possession a signed statement of Ms Boensch dated 10 December 2003 (RFM/49.20-50.30, 54.15-20), stating that Mr Boensch had said in 1999 that *"he would like to set up a family trust fund for the property in his and the kids' names"* (RFM/6.27). Following the examination, Mr Pascoe had received an opinion of counsel advising that on the available material it should be inferred that it was always Mr Boensch's intention to retain an equity in the land and to that extent the 1999 Memorandum of Trust appeared to be a 'sham' or illusory: SC[60]-[62], [117] (CAB 22-23, 39); RFM/61, 72.10-.25. After commencing proceedings and before the decision of Raphael FM, counsel gave further advice to the effect that the Memorandum of Trust was ineffective as an imperfect gift and that Mr Pascoe was entitled to be registered as proprietor of the land: SC[64], [67]-[68] (CAB 23-25); RFM/78-83, 88.5, 90-92. Mr Pascoe had also received advice of counsel that he had reasonable prospects of success in the proceedings: SC[65] (CAB 24); RFM/86.20. Further, Mr Pascoe had received a letter from Ms Nash, a solicitor acting for him in collateral litigation brought by Mr Boensch, expressing a view that the 2004 transfer form (SC[18], (CAB 11)) was clearly void under s 120 or s 121 of the *Bankruptcy Act*: SC[69] (CAB 25); RFM/102-103.

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[28] *Gustin v Taajamba Pty Ltd* (1994) 6 BPR 97468 at 4.25-5.20, Handley JA (Sheller and Powell JJA agreeing); *Edmonds v Donovan* (2005) 12 VR 513 at 549 [93], per Phillips JA (Winneke P and Charles JA agreeing).

[29] *Gustin v Taajamba Pty Ltd* (supra) at 4.25-5.20.

43. Mr Pascoe had therefore received confident legal advice before the decision of Raphael FM. He had 21 days from that decision to bring any application for leave to appeal.[30] His solicitor forwarded the 'second request' to him under cover of an email stating "*I trust that my instructions will be to give an indication that an appeal will be lodged and accordingly the caveat will not be removed until the appeal has been determined*": SC[72] (CAB 26); AFM1/291. On 16 December 2007, Mr Pascoe received a further email from his solicitor to similar effect: SC[74] (CAB 26); RFM/107. On 18 December 2007, he received advice from Mr Johnson of counsel that findings of Raphael FM were "*incorrect and not supported by the evidence or the law*"; that it would be appropriate for Mr Pascoe to seek leave to appeal from the judgment; and that he would be consulting with Mr Bigmore QC about the matter in coming days: SC[76], [127] (CAB 27, 41); RFM/109.

44. In the event, Mr Pascoe filed an application for leave to appeal from the judgment of Raphael FM on the separate question and obtained leave: SC[79] (CAB 27). The grant of leave to appeal was a contemporaneous indicator that Mr Boensch's appeal was not without reasonable prospects: FC[137] (CAB 110). While Mr Pascoe's appeal was ultimately dismissed on 18 August 2008, there was no suggestion in the judgment that the arguments that were advanced by Mr Pascoe were not reasonably arguable: SC[124] (CAB 41).

45. Notwithstanding the decision of Raphael FM, the proceedings also included claims for relief under ss 120 and 121 of the *Bankruptcy Act*. And for the reasons submitted in [40] above, it remained the case that objectively there was not an absence of reasonable cause for thinking that Mr Boensch had a prima facie right of indemnity from the trust asset. Further reasons supporting that view had also been identified in the minutes of the meeting of creditors on 16 November 2005: SC[50] (CAB 20); AFM2/502-504 [62]-[67]; RFM/14.55-.60, 15.30-.50, 18.20.

46. For these reasons, Mr Pascoe's refusal or failure to withdraw the Caveat after the second request was not shown to be without objective reasonable cause.

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[30] *Federal Court of Australia Act 1976* (Cth), ss 24(1)(d), 24(1A); *Federal Court Rules 1979* (Cth), O 52, r 5.

47. The third request (18 August 2008). The 'third request' was made by letter of 18 August 2008, following the Full Court decision. Mr Pascoe's applications for relief under ss 120 and 121 of the *Bankruptcy Act* remained on foot. He had some evidence of insolvency of Mr Boensch in 1999, arising primarily from the examination of his former wife, Ms Boensch: SC[126] (CAB 42). He had material the effect of which was discussed in a solvency report prepared subsequently: RFM/116-138. He had also received advice from counsel earlier in 2008 that, even if there had been a valid trust, Mr Boensch might still have a beneficial interest in the land as a beneficiary under the trust: SC[77] (CAB 27); RFM/111-113.[31]

10 48. Moreover, for the reasons submitted in [40] and [45] above, it remained the case that objectively there was not an absence of reasonable cause for thinking that Mr Boensch had a prima facie right of indemnity from the trust asset.

49. For these reasons, Mr Pascoe's refusal or failure to withdraw the Caveat after the third request was not shown to be without objective reasonable cause.

Part VI: Notice of Contention

50. Mr Boensch addresses Notice of Contention [1] (CAB 139) as his 'Issue 2' (AS[3], [41]-[54]). He submits at AS[45] that there is a procedural fairness issue associated with this contention. The submission is untenable. It was pleaded that there was a right of indemnity.[32] The issue was addressed in Mr Pascoe's affidavit dated some
20 15 months before the date of the hearing.[33] That affidavit was the subject of reply evidence from Mr Boensch, including evidence going to a right of indemnity and what Mr Boensch had described as a 'mutually beneficial arrangement'.[34] Mr Pascoe's opening submissions at the hearing referred to evidence on the point and squarely raised the issue.[35] At the commencement of the hearing, the primary judge, having read the opening submissions, identified this issue and informed counsel for Mr Boensch that he would need to deal with it.[36] In his closing address, counsel for Mr Boensch referred to the pleaded case based on a right of indemnity and addressed Mr Pascoe's

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[31] *Westpac Banking Corporation v State of Queensland* [2016] FCA 269 at [23], per Edelman J.
[32] Defence at [7(e)] (AFM1/14).
[33] AFM2/487-517 ([36]), [64]-[67], [103], [106]-[107], [119a]).
[34] AFM1/440-441 ([64]-[68]).
[35] AFM2/744-745 [31], 748 [46], 752 [61], [63], 753 [69], 763 [111].
[36] AFM2/519.49-520.15, 521.23-.25.

evidence about that matter.[37] The topic was addressed in detail in Mr Pascoe's written closing submissions and oral address.[38] Counsel for Mr Boensch again dealt with topic in reply.[39]

51. There was no unfairness, nor any complaint of unfairness, in the conduct of the hearing concerning whether Mr Boensch had a trustee's right of indemnity. There is no procedural fairness issue associated with Notice of Contention [1].

52. In the way that the case was decided, it was unnecessary for the primary judge to finally decide whether a caveatable interest in the land had vested in Mr Pascoe by reason of a trustee's right of indemnity enjoyed by Mr Boensch. However, for the reasons submitted below that finding could have been made and would also have justified the primary judge's answers to the separate questions and consequential orders. On appeal, the Full Court said it did not propose to decide the issue for reasons including that there was no need to do so in order to decide the appeal: FC[155] (CAB113). It gave some other reasons at FC[155] (CAB113) which, for the reasons submitted below, were no impediment to the determination of the issue.

53. It is well-established law that the right of a trustee to be reimbursed or exonerated out of trust assets generates a proprietary interest that vests in a trustee in bankruptcy under s 58 of the *Bankruptcy Act*.[40] So much is conceded at AS [55(b)]. The proprietary interest is described as an equitable lien or charge arising by operation of law and endogenously as an incident of the office of trustee.[41] As might be expected, that undoubted proprietary interest is a cavetable interest in land held on trust.[42]

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[37] AFM2/677.6-.9, 693.25-.34.
[38] AFM2/767-783, 696.20, 697.47 -698.4, 699.33-.36, 700.11-.13, 704.26-705.11, 705.44-.45, 706.1-.38, 709.40-710.3, 715.49-716.10, 721.33-.37, 722.48-723.3, 723.21-724.31.
[39] AFM2/727.25-.36, 731.32-.44.
[40] *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369-370; *Carter Holt Harvey* at 404-405 [34], per Kiefel CJ, Keane and Edelman JJ; at 417 [85], per Bell, Gageler and Nettle JJ; at 431-432 [139]-[141], 438 [173]-[174], per Gordon J.
[41] *Carter Holt Harvey* at 416-417 [83], per Bell, Gageler and Nettle JJ (Gordon J agreeing at 424 [106]); at 404 [32], per Kiefel CJ, Keane and Edelman JJ.
[42] *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 53, per Owen J (Malcolm CJ and Walsh J agreeing); *Zen Ridgeway Pty Ltd v Adams* [2009] 2 Qd R 298 at 301 [10].

54. While liabilities that have been discharged by a trustee are the subject of the right to reimbursement, a right of exoneration arises on the incurring of a trust liability.[43] The lien generated by a right of exoneration will accrue when the right arises; its accrual is not postponed until such time as accounts are settled showing that there are moneys owing to the trustee.[44] It has been held that a trustee's lien accrues even where it is not certain that actual liability will arise in the future.[45]

55. The *value* of the power (or right) of exoneration, like the *value* of the power (or right) of reimbursement, may decrease by netting-off reciprocal monetary obligations to the extent to which the trustee has incurred a duty to increase the trust funds.[46] Whether that has occurred is a question depending on the result of the general account, but until the accounting occurs the trustee is entitled to a lien over and to hold all the assets of the estate.[47] Where a trustee has a prima facie right of exoneration against liabilities incurred fulfilling the trust, the onus of proving that it has been wholly set-off by some obligation to replenish the estate rests upon those who make that assertion.[48]

56. There was a registered mortgage on the land of which Mr Boensch was registered proprietor: AFM1/87. It had not been discharged: RFM/128 [6.7]. In his sworn Statement of Affairs, Mr Boensch identified the (successor to) the mortgagee bank as a creditor, with approximately $70,000 said to be owing: AFM1/134, 141, 223. Without more, Mr Boensch's undischarged liability to the mortgagee bank gave him a right of exoneration and generated a trustee's proprietary interest or lien in the land. As in *The Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271 at 282-283, the liability for the mortgage debt conferred a beneficial interest on the trustee.

57. There was, in addition, uncontradicted and unchallenged evidence *of Mr Boensch* clearly showing that he had an undischarged right to be reimbursed for expenses which

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[43] *Vacuum Oil Company Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335; *Custom Credit Corporation Limited v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 at 52, per Owen J (Malcolm CJ and Walsh J agreeing).
[44] *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1196-1197, per O'Connor J.
[45] *X v A & Ors* [2000] 1 All ER 490 at 493-494, per Arden J; *Re Exhall Coal Mining Co Ltd, Re Bleckley* (1866) 35 Beav 449, 55 ER 970 at 972, per Lord Romilly MR; *Re Pauling's Settlement (No 2)* [1963] Ch 576, Wilberforce J; *Agusta Pty Ltd v Official Trustee in Bankruptcy as trustee of the estates of Gustavo Ferella and Angelo Ferella* [2009] NSWCA 129 at [20]-[22] (without finally deciding), per Tobias JA (Beazley and Macfarlan JJA agreeing).
[46] *Carter Holt Harvey* at [31], per Kiefel CJ, Keane and Edelman JJ.
[47] *Jennings v Mather* [1901] 1 KB 1 at 9, per Mathew LJ; *Jennings v Mather* [1900] 1 QB 108 at 113-114; *Evans v Evans* (1887) 34 Ch D 597 at 601.
[48] *Jennings v Mather* [1901] 1 KB 1 at 6, per Lord Collins MR; at 7, per Stirling LJ.

he had incurred as trustee. Mr Boensch's own evidence was that there was no money in the trust to pay expenses (AFM2/546.13-.14); that he made the mortgage payments (AFM2/537.8-.10; 537.34-.35);[49] that he paid the rates on the land (AFM2/537.12-.13; 537.31-.32);[50] that he paid maintenance and repair costs on the land (AFM2/537.18-.19; 19.37-.38); that he had paid some costs in relation to development approvals from the local council (AFM2/537.38-.40); and that he generally paid all outgoings for the land (AFM1/450 [65], [67]). Mr Boensch also gave evidence that he was not repaid the amounts that he had paid in relation to the land (AFM2/537.42-.45); and that the land had not generated any income before the bankruptcy (AFM2/536.30-.42) which could have been used to reimburse him. During the bankruptcy, Mr Boensch had stated that the land was not of a standard as would permit it to be let: SC[57] (CAB 22).

58. The essential facts founding rights of exoneration and reimbursement or recoupment were therefore not controversial. Both at first instance and on appeal, Mr Boensch sought to answer the proposition that he had such rights by making an affirmative case that there had been what he described as a *"mutually beneficial arrangement"* with the trust concerning his occupation of the land. It is also the case on this appeal that Mr Boensch concedes he paid outgoings but seeks to answer the point by reference to his occupation of the land: AS[46]-[48]. The primary judge found the details of the postulated 'arrangement' to be somewhat obscure: SC[129] (AS[43]). This was not an affirmative finding that there was such an arrangement and the notion of some arrangement cognisable at law was always misconceived. However, Mr Pascoe did not deny that the *fact of Mr Boensch's occupation* of the land might generate the need for an accounting in equity and some form of set-off.[51] At AS[47], Mr Boensch now accepts that this was the proper framework for analysis.

59. But as the principles collected above demonstrate, until the *value* of rights of exoneration and reimbursement had been ascertained on an accounting, Mr Boensch continued to have a lien over the land and it was not held solely on trust. The interest constituted by the lien vested in Mr Pascoe under s 58(1)(a) of the *Bankruptcy Act*. That was a caveatable interest.

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[49] Other evidence of such payments is at RFM/124-125 [5.3], 127 [6.3].
[50] Evidence of some annual rates payable in relation to the land is at RFM/5.
[51] AFM2/715.49-716.10, 723.41-.47, 779-780 [44].

60. The fact that there was no evidence of the quantum of any off-setting obligation of Mr Boensch was a deficiency in his case. That is so for two reasons. First, the principles collected above show that Mr Boensch had the onus on this issue. Secondly, under s 74P(1) Mr Boensch had the overall onus of showing an absence of reasonable cause. For these reasons, the Full Court could and should have dealt with Mr Pascoe's Notice of Contention. Contrary to FC[155] (CAB 113), it did not need to make any findings of fact about the postulated 'arrangement' to find that Mr Boensch had a trustee's lien over the land. Although the Full Court said it might 'possibly' need to make findings about whether the indemnity had any value, that was not the case. And no question about Mr Boensch's credibility or reliability arose on the Notice of Contention. No one disputed that he had occupied the land (and SC[129] (CAB 43) is to be read as finding that he had done); and the postulated 'arrangement' was legally irrelevant.

61. Mr Boensch did not discharge his onus of proving that Mr Pascoe had no caveatable interest in the land by reason of the vesting in him of a trustee's lien enjoyed by Mr Boensch.

62. Given what has been said at [32] above, Notice of Contention [2] (CAB 139-140) does not arise.

Part VII: Estimated time for oral argument

63. It is estimated that two hours will be required for the presentation of Mr Pascoe's oral argument.

Dated: 6 September 2019

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ANNEXURE

1. *Acts Interpretation Act 1901* (Cth), s 15AA
2. *Bankruptcy Act 1966* (Cth), ss 5, 58(1)(a), 116, 120 and 121 as in force as at August 2005
3. *Conciliation and Arbitration Act 1904* (Cth), s 197A
4. *Civil Procedure Act 2005* (NSW); s 99(1)(b)
5. *Criminal Procedure Act 1986* (NSW), s 214(1)
6. *Fair Work Act 2009* (Cth), s 570(2)
7. *Federal Court of Australia Act 1976* (Cth), s 24(1)(d), 24(1A) as in force as at December 2007
8. *Federal Court Rules 1979* (Cth), O 52, r 5 as in force as at December 2007
9. *Real Property Act 1900* (NSW), s 74P(1) as in force as at December 2015; s 74F as in force as at August 2005; s 98 as in force before 1988
10. *Workplace Relations Act 1996* (Cth), s 347 as in force as at December 2006