FORM 27A – APPELLANT'S SUBMISSIONS

(Rule 44.02.2)

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M187 of 2016

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

BETWEEN:

THE AUSTRALIAN WORKERS' UNION
Appellant

and

ESSO AUSTRALIA PTY LTD
(ABN 49 000 018 566)
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues in the Appeal

2. Whether the intent to coerce referred to in sections 343 and 348 of the *Fair Work Act 2009* (Cth) (**FW Act**) refers to a subjective intent to take action which is unlawful, illegitimate or unconscionable in order to overbear the will or negate the choice of another.

Part III: Judiciary Act 1901

3. We certify that we have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903.*

Part IV: Judgments

4. (i) *Esso Australia Pty Ltd v The Australian Workers Union* (2015) 253 IR 304 (Jessup J)
(ii) *Esso Australia Pty Ltd v The Australian Workers Union* (2016) 258 IR

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396 (Full Court)

Part V: Narrative Statement of Relevant Facts

The Industrial Action

5. In 2015, the appellant **(AWU)** was engaged as the bargaining representative of its members[1] employed by the respondent (**Esso**) at offshore platforms in Bass Straight and onshore facilities at Longford, Long Island Point and Barry Beach (**employees**), in negotiations with Esso for a new enterprise agreement.

6. In aid of those negotiations, on 3 February 2015, AWU gave Esso a notice under s.414(6) of the FW Act of its intention to take a number of forms of protected industrial action (**industrial action notice**)[2], one of which was:

> *An indefinite ban on the de-isolation of equipment…commencing at 12.01 a.m. on Thursday 12 February 2015.*[3] (**de-isolation ban**)

7. In applying the de-isolation ban, the employees banned tasks known as 'air freeing' and 'leak testing' (from 4 March 2015) and manipulating 'bleeder valves' (from 7 March 2015) (**banned tasks**).[4]

8. The central factual controversy in the case was whether the banned tasks fell within the meaning of the expression 'de-isolation of equipment' in the industrial action notice and thus formed part of the de-isolation ban. If they did not, then they were not protected industrial action.

9. At trial, Esso relied on the defined meaning of 'de-isolation of equipment' in its 'Work Management System' ('**WMS**') manual,[5] the effect of which would be to exclude the banned tasks. AWU relied on another part of the WMS which prescribed an electronic control of isolations and de-isolations called the 'Isolation Control Certificate' (**ICC**).[6] The ICC provided for a range of tasks, including the banned tasks, to be carried out on equipment to bring it back into service and while that was being done, the ICC described the process as "de-isolation progress". The AWU also relied on what it said was the well understood meaning of the expression by employees and supervisors at Longford.

10. The primary Judge accepted Esso's argument that the banned tasks were not

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1 FW Act s.176(1)(b).

2 The notice reflected the various forms of industrial action that had been overwhelmingly endorsed by the AWU's members in a 'protected action ballot' conducted pursuant to s.449 of the FW Act.

3 First Instance Judgment at [31].

4 First Instance Judgment at [46] and [58].

5 First Instance Judgment at [11]; See also Section 4.6.5 at [18].

6 First Instance Judgment at [19].

covered by the de-isolation ban. His Honour concluded that the WMS manual 'is the more closely related to the work as such, and is more directly concerned with marking out de-isolation as an activity of work'.[7] It followed from this conclusion that the AWU's 'ban on work of that kind was not protected industrial action within the meaning of the FW Act'.[8] A majority in the Full Court upheld the primary Judge's finding of fact.[9] That finding is not challenged in this appeal.

The Alleged Coercion

11. Esso contended that by organising the banned tasks and the other industrial action in the industrial action notice, the AWU contravened s.343 of the FW Act by organising 'action' against Esso with the intent to coerce Esso to exercise a 'workplace right' to make an enterprise agreement or to make such an agreement 'in a particular way', namely on terms acceptable to the AWU.[10]

12. A parallel claim was made of contravention of s.348 of the FW Act on the basis that the same action was taken by AWU with intent to coerce Esso to engage in industrial activity by agreeing to a request or requirement by AWU to make an enterprise agreement.[11]

13. By operation of s.361 of the FW Act, the AWU bore the onus of proof in relation to its intent for the purposes of sections 343 and 348.

14. The primary Judge held that, in relation to the industrial action in the industrial action notice, the individual who made the decision to organise that industrial action on behalf of the AWU was its Victorian branch secretary, Mr Davis.[12] Therefore the intent of the AWU was the intent of Mr Davis. The primary Judge referred to the evidence in chief of Mr Davis about his intent when he signed the industrial action notice.[13] In summary it was that:

    (a) he had no intention in arranging the industrial action to negate Esso's choice in any way in relation to the making of an enterprise agreement and that the action was organised with the intention of legitimately advancing the industrial interests of the employees; and
    (b) at all times, he believed and intended that the industrial action he organised would be protected under the FW Act.

15. Under cross-examination, Mr Davis conceded that he was aware that Esso

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7 First Instance Judgment at [89].
8 First Instance Judgment at [90].
9 Buchanan J at [117]-[125]; Siopis J agreeing at [1]; Bromberg J dissenting at [340]-[347].
10 First Instance Judgment at [155]-[156]; Esso relied on s. 341(1)(b) and (2)(e) of the FW Act.
11 Section 347(b)(iv) of the FW Act; First Instance Judgment at [190].
12 First Instance Judgment at [169].
13 First Instance Judgment at [170].

was 'more vulnerable than usual' during its shutdown and that he wanted to put pressure on Esso to come to a compromise outcome in which it agreed to claims to which it did not want to agree and to drop or modify claims it was pursuing.[14]

16. In relation to 14(a) above, the primary Judge found that 'the intent of Mr Davis, and therefore the [AWU], in organising the action conformably with [the notice] was to apply sufficient pressure on [Esso] to cause it to act otherwise than in the exercise of its own free choice'.[15] In relation to 14(b), the primary Judge did not question that the belief of Mr Davis was that the industrial action which he organised would be protected.[16] However, because of the way the primary Judge construed the meaning of 'intent' in sections 343 and 348 of the FW Act, his Honour held that that belief was 'irrelevant to the question whether he intended to coerce [Esso]'.[17]

17. In relation to the refusal to perform leak testing and air freeing on 4 March 2015, which was held not to be covered by the industrial action notice, the primary Judge found that it was organised and imposed by Mr Davis and an AWU delegate, Mr Steed, on behalf of the AWU.[18] Mr Davis gave no evidence specifically about these actions. Mr Steed's evidence was that in his view these actions were covered by the industrial action notice.[19] The primary Judge made the same findings about their intent (and that of the AWU) in relation to these actions that his Honour had made in respect of the bans covered by the industrial action notice.[20]

18. In relation to the ban on manipulating bleeder valves, the primary Judge held that it was 'imposed' on 7 March 2015 by two other AWU delegates, Mr Tschugguel and Mr Rawnson.[21] Their conduct was that of the AWU.[22] Mr Tschugguel's evidence about intent was that he believed the ban was covered by the industrial action notice.[23] The primary Judge made the same findings about their intent (and that of the AWU) in relation to that ban that his Honour had made in respect of the other bans referred to above.[24]

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14 First Instance Judgment at [173].
15 First Instance Judgment at [174].
16 Mr Davis' evidence about his belief was not challenged in cross-examination at the trial.
17 First Instance Judgment at [171].
18 First Instance Judgment at [179].
19 First Instance Judgment at [179]. Mr Steed's evidence about his view that the action was covered by the industrial action notice was not challenged in cross-examination at the trial.
20 First Instance Judgment at [182]-[183].
21 First Instance Judgment at [184].
22 First Instance Judgment at [184] referring to s.363(1)(d) of the FW Act.
23 Mr Tschugguel's evidence about his and Mr Rawnson's view that the action was covered by the industrial action notice was not challenged in cross-examination at the trial. Mr Rawnson did not give evidence.
24 First Instance Judgment at [185]-[188].

19. The ultimate findings of fact by the primary Judge were that:

(a) *"In the light of the evidence to which I have referred, I find that the intent of Mr Davis, and therefore of the [AWU], in organizing industrial action conformably with the notification of 3 February 2015 was to apply sufficient pressure on [Esso] to cause it to act otherwise than in the exercise of its own free choice. It was to cause it to agree to terms in prospective enterprise agreement to which it would not, as a matter of choice, have agreed in the absence of that pressure."* (First Instance Judgment [174])

(b) *"In my view that application of pressure was illegitimate. In every respect, the bans and stoppages notified on 3 February 2015 involved refusals by the employees concerned to perform some aspects of their required, customary duties pursuant to their contracts of employment. The obligation to serve lies at the heart of the employment relationship. The conclusion that it is illegitimate for an employee to refuse to serve as a means of extracting beneficial terms from his or her employer is one that will rarely be difficult to draw. On the facts of the present case, when, to use Mr Davis' concession, the employer was in a vulnerable position, this conclusion is readily to be drawn, and I do so."* (First Instance Judgment [175])

(c) *"For the above reasons, I find the industrial action notified by [AWU] on 3 February 2015 was organize with intent to coerce [Esso] to make an enterprise agreement, or to make one on terms acceptable to [AWU]."* (First Instance Judgment [176])

Part VI: Argument

'Intent to Coerce'

20. AWU submits that both the primary Judge and the majority in the Full Court[25] erred in finding in relation to the element of intent to coerce in both sections 343 and 348 of the FW Act, that it was not necessary to prove that the intent was to negate choice by organising or taking action which was unlawful, illegitimate or unconscionable in order to make out a contravention of either section.

21. There is no contest that under either section it is necessary to establish that the action taken was unlawful, illegitimate or unconscionable. These criteria derive from the general law relating to economic duress. The issue in contest is as to the content of the intent to coerce.

22. As was noted by the primary Judge, prior to this proceeding, this issue about the nature of the required intent, has only been considered judicially on one occasion and that was in *Seven Network*.[26] That was a case brought for

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25 Siopis and Buchanan JJ, Bromberg J not deciding.

26 *Seven Network (Operations) Ltd v CEPU* (2001) 109 FCR 378.

contravention of s.170NC of the *Workplace Relations Act 1996* (**WR Act**), the predecessor to s.343.

23. *Seven Network* involved an allegation that a union had threatened to take unprotected industrial action against the Seven Network with the intent to coerce it to agree to make an industrial agreement. The conduct identified as the threat included the service of a notice to take protected industrial action under s.170MO(2) of the WR Act.[27] It was said to be coercive because any industrial action taken pursuant to the threats would necessarily be unprotected industrial action as the union did not have any members who had the power or capacity to take the threatened protected industrial action.[28]

24. Merkel J held that the correct starting point in construing the phrase 'intent to coerce' is an understanding that s.170NC of the WR Act prohibits the intentional doing of an act of the character prescribed by the section.[29] Therefore, as explained by Brennan J in *He Kaw Teh v The Queen,*[30] the necessary *mens rea* is 'general or basic intent', i.e. 'knowledge of the circumstances which give the act its character'.[31]

25. Merkel J referred to the judgment of the plurality in *Giorgiani v The Queen,*[32] where it was held that it is actual knowledge that must be established in such cases and not imputed knowledge. It is insufficient to prove that a person's knowledge or belief extends only to the possibility or even probability that the act which the person is assisting or encouraging is something which goes to make up the facts which constitute the commission of a criminal offence. As the Court there explained:

> *"If that were sufficient, a person might be guilty of aiding, abetting, counselling or procuring of an offence which form no part of his design. Intent is required and it is intent which must be based upon knowledge or belief of the necessary facts."*[33] (Underlining added)

26. Merkel J applied these principles to the phrase 'intent to coerce' in s.170NC of the WR Act[34] and concluded that to succeed:

> *"...Seven Network must establish that:*
> *(a) The respondent's threats of industrial action were made with intent to negate Seven Network's choice by the exertion of pressure that was, in the circumstances, unlawful, illegitimate or unconscionable; and*

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27 Section 170MO(2) was the statutory predecessor to s.414(6) of the FW Act.
28 *Seven Network* at [54].
29 *Seven Network* at [33].
30 (1985) 157 CLR 523 at 569-570 (extracted in *Seven Network* at [32]).
31 *ibid.*
32 (1984) 156 CLR 473 at 504 (Wilson, Deane and Dawson JJ).
33 *ibid.*
34 *Seven Network* at [36]-[37].

(b) *The respondents had actual knowledge of the circumstances that made their conduct coercive in the sense discussed in (a) above.*"[35] (Underlining added)

27. On the facts in *Seven Network*, the circumstances that made the conduct coercive were that the union had no legitimate members who were employed by the employer and thus no one was able to validly take the threatened industrial action. The union officials who had made the relevant threats gave evidence that they believed that the members were legitimate members of the union and therefore able to take protected industrial action and they argued that they therefore did not have the requisite intention under s.170NC. Merkel J did not accept the evidence of the officials as to their belief about the members and therefore the union was held to be liable.[36] However, it is clear that the union would not have been liable if the court accepted that the officials in fact believed that the industrial action, if taken, would have been protected industrial action.[37]

28. AWU submits that the above finding by Merkel J as to the content of the intent required under s.170NC of the WR Act, is equally applicable to the intent required under each of sections 343 and 348 of the FW Act.

29. AWU further submits that his Honour's finding is consistent with the text in each of the sections, which is relevantly the same and which focuses on an "intent to coerce", unlike the common law of economic duress which has frequently been referred to in the cases on these sections, and which focuses on the actual coercive effect of actions taken.[38] It is also consistent with the general principles about intent explained in *He Kaw Teh* and *Giorgiani.*

30. The primary Judge disagreed with the description of the requisite intent to coerce posited by Merkel J at [43] of the latter's judgment.[39] The primary Judge held that the adjectives, "unlawful, illegitimate or unconscionable" reflect characterisations of the action organised or taken. However, his Honour did not explain why they do not equally inform the content of the intent proscribed by the phrase "intent to coerce". Intent simply to negate choice is not necessarily unlawful.[40]

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35 *Seven Network* at [43].

36 *Seven Network* at [56]-[60].

37 See for example, the findings of Merkel J at [59](j) and [60] see also the fifth sentence of paragraph [44], a sentence that the primary Judge considered to be 'problematic' - First Instance judgment at [163].

38 Clause 1391 of the Explanatory Memorandum for the FW Act stated in relation to s 343: "*The prohibition applies irrespective of whether the action taken to coerce the other person is effective or not".* In relation to the common law: *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 41 **(*Crescendo*)** at 45-46 per McHugh JA, with whom Samuels and Mahoney JJA agreed.

39 First Instance Judgment at [166].

40 *Barton v Armstrong* [1976] AC 104 at 121 per Lord Wilberforce and Lord Simon (cited in *Crescendo* at 46).

31. Further, the primary Judge also erred at [166] in finding that Merkel J held that the actor's belief that the action was lawful was not exculpatory. Merkel J held to the opposite at [43] and only found against the actors because he did not accept their evidence as to their belief that the threatened action was protected. This formed a critical part of his Honour's findings.[41]

32. Finally, the primary Judge erred in rejecting AWU's submissions as to the need to establish the real intent of the actor, by analogy with the reasoning in *Barclay.*[42] His Honour provided no developed reasons for doing so.

33. The primary judge concluded that the industrial action taken by AWU was intended to apply pressure on Esso to act otherwise than in the exercise of its own free will and on that basis found that AWU had the prohibited intent under s.343.[43]

34. The majority in the Full Court came to the same conclusion as the primary Judge.[44] Their reasoning is broadly the same as that of the primary Judge, although Buchanan J undertook his own analysis of *Seven Network*.

35. However, at [194], when dealing with the finding at [43] in *Seven Network*, Buchanan J misconstrued it by failing to recognise that Merkel J was referring to the subjective intent of the actor to coerce, both in relation to the nature of the intended action and to the actor's knowledge of the circumstances that made the action coercive. That is the only reading of [43] that gives effect to Merkel J's earlier references to *He Kaw Teh* and *Giorgiani*. Buchanan J gives no attention to those earlier references.

The Common Law of Economic Duress

36. In the Court below, Buchanan J observed (at [194]) that the approach that has been taken by the courts to s.343 of the FW Act, and its statutory predecessors such as s.170NC of the WR Act 'is consistent with the common law origins of the notion of coercion which can be traced back to the tort of economic duress…'.[45]

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41 *Seven Network* at [57] (first two sentences), [59](j) and (k), [60](final sentence).

42 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No. 1)* (2012) 248 CLR 500; see also *CFMEU v BHP Coal Pty Ltd* (2014) 253 CLR 243, especially at [92] per Gageler J; *CFMEU v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 at [30] per Jessup J and [77] per Perram J.

43 First Instance Judgment at [174] & [176].

44 Appeal Judgment at [176] and [201].

45 Such an approach has been taken in a number of cases concerning s 343 of the FW Act and its predecessors: *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16 at [18]-[25]; *Fair Work Ombudsman v National Jet Systems* (2012) 218 IR 436 at [12]-[42]; *Victoria v CFMEU* (2013) FCR 172 at [72]; [91]-[99]. Cases construing the meaning of 'duress' in industrial relations legislation have also referred to the common law

37. Respectfully however, His Honour has misapplied the common law concepts of coercion and economic duress because at common law the 'intent' of the party applying the pressure is irrelevant.

38. The learned authors of Cheshire and Fifoot's *Law of Contract* describe the elements of economic duress as:

(a) D has used a form of illegitimate pressure, physical, economic or psychological, in order to compel P to assent to a transaction;

(b) that pressure has left P with no reasonable alternative but to assent to the transaction; and

(c) the pressure in fact caused P to assent to the transaction or was a cause of P assenting to it.[46]

39. The common law cause of action is concerned with whether an agreement should be enforced in circumstances where one party to it may not have entered into it freely. The focus is on the 'victim' and the effect the conduct has had on her or him.

40. By contrast, provisions such as s.343 and s.348 of the FW Act serve a very different purpose. They are penal provisions concerned with the protection of 'workplace rights'.[47] In contrast to the common law, the sections are not directed at the actual effect of any coercive pressure. Their focus is on the anterior question of the intent of the person imposing the pressure. The pressure does not need to have had any effect on the target for the statutory offence to be made out.[48]

41. It follows that the common law economic duress jurisprudence is only of assistance in understanding the meaning of 'coerce'. Contrary to the suggestion of Buchanan J, the common law of economic duress is not concerned with intent or purpose.

42. Buchanan J erred again in his interpretation of *Seven Network* at [198] when he suggested that the findings in that case are consistent with that of the primary Judge. That is plainly wrong when the reasoning of Merkel J referred to in paragraph 26 above is examined.

43. AWU submits that having regard to the penal nature of s.343, the specific

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economic duress cases, see, eg, *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186 at [8]-[18].

46 Seddon, N, Bigwood R & Ellinghaus M, *Cheshire & Fifoot's Law of Contract* (10th Australian ed.), p. 743.

47 FW Act, s 336.

48 See *Granada Tavern v Smith* (2008) 173 IR 328 at [75] (Heerey J) cited with approval by Buchanan J in *Fair Work Ombudsman v National Jet Systems* (2012) 218 IR 436 at [37]-[38].

reference to an 'intent to coerce' in the section and the principles about intent discussed in *He Kaw Teh* and *Giorgiani*, the primary Judge and the Full Court have come to an erroneous conclusion.

44. The primary Judge and the Full Court effectively applied the same reasoning to the alleged contravention of s.348 of the FW Act. For the reasons advanced above in relation to s.343, AWU submits that the requirement of intent to coerce in s.348 should be treated the same as under s.343 namely, as explained in *Seven Network.*

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45. The AWU's contention that the intent to coerce in the two sections is directed to the subjective intent of the actor, is consistent with the analysis of the former s.170NC in *Electrolux*.[49] In that case, the High Court took the view that the necessary intent to coerce in s.170NC(1) referred to the subjective view of the actor about the character of the proposed enterprise agreement in support of which the industrial action was being taken.[50] Consistent with this, the AWU contends that the subjective view of the actor about the character of the alleged coercive conduct is similarly determinative. There is no mandate for treating the intent differently in relation to the two matters.

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46. Sections 343 and 348 of the FW Act require a search for the real or actual intent of the person said to have coerced just as s.340 of the same Act requires a search for the real or actual reason or reasons.[51] Section 361 applies without distinction to both the issues of reason and intent. The discussion in *Barclay* about the effect of s.361 on the inquiry into the reason for adverse action applies equally to the inquiry into the intent to coerce.[52] Contrary to the view of the present Full Court,[53] the 'line of inquiry' is the same.

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Part VII: Applicable Legislation

47. See annexure 'A'.

Part VIII: Orders Sought

48. Order 3 of the judgment of the Full Court of the Federal Court of Australia made on 25 May 2016 be set aside to the extent that it dismissed the Appellant's appeal against declarations 5 to 10 made by Jessup J on 13 August 2015.

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49 (2004) 221 CLR 309.

50 *Ibid* at [169]-[171] (Gummow, Hayne and Heydon JJ).

51 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No. 1)* (2012) 248 CLR 500.

52 *Ibid* at [41].

53 Judgment of Buchanan J at [189]; Siopis J agreeing (at [1]); Bromberg J not deciding.

49. Declarations 5 to 10 made by Jessup J on 13 August 2015 are set aside.

Part IX: Duration

50. The oral presentation of the argument should take approximately 2 hours.

DATED: 27 January 2017

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ANNEXURE A: APPLICABLE LEGISLATION

***Workplace Relations Act 1996* (Cth), s.170NC.**

S.170NC was repealed by Schedule 1 of the *Workplace Relations Amendment (Workchoices) Act 2005* (Cth) which commenced operation on 27 March 2006.

***Fair Work Act 2009* (Cth), ss. 336, 341, 343, 347, 348, 361, 363, 414.**

The above mentioned sections of the *Fair Work Act 2009* (Cth) are still in force, in the form reproduced in this annexure, as at the date of the submissions.

Division 9—Prohibition of coercion in relation to agreements

170NC Coercion of persons to make, vary or terminate certified agreements etc.

(1) A person must not:

(a) take or threaten to take any industrial action or other action; or

(b) refrain or threaten to refrain from taking any action;

with intent to coerce another person to agree, or not to agree, to:

(c) making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3; or

(d) approving any of the things mentioned in paragraph (c).

Note: The Court has certain remedial powers in relation to a contravention of this section: see Division 10.

(2) Subsection (1) does not apply to action, or industrial action, that is protected action (within the meaning of Division 8).

(3) An employer must not coerce, or attempt to coerce, an employee of the employer:

(a) not to make a request as mentioned in subsection 170LK(4) in relation to an agreement that the employer proposes to make; or

(b) to withdraw such a request.

Division 3—Workplace rights

340 Protection

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

341 Meaning of *workplace right*

Meaning of ***workplace right***

(1) A person has a ***workplace right*** if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

(b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

343 Coercion

(1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or

(b) exercise, or propose to exercise, a workplace right in a particular way.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply to protected industrial action.

344 Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

(a) make, or not make, an agreement or arrangement under the National Employment Standards; or

(b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or

(c) agree to, or terminate, an individual flexibility arrangement; or

(d) accept a guarantee of annual earnings; or

(e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: This section can apply to decisions whether to consent to performing work on keeping in touch days (see subsection 79A(3)).

Rectified 3/12/2014 ComLaw Authoritative Act C2014C00031

(c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or

(d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or

(e) complies with an unlawful request made by, or requirement of, an industrial association; or

(f) takes part in industrial action; or

(g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or

(ii) to which an employee is not entitled because of that Division.

348 Coercion

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

Note: This section is a civil remedy provision (see Part 4-1).

349 Misrepresentations

(1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:

(a) another person's obligation to engage in industrial activity;

(b) another person's obligation to disclose whether he or she, or a third person:

(i) is or is not, or was or was not, an officer or member of an industrial association; or

(ii) is or is not engaging, or has or has not engaged, in industrial activity.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

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(a) action taken by the committee of management of the industrial association;

(b) action taken by an officer or agent of the industrial association acting in that capacity;

(c) action taken by a member, or group of members, of the industrial association if the action is authorised by:

(i) the rules of the industrial association; or

(ii) the committee of management of the industrial association; or

(iii) an officer or agent of the industrial association acting in that capacity;

(d) action taken by a member of the industrial association who performs the function of dealing with an employer on behalf of the member and other members of the industrial association, acting in that capacity;

(e) if the industrial association is an unincorporated industrial association that does not have a committee of management—action taken by a member, or group of members, of the industrial association.

(2) Paragraphs (1)(c) and (d) do not apply if:

(a) the committee of management of the industrial association; or

(b) a person authorised by the committee; or

(c) an officer of the industrial association;

has taken all reasonable steps to prevent the action.

(3) If, for the purposes of this Part, it is necessary to establish the state of mind of an industrial association in relation to particular action, it is enough to show:

(a) that the action was taken by a person, or a group, referred to in paragraphs (1)(a) to (e); and

(b) that the person, or a person in the group, had that state of mind.

(4) Subsections (1) to (3) have effect despite subsections 793(1) and (2) (which deal with liabilities of bodies corporate).

(a) 3 working days; or

(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

Notice of employee claim action not to be given until ballot results declared

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements—employee response action

(4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements—employer response action

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:

(a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and

(b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

Notice requirements—content

(6) A notice given under this section must specify the nature of the action and the day on which it will start.