

BETWEEN:



THE AUSTRALIAN WORKERS' UNION
Appellant

and

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

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RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: The Issue

2. This appeal ultimately raises a question as to the proper construction of sections 343 and 348 of the *Fair Work Act 2009* (Cth) (**FW Act**). Inherent in the appellant's stated issue is a particular construction of those provisions never previously considered by this Court.¹
3. Assuming that this Court were to adopt that same test, the respondent would state the issue in these terms: in order to form the requisite "intent to coerce" for the purposes of sections 343(1) and 348 of the FW Act, does the contravener need to know that the action it organises/threatens/takes is in fact and in law, unlawful, illegitimate or unconscionable?
4. The respondent contends that the answer to that question is "no".

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¹ The dual element test for "intent to coerce": Appeal Judgment at [174]. The respondent adopts the same defined terms as used in the Appellant's Submissions.

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The respondent certifies that it has considered whether a notice should be given under section 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

Part IV: Facts

6. Although now of limited relevance to the issues in this appeal, the suggestion (Appellant's Submissions (**AS**) at [9]) that the "*ICC provided for a range of tasks, including the banned tasks, to be carried out on equipment to bring it back into service*", was one of the key factual issues in contest in the appellant's appeal before the Full Court and was a suggestion which the minority accepted and which the majority rejected.²
7. Aspects of each of paragraphs 16-18 of the AS and in particular, footnotes 16, 19 and 23, are wrong. Before the primary judge, the respondent contended that the evidence of each of Messrs Davis, Steed and Tschugguel as to their belief that the banned tasks were within the scope of the industrial action notice and therefore protected, was unreliable, should not be believed, stretched credulity and was unconvincing. Each of them were cross-examined to the effect that they did not believe the banned tasks were protected action, or at least they were wilfully blind on that question.
8. The primary judge did not comment upon or resolve these evidentiary issues³ because of his conclusion that the evidence on this issue was irrelevant.⁴

Part V: Applicable Constitutional and Statutory Provisions

9. To the appellant's list of applicable statutory provisions should be added those set out in Annexure A.

² Compare paragraphs [83]-[84] and [115]-[116] (Buchanan J, with whom Siopis J agreed) with paragraphs [278]-[279] and [317]-[320] (Bromberg J) of the Appeal Judgment.

³ As would have been required of him.

⁴ First Instance Judgment at [171].

Part VI: Argument

10. The appellant's appeal relates to the second element of the dual element test for "intent to coerce" in sections 343(1) and 348 of the FW Act, developed by the Federal Court and accepted at Full Court level.
11. Paragraph 21 of the AS overstates the position somewhat. Whilst the respondent does not here (and did not below) specifically contend (by way of Notice of Contention) for any alternative construction, it has always questioned the correctness of the dual element test but nevertheless been content to assume its correctness and deal with the appellant's point (as the primary judge and the Full Court did).
12. Either way, the genesis of (and rationale for) the dual element test has some relevance to the disposition of the appeal. Statutory history, statutory construction, the genesis of the dual element test and context and purpose, all support the conclusion reached by the Full Court, that the second element (as it is described in many of the authorities) is "objective" and is to be applied objectively.
13. The reference to "intent to coerce" in sections 343(1) and 348 does not mean that the actor had to intend (in the sense of know) that his or her action would be unlawful, illegitimate or unconscionable. Those adjectives, derived from related common law concepts and developed in the authorities set out below, reflect legal characterisations of the action threatened/organised/taken. The intent relates to the negation of choice, not the characterisation of the means adopted to achieve that end.⁵

Statutory history

14. The earliest predecessors to sections 343(1) and 348 of the FW Act were first enacted in October 1977 with the passage and commencement of the *Conciliation and Arbitration Amendment Act (No 3) 1977* (Cth). That Act introduced sections 5(1A)(aa), 132A(1), 144A(6) and 188 into the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (**C&A Act**), which

⁵ First Instance Judgment at [166]; Appeal Judgment at [176] and [179].

prevented certain actions being taken with “intent to coerce” the victim to do or not to do certain things.

15. The substance of these prohibitions were re-enacted in 1988 in sections 320 and 334-336 of the *Industrial Relations Act 1988* (Cth) (**IR Act**) and again in 1996 in sections 170NC, 187AB and 298P-298S of the *Workplace Relations Act 1996* (Cth) (**WR Act**).⁶

Judicial consideration of “intent to coerce”

16. The first substantive judicial consideration of the phrase “intent to coerce” (in then section 170NC of the WR Act) was conducted in 1997 in *National Workforce Pty Ltd v Australian Manufacturing Workers’ Union (No 2)*.⁷ In *obiter*, the Victorian Court of Appeal referred to the ordinary and legal dictionary definitions of “coerce”/“coercion” and a series of cases of which it was said that the “*word was held, admittedly in particular contexts, to require wrongful, illegitimate or illegal action or at any rate the negation of choice, something more than the pressure inevitably attending on industrial action.*”⁸
17. The appellant in that case argued that if the line of cases referred to by the Court of Appeal laid down a legal definition of coerce different from the popular (dictionary) meaning, then the legal definition was inapplicable to section 170NC. This distinction was a reference to the requirement of “*wrongful, illegitimate or illegal*” action, because it was argued that section 170NC(2) of the WR Act (like section 343(2) of the FW Act) indicated that “protected action” “*would, or might, otherwise contravene subs (1)*”.⁹ Without deciding, the Court of Appeal said that there was “*much to commend*” this reading of the provision.¹⁰
18. It is questionable whether the cases referred to by the Court of Appeal establish

⁶ The substance of these was re-enacted/renumbered with the passage of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), becoming sections 400, 508, 789, 796-800 and 802 of the WR Act.

⁷ [1997] VSC 51; [1998] 3 VR 265 (Phillips, Charles and Batt JJA).

⁸ *Ibid* at 286.1.

⁹ *Ibid* at 286.6-286.8.

¹⁰ *Ibid* at 286.9. It appears to be the reading adopted here: Primary Judgment at [158].

the proposition set out in paragraph 16 above, now manifested in the second element of the dual element test. Lord Watson's opinion in *Allen v Flood* is the closest.¹¹ The citation for *Hodges v Webb* supports the first element (negation of choice) but does not otherwise expressly support the second element.¹²

19. *Goddard v Osborne*¹³ considered the defences of duress and marital coercion. The commentary on marital coercion supported the first element only.¹⁴ It is noteworthy that "duress" and "coercion" were described as cognate in relation to the state of mind of the perpetrator of the offence (*i.e.* were they the subject of duress or marital coercion sufficient to provide a defence to the offences charged?)¹⁵
20. Section 170NC of the WR Act was revisited in *Finance Sector Union of Australia v Commonwealth Bank of Australia*.¹⁶ Gyles J (at 23 [18]) referred to the "inconclusive discussion" from *National Workforce* and interlocutory observations of Finkelstein J (to the effect that coercion was presumably no more than a "*particularly nasty form*" of inducement).¹⁷
21. Gyles J also referred to the supposed holding of the line of cases referred to in *National Workforce*, but expressed difficulty with the discussed distinction between the legal and ordinary meaning of "coercion" from *National Workforce*, because each of them required "*negation of choice*".¹⁸ It is true that the dictionaries and the cases refer to/support the first element of the dual element test (negation of choice), but the distinction there discussed related to the second element (see paragraph 17 above).

¹¹ [1898] AC 1 at 98. The other cited reference (to Lord Herschell at 128-9) supports the first element, but provides little support for the second element.

¹² [1920] 2 Ch 70 at 86 (Peterson J). *White v Riley* did approve *Hodges v Webb*, but not on this particular point: [1921] 1 Ch 1 at 20 (Lord Sterndale MR) and 27 (Warrington LJ).

¹³ (1978) 18 SASR 481 (Hogarth ACJ, Zelling and King JJ).

¹⁴ *Ibid* at 491, citing Lord Simon of Glaisdale from *Director of Public Prosecutions v Lynch* [1975] AC 653 at 694.

¹⁵ Note too, *Director of Public Prosecutions v Lynch* [1975] AC 653 at 693-4 (Lord Simon of Glaisdale).

¹⁶ [2000] FCA 1468; (2000) 106 FCR 16 (Gyles J).

¹⁷ *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2000] FCA 1372; (2000) 106 IR 139 at 152 [44].

¹⁸ [2000] FCA 1468; (2000) 106 FCR 16 at 23 [20].

22. His Honour then regarded the Full Court decision in *Schanka v Employment National (Administration) Pty Ltd*¹⁹ as providing “authoritative guidance”.²⁰ *Schanka* dealt with the meaning of the word “duress” in section 170WG of the WR Act and in particular, whether the concept of duress focussed on the victim (as the text and purpose suggested) or the perpetrator (as was the common law’s focus).²¹ His Honour applied *Schanka* because of his view that if there was “a difference between duress and coercion, it is not, in my opinion, material here”.²²
- 10 23. The discussion in *Schanka* and *Commonwealth Bank* involved a consideration of common law economic duress. *Schanka* (at 191-2 [18]) referred to the dissenting opinion of Lord Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*,²³ to the effect that economic duress required the establishment of two elements: compulsion/overbearing of the will and illegitimacy.²⁴ This was said to follow from the authorities upon which *Barton v Armstrong*²⁵ and *Pao On v Lau Yiu Long*²⁶ were based. There is some (but limited) support for that proposition.
- 20 24. The majority advice in *Barton v Armstrong* referred to the development of duress in equity, where relief was granted when there was the “exercise of pressure which the Chancellor considered to be illegitimate”.²⁷ The minority opinion stated that overbearing of the will is not of itself, negation of consent in law: “for this the pressure must be one of a kind which the law does not regard as legitimate”.²⁸

¹⁹ [2000] FCA 202; (2000) 97 FCR 186 (Ryan, Lee and Branson JJ).

²⁰ [2000] FCA 1468; (2000) 106 FCR 16 at 23 [21].

²¹ The precise issue was whether the victim had to actually accede to the pressure and make an AWA, or whether the application of the pressure was sufficient (whether or not it had its intended effect).

²² [2000] FCA 1468; (2000) 106 FCR 16 at 23 [21].

²³ [1983] AC 366 (HL).

²⁴ *Ibid* at 400.

²⁵ [1976] AC 104 (PC).

²⁶ [1980] AC 614 (PC).

²⁷ [1976] AC 104 at 118.5.

²⁸ *Ibid* at 121.5.

25. *Pao On v Lau Yiu Long* supports the compulsion/overbearing of the will analysis, but says nothing about illegitimacy/unlawfulness.²⁹
26. *Schanka* also referred to the leading Australian authority on economic duress, never directly considered in this Court, *Crescendo Management Pty Ltd v Westpac Banking Corporation*.³⁰ In *Crescendo*, McHugh JA (as he then was) rejected the overbearing of the will theory, holding that the application of pressure which induces entry into a contract is sufficient, if the pressure “went beyond what the law is prepared to countenance as legitimate”.³¹ His Honour said that pressure “will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct”.³²
27. His Honour earlier referred to *Universe Tankships* as supporting the requirement that the pressure be illegitimate.³³
28. Shortly after *Commonwealth Bank* came *Cadbury Schweppes Pty Ltd v ALHMMWU*.³⁴ In that case, Finkelstein J assumed no difference between “economic coercion” and “economic duress”, referred to *Barton v Armstrong*, *Pao On v Lau Yiu Long*, *Universe Tankships* and *Crescendo* and stated that “at least in proceedings for restitution or the avoidance of a contract”, it must be established that illegitimate economic pressure induced a party to act.³⁵
29. In *National Union of Workers v Qenos Pty Ltd*,³⁶ Weinberg J accepted the analysis of Gyles J in *Commonwealth Bank*.³⁷ In *Seven Network (Operations) Ltd v CEPU*, Merkel J cited each of these authorities on section 170NC, in adopting the dual element test.³⁸

²⁹ [1980] AC 614 at 635-6.

³⁰ (1988) 19 NSWLR 40.

³¹ *Ibid* at 46.1 (McHugh JA, Samuels and Mahoney JJA agreeing).

³² *Ibid* at 46.2.

³³ *Ibid* at 45.5-45.7.

³⁴ [2000] FCA 1793; (2000) 106 FCR 148 (Finkelstein J).

³⁵ *Ibid* at 153 [19].

³⁶ [2001] FCA 178; (2001) 108 FCR 90 (Weinberg J).

³⁷ *Ibid* at 119 [128].

³⁸ [2001] FCA 456; (2001) 109 FCR 378 at 387-8 [38]-[41].

30. Finally, an argument that the dual element test was wrong was rejected by a Full Court of the Federal Court in *State of Victoria v Construction, Forestry, Mining and Energy Union*.³⁹

The rationale for the dual element test

31. As was observed by Merkel J in *Seven Network*, the second element of the dual element test has been “superimposed”⁴⁰ upon the ordinary meaning of “coercion”.⁴¹ The rationale for this is then explained: section 170NC(1) (now, section 343(1)/348) could have “*an anomalous operation insofar as it might prevent the legitimate exercise of rights by employees or employers*”. This echoes the oft-cited minority opinion in *Barton v Armstrong*.⁴²
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32. It may be argued that this line of judicial exposition focussed too much on judicial exegesis of related, but different, common law concepts arising in different contexts (without any particular reasoned footing), as opposed to approaching the task as an exercise in statutory construction, which inevitably it is.⁴³

The flaws in the appellant’s argument

33. Whether the dual element test is correct or the position is more nuanced, the matters addressed above tend to suggest that the appellant’s proposed construction of sections 343 and 348 of the FW Act is wrong.

³⁹ [2013] FCAFC 160; (2013) 218 FCR 172 at 187 [69]-[72] (Buchanan and Griffiths JJ, Kenny J agreeing (at [7])).

⁴⁰ By way of “judicial gloss”: *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469 at 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59; (2003) 216 CLR 1 at 10 [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁴¹ [2001] FCA 456; (2001) 109 FCR 378 at 388 [42].

⁴² [1976] AC 104 at 121.5. See also, *Fair Work Ombudsman v National Jet Systems Pty Ltd* [2012] FCA 243; (2012) 218 IR 436 at 444-5 [31] (Buchanan J).

⁴³ For example, (1) related legislative history (section 9(1A)(b) of the C&A Act, following amendments made by section 5 of the *Commonwealth Conciliation and Arbitration Act 1920* (No. 31 of 1920) and section 5(1A)(aa) of the C&A Act from 1977) and what it may have meant for the application of economic duress cases, most of which had not entered the common law by this time; (2) the required implication of words into the provision and the fact that the means adopted to intend to coerce were for a long time specified in the legislation (not merely “any action”); and (3) adopting “duress” jurisprudence for the word “coercion”, when “duress” was used in the same Act (section 170WG of the WR Act).

34. The appellant largely founds its argument on what were obiter observations⁴⁴ of a single judge of the Federal Court in *Seven Network*. Properly construed, *Seven Network* favours the respondent (and the conclusion reached by the Full Court).⁴⁵
35. The appellant focusses on paragraph [43] in *Seven Network* and suggests that in this passage, his Honour held that a contravener must have actual knowledge of the unlawfulness, illegitimacy, etc. This is not correct.
36. When paragraph [43] is read together with paragraphs [35]-[37], [44] and [59]-[60], it is apparent that his Honour's reference to knowledge of the circumstances which gave conduct its coercive character, was a reference to those facts which negated choice or overbore the victim's will and which make the act unlawful, rather than the legal characterisation of the conduct (as unlawful) or a belief as to whether it was protected action.⁴⁶ That is, "*intention [knowledge] relates to the result which the [party] desires to obtain*".⁴⁷ There is no other way to read paragraph [35] or the first sentence of paragraph [44], passages which the appellant avoids.⁴⁸ This is how the majority construed *Seven Network* in the Appeal Judgment. There is no support in *Seven Network* for the assertions in the last sentence of paragraph 27 of the AS, nor in the last two sentences of paragraph 31 of the AS.⁴⁹
37. The matters set out in paragraphs 14-32 above all support the conclusion, reached by the Full Court, that the second element is "objective" and is applied objectively. Indeed, this had already been held to be the law relating to duress in section 170WG of the WR Act in *Fair Work Ombudsman v National Jet*

⁴⁴ The observations were obiter as Merkel J did not find it necessary to decide, and did not decide, whether a belief or intent that the action be protected action afforded a defence (see 391-2 [53]). His Honour did not need to decide this question as he rejected the factual allegation that the belief was in fact held (at 393 [57]).

⁴⁵ It matters little. Merkel J's judgment (whatever it means) will not sustain the appellant now in this Court, especially in light of the Appeal Judgment.

⁴⁶ See Appeal Judgment at [194].

⁴⁷ *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 535 (Brennan J).

⁴⁸ The primary judge took a similar view of paragraph [44]: First Instance Judgment at [164]-[165]. These are again, passages which the appellant avoids. See also Appeal Judgment at [189].

⁴⁹ Paragraph 42 of the AS is either wrong, or as explained above, matters little. What Merkel J said or meant in *Seven Network* is now of little moment.

*Systems Pty Ltd.*⁵⁰

38. As identified by Buchanan J in *National Jet*, the second element must be “necessarily objective” because of the indeterminate reach of the concepts of “illegitimate” and “unconscionable”⁵¹ and (it should be added) the difficulty in requiring that a contravener “know the law” (unlawful).
39. The appellant’s argument at this point breaks down. If it is said that illegitimacy and unconscionability are to be given subjective meanings referable to the alleged contravener and be subjectively held, the contravener’s own moral compass would determine their liability, irrespective of the objective gravamen and impropriety of their conduct. It would be a complete defence to section 343(1) for an alleged contravener to say in evidence (and be believed) that they did not know the conduct was unlawful and did not regard it as illegitimate or unconscionable, irrespective of what it actually was.⁵² The less an alleged contravener knew about the law or industrial relations, the better.⁵³
40. Further, what would occur where the alleged contravener believed and intended to act unlawfully or illegitimately, but the law would not have characterised their actions in that way? Is the contravener still liable because of their “evil” but erroneous state of mind?
41. If alternatively, the meanings are objective in their characterisation but subjective as to whether the contravener has to hold the belief or knowledge, how is a person supposed to know in advance that the law would later characterise their actions as illegitimate or unconscionable? A contravener would have to know the law (for unlawfulness) and know what the law defines as unconscionable or illegitimate (a question that itself has no fixed answer), in

⁵⁰ [2012] FCA 243; (2012) 218 IR 436 at 442-4 [21]-[28].

⁵¹ Ibid at 446 [39]-[40]. A similar approach is taken with the concept of “dishonesty”: *Royal Brunei Airlines SDN BHD v Tan* [1995] 2 AC 378 at 389 (PC).

⁵² A move from “ignorance of the law is not a defence” (*Johnson v Youden* [1950] 1 KB 544 at 546) to ignorance of the law is a complete defence. See also the comments of Kirby J regarding “dishonesty” in *Peters v The Queen* [1998] HCA 7; (1998) 192 CLR 493 at 543-4 [118].

⁵³ See *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at 527 [85] (Callinan and Heydon JJ).

order to be liable.⁵⁴ Like with the wholly subjective test stated in paragraph 39 above, the appellant's argument would require the alleged contravener to know of these matters of characterisation (in advance) and would enable a person to escape liability solely based on a lack of knowledge or awareness of legal norms.

42. There are some similarities here with common law offences requiring an accused to intend to do some act or achieve some end which can be characterised as a legal conclusion. Examples are common law conspiracy to defraud and attempting to pervert the course of justice.

10 43. In *Peters v The Queen*, McHugh J (with whom Gummow J agreed) described the *mens rea* of conspiracy to defraud as the "*intention to prejudice the interests of a third person by the use of means that are dishonest.*"⁵⁵ His Honour held that dishonesty was not an express element of the offence (as here with unlawful, etc) and that whilst it was nevertheless essential to establish a "*conscious design on the part of the conspirators to use dishonest means*", this did not mean that the defendants "*must know that they acted dishonestly*".⁵⁶

44. Similarly with attempts to pervert the course of justice, the accused must intend to pervert the course of justice. The intention here is to do acts which have the effect of perverting the course of justice, even if the defendants had never heard
20 of the phrase "perverting the course of justice" and hence, never intended or knew that their acts had that effect.⁵⁷

45. In these examples, the accused needs to know of and intend to do the acts which meet the objective legal characterisation, but does not need to intend or

⁵⁴ As to "unconscionable", see generally *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186 (Allsop CJ, Besanko and Edelman JJ) and *ACCC v C G Berbatis Holdings Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51. See also *Royal Brunei Airlines SDN BHD v Tan* [1995] 2 AC 378 at 392 (PC).

⁵⁵ [1998] HCA 7; (1998) 192 CLR 493 at 526 [75] and 530 [85].

⁵⁶ *Ibid* at 526-8 [77]-[79] and 530 [85]. Kirby J took the opposite view, fundamentally based on the criminal nature of the alleged offences (at 550-2 [133]-[137]). It appears that Toohey and Gaudron JJ took a similar, but slightly different approach, to that of McHugh and Gummow JJ (at 508 [29]).

⁵⁷ *Meissner v The Queen* [1995] HCA 41; (1995) 184 CLR 132 at 144 (Brennan, Toohey and McHugh JJ) and 159 (Dawson J). See also *Peters v The Queen* [1998] HCA 7; (1998) 192 CLR 493 at 527-8 [79] (McHugh J, Gummow J agreeing).

know that those acts have that characterisation. At the conceptual level, there is no material difference here. The contravener has to take action with the intent to overbear will/negate choice where the action taken is objectively unlawful, etc, but the contravener does not need to intend or know that the action taken has the requisite legal characterisation.⁵⁸

46. If it is true to say that the law “superimposes” the second element onto the statutory intention so as to avoid anomalous outcomes, that purpose is met by requiring the second element to objectively exist in fact and law. No further or useful legislative purpose is served by further limiting the operation of the provisions to action which is unlawful or illegitimate in fact, and knowingly so.
47. Another telling reason as to why the appellant’s construction is wrong is the existence and drafting of sections 343(2) and 415 of the FW Act. The effect of each of them is to provide a defence or immunity from a finding of contravention of sections 343 and 348 of the FW Act, where the action taken with the requisite intent *is* “protected industrial action”.
48. The appellant’s construction of section 343(1) has the effect of substantially redrafting section 343(2) of the FW Act: something like “*Subsection (1) does not apply to protected industrial action or to industrial action which the person believes to be protected industrial action.*” Such a conclusion is unlikely.⁵⁹
49. It is not clear what is being said in paragraphs 36-41 of the AS. It is self-evident that common law notions of duress focussed on the “victim” of the pressure (and whether their will was overborne) whereas sections 343/348 focus on the perpetrator. That is a function of the statutory language: the perpetrator must not do an act with “intent to coerce”. The fact that the latter derives from the former is not controversial.
50. Further, the appellant’s complaint in paragraph 41 of the AS is misplaced. The better reading of paragraph [194] of the Appeal Judgment, in context, is that his

⁵⁸ “[I]gnorance of the legal consequences that flow from the existence of facts that constitute an offence is ordinarily not a matter of exculpation...”: *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at 500 [2] (Gleeson CJ and Kirby J).

⁵⁹ First Instance Judgment at [158] and [165]; Appeal Judgment at [179] and [189]; *Seven Network* at 388 [44].

Honour's reference to purpose or intent applying to the first element (overborne will) was a reference to the fact that the overborne will negated purpose or intent, sufficient to avoid the consequences of the particular transaction or avoid criminal responsibility.

51. Contrary to paragraph 45 of the AS, *Electrolux*⁶⁰ assists the respondent. On the facts in *Electrolux*, there was no dispute that the union intended, thought and believed that the industrial action it had organised was protected action. The contravention of section 170NC depended not on the union's state of mind about the protected status of the action, but rather, whether it was *in fact* protected. If the appellant's construction were correct, the orders made by the High Court in *Electrolux* (restoring the declared contravention of section 170NC) could not have been made.
52. Further, the appellant misreads what Gummow, Hayne and Heydon JJ said at 372-3 [169]-[171]. In these passages, their Honours make clear that the requisite intent for the purposes of section 170NC(1) is formed if the contravener believed the agreement they were seeking was of a kind to which the statute applied (even if it was not). Extending the appellant's argument here to that case, it was clear that the union believed its action was protected because of that subjective belief about the nature of the agreement. Far from being a complete defence (as the appellant would have it here), that state of mind manifested itself as a contravention. Similar conclusions were reached by Gleeson CJ (at 330-1 [26]) and McHugh J (at 360 [127]).
53. The appellant's resort (at paragraph 46 of the AS) to *Barclay* and related cases dealing with sections 340 and 346 of the FW Act is misplaced. Sections 340 and 346 focus on "why" a person acted:⁶¹ that is, their motive or motives.⁶² On the other hand, sections 343 and 348 focus on intended outcomes (what the person was trying to achieve, not why they wanted to achieve it). Intention is

⁶⁰ *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309.

⁶¹ *Board of Bendigo Regional Institute of TAFE v Barclay* [2012] HCA 32; (2012) 248 CLR 500 at 517 [44] (French CJ and Crennan J) and 534-5 [101] (Gummow and Hayne JJ).

⁶² *Pearce v WD Peacock & Co Ltd* [1917] HCA 28; (1917) 23 CLR 199 at 203 (Barton ACJ, Gavan Duffy and Rich JJ agreeing).

different to motive.⁶³

Disposition

54. In the event the appellant's appeal is successful, the orders it seeks are not complete. The orders sought in paragraphs 48-49 of the AS would be appropriate, assuming that the construction of sections 343 and 348 of the FW Act were resolved in the same manner.
55. However, it is necessary to remit that part of the proceeding involving the alleged contraventions of sections 343 and 348 of the FW Act to the Federal Court for rehearing.
- 10 56. Principally, this is because of what is set out in paragraphs 7-8 above. The respondent did not accept the asserted state of mind of the appellant's witnesses and asked the primary judge to reject their evidence. His Honour did not resolve that evidentiary issue because it was not necessary for him to do so.
57. Further and in any event, the primary judge found that the impugned conduct of the appellant in each case was "illegitimate"⁶⁴ and this aspect of "coercion" was never directly denied by the appellant's witnesses. Any finding that they believed the action was protected industrial action does not foreclose a finding that they regarded the action as illegitimate.

Part VII: Notice of Contention/Cross-Appeal

- 20 58. Not applicable.

Part VIII: Time for Oral Argument

59. It is estimated that 1 hour will be required for the presentation of the oral argument of the respondent.

⁶³ *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 535 (Brennan J).

⁶⁴ First Instance Judgment at [175], [182] and [187].

Dated: 17 February 2017



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BETWEEN:

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ANNEXURE A: APPLICABLE STATUTORY PROVISIONS

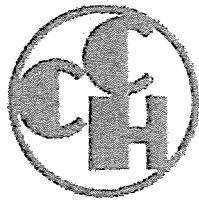
| LEGISLATION | SECTIONS |
|-------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|
| <i>Conciliation and Arbitration Act 1904 (Cth) (as amended by the Conciliation and Arbitration Amendment Act (No 3) 1977 (Cth))</i> | ss 5(1A)(aa), 132A(1), 144A(6) and 188 |
| <i>Industrial Relations Act 1988 (Cth)</i> | ss 320 and 334-336 |
| <i>Workplace Relations Act 1996 (Cth)</i> | ss 170WG, 187AB and 298P-298S |
| <i>Fair Work Act 2009 (Cth)</i> | s 415 |

**THE SOLICITOR FOR THE RESPONDENT IS:
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CLAYTON UTZ & COMPANY

CONCILIATION AND ARBITRATION ACT 1904

Including
REGULATIONS
with
SEC. 45D and 45E of the
TRADE PRACTICES
ACT

4th Edition
Consolidated to
1 January 1981

CCH Australia Limited
TAX AND BUSINESS LAW PUBLISHERS
Cnr. Talavera and Khartoum Roads, North Ryde
P.O. Box 230, North Ryde
N.S.W. 2113

(f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization.

Penalty: Four hundred dollars.

History

S. 5(1)(aa) was inserted by s. 4(a) of Act No. 108 of 1977 which commenced 21 October 1977.

(1A) An employer shall not threaten to dismiss an employee, or to injure him in his employment, or to alter his position to his prejudice—

(a) by reason of the circumstance that the employee is, or proposes to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization, or that the employee proposes to appear as a witness or to give evidence in a proceeding under this Act; or

(aa) with the intent to coerce the employee to join in industrial action; or

(b) with the intent to dissuade or prevent the employee from becoming such officer, delegate or member or from so appearing or giving evidence; or

(c) with intent to dissuade the employee, being an officer, delegate or member of an organization, from doing an act or thing of the kind in relation to which paragraph (f) of sub-section (1) applies.

Penalty: Four hundred dollars.

History

S. 5(1A)(aa) was inserted by s. 4(b) of Act No. 108 of 1977 which commenced 21 October 1977.

(2) An employee shall not cease work in the service of his employer by reason of the circumstance that the employer—

(a) is an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; or

(b) is entitled to the benefit of an industrial agreement or an award; or

(c) has appeared as a witness, or has given any evidence, in a proceeding under this Act.

Penalty: Two hundred dollars.

(3) A reference in this section to an organization shall be read as including a reference to a branch of an organization.

(4) In any proceedings for an offence against this section, if all the relevant facts and circumstances, other than the reason or intent set out in the charge as being the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was not actuated by that reason or taken with that intent.

History

S. 5(4) was substituted by s. 4(c) of Act No. 108 of 1977 which commenced 21 October 1977.

(5) Where an employer has been convicted of an offence against this section the court by which the employer is convicted may order that the employee be reimbursed any wages lost by him and may also direct that the employee be reinstated in his old position or in a similar position.

(2A) A rule of an association or organization dealing with matters so prescribed or dealing with matters required by this Act to be complied with as conditions for registration may be mandatory or directory.

History

S. 132(2A) inserted by s. 4(d) Act No. 89 of 1974
commenced 29 October 1974.

(3) Upon registration, the association shall become and be an organization.

(4) In sub-paragraph (ii) of paragraph (b), and sub-paragraph (ii) of paragraph (c), of sub-section (1), "employee" means any employee in any industry, and includes—

- (a) any person whose usual occupation is that of employee in any industry; and
- (b) any person employed in an industry, or engaged in an industrial pursuit, in the State of New South Wales, Queensland, South Australia or Western Australia who—
 - (i) in the case of a person so employed or engaged in New South Wales — is an employee for the purposes of the *Industrial Arbitration Act* 1940 of that State or that Act as amended from time to time;
 - (ii) in the case of a person so employed or engaged in Queensland — is an employee for the purposes of the *Industrial Conciliation and Arbitration Act* 1961-1976 of that State or that Act as amended from time to time;
 - (iii) in the case of a person so employed or engaged in South Australia — is an employee for the purposes of the *Industrial Conciliation and Arbitration Act*, 1972-1975 of that State or that Act as amended from time to time; or
 - (iv) in the case of a person so employed or engaged in Western Australia — is a worker for the purposes of the *Industrial Arbitration Act*, 1912-1976 of that State or that Act as amended from time to time.

History

S. 132(4) inserted by s. 12(e) of Act No. 108 of 1977
commenced 21 October 1977.

SEC. 132A Offences in relation to independent contractors, etc.

(1) An organization—

- (a) shall not advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person by reason of the circumstance that the eligible person is not a member of the organization;
- (b) shall not take, or threaten to take, industrial action against an employer with the intent to coerce the employer to take discriminatory action against an eligible person by reason of the circumstance that the eligible person is not a member of the organization; or
- (c) shall not take, or threaten to take, industrial action against an eligible person being an employer, with the intent to coerce him to join the organization.

(2) A contravention of sub-section (1) is an offence against that sub-section punishable, upon conviction, by—

- (a) where the action constituting the offence has continued for more than a day — a penalty not exceeding a fine of \$400 for each day during which that action has continued;
or
- (b) in any other case — a penalty not exceeding a fine of \$400.

(3) In any proceedings for an offence against sub-section (1), if all the relevant facts and circumstances, other than the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was not actuated by that reason or taken with that intent.

(4) For the purposes of this section, an action taken by—

- (a) the committee of management of an organization;

SEC. 144A Conscientious beliefs with respect to organizations

(1) Where a person, upon application made to the Registrar in the prescribed form and manner, and payment of the prescribed fee, satisfies the Registrar that the person's conscientious beliefs do not allow the person to be a member of any association of a kind described in a paragraph of sub-section (1) of section 132, the Registrar shall issue to the person a certificate to that effect.

(2) In sub-section (1)—

“conscientious beliefs” means any conscientious beliefs, whether the grounds for the beliefs are or are not of a religious character and whether the beliefs are or are not part of the doctrine of any religion;

“prescribed fee”, in relation to an applicant under sub-section (1), means a fee equal to the annual subscription payable by the members of the organization that, in the opinion of the Registrar, is the organization that would, but for the person's conscientious beliefs, have been the appropriate organization for the person to join having regard to his past employment (if any) and his future prospects of employment.

(3) Notwithstanding section 88F, no appeal lies to the Commission against—

- (a) a decision of the Registrar to issue a certificate under sub-section (1); or
- (b) a determination by the Registrar of the prescribed fee in relation to an applicant under sub-section (1).

(4) A certificate under sub-section (1) remains in force for such period, not exceeding 12 months, as is specified in the certificate but may be renewed from time to time by the Registrar for such period, not exceeding 12 months, as the Registrar thinks fit.

(5) An employer—

- (a) shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee, being a person in respect of whom there is in force a certificate under sub-section (1), is not a member of an organization;
- (b) shall not threaten to dismiss an employee, being a person in respect of whom there is in force a certificate under sub-section (1), or to injure such an employee in his employment or to alter the position of such an employee to his prejudice, with intent to coerce the employee to join an organization; or
- (c) shall not refuse to employ a person in employment by reason of the circumstance that the person, being a person in respect of whom there is in force a certificate under sub-section (1), is not a member of an organization.

(6) An organization—

- (a) shall not advise, encourage or incite an employer to take action in relation to a person that would, if taken, be a contravention of sub-section (5);
- (b) shall not take, or threaten to take, industrial action against an employer with the intent to coerce the employer to take action in relation to a person that would, if taken, be a contravention of sub-section (5); or
- (c) shall not take, or threaten to take, any action having the effect, directly or indirectly, of prejudicing a person in his employment, being a person in respect of whom there is in force a certificate under sub-section (1), with the intent to coerce the person to join the organization.

(7) A contravention of sub-section (5) or (6) is an offence against that sub-section, punishable, upon conviction by—

- (a) where the action constituting the offence has continued for more than a day — a penalty not exceeding a fine of \$400 for each day during which that action has continued; or

evidence except in pursuance of the direction of the Court or Commission, and, if given, shall not be published in any newspaper or otherwise without an order of the Court or Commission permitting such publication.

(2) Where the Court or the Commission directs that information relating to a trade secret or to the financial position of any witness or party shall be given in evidence that evidence shall, if the witness or party or the person entitled to the trade secret so requests, be taken in private.

(3) The Court or the Commission may direct that any evidence given in proceedings before it or the contents of any book, paper or document produced for inspection shall not be published.

(4) Any person who gives as evidence, or publishes, any information in contravention of this section or of any direction or order given or made thereunder shall be guilty of an offence.

Penalty: One thousand dollars or imprisonment for six months.

SEC. 187 Inspection of books, etc.

All books, papers, documents and things produced in evidence before the Court or the Commission may be inspected by the Court or the Commission or by such of the parties as the Court or the Commission allows.

SEC. 188 Offences by organizations in relation to industrial action

(1) An organization—

- (a) shall not advise, encourage or incite an employer to take action in relation to a person that would, if taken, be a contravention of paragraph (aa) of sub-section (1), or paragraph (aa) of sub-section (1A), of section 5;
- (b) shall not take, or threaten to take, industrial action against an employer with the intent to coerce the employer to take action in relation to a person that would, if taken, be a contravention of paragraph (aa) of sub-section (1), or paragraph (aa) of sub-section (1A), of section 5;
- (c) shall not take, or threaten to take, any action having the effect, directly or indirectly of prejudicing a person in his employment with the intent to coerce the person to join in industrial action;
- (d) shall not impose, or threaten to impose, a penalty, forfeiture or disability of any kind upon a member of the organization with the intent to coerce the member to join in industrial action; or
- (e) shall not impose or threaten to impose, a penalty, forfeiture or disability of any kind upon a member of the organization by reason of the circumstance that the member has refused or failed to join in industrial action.

(2) A contravention of sub-section (1) is an offence against that sub-section punishable, upon conviction, by—

- (a) where the action constituting the offence has continued for more than a day — a penalty not exceeding a fine of \$400 for each day during which that action has continued; or
- (b) in any other case — a penalty not exceeding a fine of \$400.

(3) In any proceedings for an offence against sub-section (1), if all the relevant facts and circumstances, other than the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was not actuated by that reason or taken with that intent.

(4) For the purposes of this section, an action taken by---

- (a) the committee of management of an organization;
- (b) the committee of management of a branch of an organization;
- (c) an officer, employee or agent of an organization;
- (d) a group of members of an organization; or
- (e) a member of an organization who performs the function of dealing with an employer on behalf of himself and other members of the organization,

shall be deemed to have been taken by the organization.

History

S. 188 substituted by s. 29 Act No. 108 of 1977
commenced 21 October 1977.

SEC. 188A Furnishing of rules of organization

If a member of an organization requests the secretary, or a person performing in whole or in part the duties of secretary, of the organization or of a branch of the organization, to furnish to the member a copy of the rules of the organization or of the branch of the organization, the secretary or other person to whom the request is made shall, within seven days after that request is made and upon payment or tender by the member of such amount, not exceeding the prescribed amount, as the secretary or other person may require, furnish to the member a copy of the rules of the organization or branch, as the case may be, as in force at the time of the request or a copy of those rules as in force at an earlier time together with a copy of each amendment of the rules made since that time and before the time of the request.

Penalty: Fifty dollars.

SEC. 189 Jurisdiction of State Courts

For the purposes of this Act, a State Court or Magistrate, whose jurisdiction is limited, as to area, subject-matter, or parties, to any part of a State, shall be deemed to have jurisdiction throughout the State:

Provided that on the hearing of any proceeding in a Court of competent jurisdiction for the recovery of any penalty, fine, fee, levy, or due, the Court, if in the interests of justice it thinks fit, may adjourn the hearing to a Court of competent jurisdiction to be held at some other place in the same State.

SEC. 190 Meaning of expressions in awards

Expressions used in any award made under this Act shall, unless the contrary intention appears in the award, have the same meaning as is applied to those expressions by the *Acts Interpretation Act 1901-1918*.

SEC. 191 Court may impose penalties for offences

(1) A person who has committed an offence against this Act or the regulations may be charged accordingly before the Court and the Court may impose the penalty provided by this Act or the regulations in respect of that offence.

(2) Proceedings before the Court under this section may be instituted by summons issued upon information, without indictment.

SEC. 192 Awards to be available at Registries

Copies of every award and of every order varying an award or affecting the operation of an award shall be sent to each Registry as soon as possible after the making thereof and shall be open for inspection.

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- (a) a ballot ordered under section 135 or 136; or
- (b) a ballot conducted under section 243.

Failure to comply with requirement made in relation to amalgamation

318. An officer or employee of an organisation or branch of an organisation shall comply with a requirement made under section 245.

Penalty: \$500 or imprisonment for 6 months, or both.

Failure to give statement as to membership of organisation

319. An organisation shall not contravene section 263.

Penalty: \$500.

Offences in relation to conscientious objectors

320. (1) An employer shall not:

- (a) dismiss an employee who is a conscientious objector, injure such an employee in his or her employment, or alter the position of such an employee to the employee's prejudice, because the employee is not a member of an organisation;
- (b) threaten to dismiss an employee who is a conscientious objector, threaten to injure such an employee in his or her employment, or threaten to alter the position of such an employee to the employee's prejudice, with intent to coerce the employee to join an organisation; or
- (c) refuse to employ a person who is a conscientious objector because the person is not a member of an organisation.

(2) An organisation shall not:

- (a) advise, encourage or incite an employer to take action in relation to a person that would, if taken, contravene subsection (1);
- (b) take, or threaten to take, industrial action against an employer with intent to coerce the employer to take action in relation to a person that would, if taken, contravene subsection (1); or
- (c) take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person who is a conscientious objector in his or her employment, with intent to coerce the person to join an organisation.

(3) An organisation shall not:

- (a) injure:
 - (i) an employer who is a conscientious objector; or
 - (ii) a person who is a conscientious objector and, although not an employer, is otherwise eligible to join an organisation of employers;in his or her business with intent to coerce the employer or person to join an organisation; or
- (b) advise, encourage or incite an organisation of employees to take industrial action against:

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- (i) an employer who is a conscientious objector; or
- (ii) a person who is a conscientious objector and, although not an employer, is otherwise eligible to join an organisation of employers;

with intent to coerce the employer or person to join an organisation.

(4) A person who contravenes subsection (1), (2) or (3) is guilty of an offence punishable, on conviction, by a penalty not exceeding a fine of \$1,000 for the first day on which the action constituting the offence takes place plus \$500 for each subsequent day on which the action continues.

(5) In a prosecution for an offence against subsection (4), it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge.

(6) For the purposes of this section, action done by:

- (a) the committee of management of an organisation or branch of an organisation;
- (b) an officer, employee or agent of an organisation or branch of an organisation acting in that capacity;
- (c) a member or group of members of an organisation or branch of an organisation acting under the rules of the organisation or branch; or
- (d) a member of an organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity;

shall be taken to have been done by the organisation.

(7) Where an employer is convicted of an offence against subsection (4) constituted by dismissing an employee, the Court may order the employer:

- (a) to reinstate the person to the position that the person occupied immediately before the dismissal or a position no less favourable than the position; and
- (b) to pay the person the whole or part of the wages lost by the person because of the dismissal.

(8) In this section:

“conscientious objector” means:

- (a) a person in relation to whom there is in force a certificate under subsection 267 (1); or
- (b) a person who has applied for a certificate under subsection 267 (1) and whose application has not been determined.

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but a person is not guilty of an offence against this subsection merely because of refusing or failing to answer a question.

Penalty: \$500.

(2) In subsection (1), a reference to subsection 280 (7) includes a reference to that subsection as it applies under subsection 281 (5).

Offences in relation to lodging of accounts

330. Where a branch of an organisation contravenes subsection 281 (4), the organisation is guilty of an offence punishable, on conviction, by a fine not exceeding \$1,000 plus \$250 for each complete week in the period starting at the end of the period of 14 days referred to in that subsection or the longer period allowed by a Registrar under that subsection, as the case requires, and ending on:

- (a) if the copies and certificate concerned are lodged in the Industrial Registry before the day on which the organisation is convicted—the day on which the copies and certificate are lodged; or
- (b) in any other case—the day on which the organisation is convicted.

Offences in relation to accounts of low income organisations

331. An organisation shall not contravene subsection 285 (5), (7), (8) or (9).

Penalty: \$1,000.

Failure by returning officer to provide information on request by member

332. A returning officer shall not unreasonably contravene section 288.

Penalty: \$500 or imprisonment for 6 months, or both.

Failure to provide copy of rules on request by member

333. Where the secretary, or a person performing (in whole or part) the duties of secretary, of an organisation or branch of an organisation contravenes section 289, the organisation is guilty of an offence punishable, on conviction, by a fine not exceeding \$500.

Certain offences in relation to members of organisations etc.

334. (1) An employer shall not dismiss an employee, injure an employee in his or her employment, or alter the position of an employee to the employee's prejudice, because the employee:

- (a) is or has been, or proposes, or has at any time proposed, to become an officer, delegate or member of:
 - (i) an organisation; or
 - (ii) an association that has applied to be registered as an organisation;
- (b) has refused or failed to join in industrial action;
- (c) has made, or proposes, or has at any time proposed, to make, application to the Commission for an order under section 136 for the holding of a secret ballot;

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- (d) has participated in, or proposes, or has at any time proposed, to participate in a secret ballot ordered by the Commission under section 135 or 136;
- (e) is entitled to the benefit of an award or an order of the Commission;
- (f) has appeared or proposes to appear as a witness, or has given or proposes to give evidence, in a proceeding under this Act;
- (g) being a member of an organisation that is seeking better industrial conditions, is dissatisfied with his or her conditions;
- (h) has absented himself or herself from work without leave if:
 - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer or delegate of an organisation; and
 - (ii) the employee applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or
- (j) being an officer, delegate or member of an organisation, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the organisation where the act or thing is:
 - (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee by the organisation under its rules.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$1,000.

(2) An employer shall not refuse to employ a person, or discriminate against a person in the terms or conditions on which the employer offers to employ the person, because the person:

- (a) is or has been, or proposes, or has at any time proposed, to become, an officer, delegate or member of:
 - (i) an organisation; or
 - (ii) an association that has applied to be registered as an organisation;
- (b) has refused or failed to join in industrial action;
- (c) has made, or proposes, or has at any time proposed, to make, application to the Commission for an order under section 136 for the holding of a secret ballot;
- (d) has participated in, or proposes, or has at any time proposed, to participate in a secret ballot ordered by the Commission under section 135 or 136;
- (e) is entitled to the benefit of an award or an order of the Commission;
- (f) has appeared or proposes to appear as a witness, or has given or proposes to give evidence, in a proceeding under this Act; or
- (g) being an officer, delegate or member of an organisation, has done, or proposes to do, an act or thing for the purpose of furthering or

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protecting the industrial interests of the organisation where the act or thing is:

- (i) lawful; and
- (ii) within the limits of an authority expressly conferred on the employee by the organisation under its rules.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$1,000.

(3) An employer shall not threaten to dismiss an employee, threaten to injure an employee in his or her employment, or threaten to alter the position of an employee to his or her prejudice:

- (a) because the employee is, or proposes to become, an officer, delegate or member of an organisation, or an association that has applied to be registered as an organisation, or with intent to dissuade or prevent the employee from becoming such an officer, delegate or member;
- (b) with intent to coerce the employee to join in industrial action;
- (c) because the employee has made, or proposes, or has at any time proposed, to make, application to the Commission for an order under section 136 for the holding of a secret ballot;
- (d) because the employee has participated in, or proposes, or has at any time proposed, to participate in, a secret ballot ordered by the Commission under section 135 or 136;
- (e) because the employee has appeared or proposes to appear as a witness, or has given or proposes to give evidence in a proceeding under this Act, or with the intent to dissuade or prevent the employee from so appearing or giving evidence; or
- (f) with the intent to dissuade or prevent the employee, being an officer, delegate or member of an organisation, from doing an act or thing for the purpose of furthering or protecting the industrial interests of the organisation where the act or thing is:
 - (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee by the organisation under its rules.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$1,000.

(4) An employee shall not cease work in the service of his or her employer because the employer:

- (a) is an officer, delegate or member of:
 - (i) an organisation; or
 - (ii) an association that has applied to be registered as an organisation;

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- (b) is entitled to the benefit of an award or an order of the Commission;
or
- (c) has appeared as a witness, or has given evidence, in a proceeding under this Act.

Penalty: \$500.

(5) An organisation shall not take, or threaten to take, industrial action against an employer because the employer is an officer, delegate or member of:

- (a) an organisation; or
- (b) an association that has applied to be registered as an organisation.

Penalty: \$1,000.

(6) In a prosecution for an offence against subsection (1), (2), (3), (4) or (5), it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge.

(7) Where an employer is convicted of an offence against subsection (1), (2) or (3) constituted by dismissing an employee, the Court may order the employer:

- (a) to reinstate the person to the position that the person occupied immediately before the dismissal or a position no less favourable than the position; and
- (b) to pay the person the whole or part of the wages lost by the person because of the dismissal.

(8) For the purposes of this section, action done by:

- (a) the committee of management of an organisation or branch of an organisation;
- (b) an officer, employee or agent of an organisation or branch of an organisation acting in that capacity;
- (c) a member or group of members of an organisation or branch of an organisation acting under the rules of the organisation or branch; or
- (d) a member of an organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity;

shall be taken to have been done by the organisation.

(9) In this section:

“organisation” includes a branch of an organisation.

Offences by organisations in relation to industrial action etc.

335. (1) An organisation shall not:

- (a) advise, encourage or incite an employer to take action in relation to a person that would, if taken, contravene paragraph 334 (1) (b), (c) or (d), (2) (b), (c) or (d) or (3) (b), (c) or (d);

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- (b) take, or threaten to take, industrial action against an employer with intent to coerce the employer to take action in relation to a person that would, if taken, contravene paragraph 334 (1) (b), (c) or (d), (2) (b), (c) or (d) or (3) (b), (c) or (d);
- (c) because a member of the organisation has refused or failed to comply with a direction given by the organisation, take, or threaten to take, industrial action against an employer with intent to coerce the employer to prejudice the member in the member's employment or possible employment;
- (d) because a member of the organisation has refused or failed to comply with a direction given by the organisation, advise, encourage nor incite an employer to prejudice the member in the member's employment or possible employment;
- (e) take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment or possible employment with intent to coerce the person to join in industrial action;
- (f) impose, or threaten to impose, a penalty, forfeiture or disability of any kind on a member of the organisation with intent to coerce the member to join in industrial action;
- (g) impose, or threaten to impose, a penalty, forfeiture or disability of any kind on a member of the organisation because the member has refused or failed to join in industrial action;
- (h) take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment or possible employment with the intent to deter or prevent the person from making application to the Commission for an order under section 136 for the holding of a secret ballot; or
- (j) impose, or threaten to impose, a penalty, forfeiture or disability of any kind upon a member of the organisation because the member:
 - (i) has made, or proposes, or has at any time proposed, to make, application to the Commission for an order under section 136 for the holding of a secret ballot; or
 - (ii) has participated in, or proposes, or has at any time proposed, to participate in, a secret ballot ordered by the Commission under section 135 or 136.

(2) A contravention of subsection (1) is an offence punishable, on conviction, by a penalty not exceeding a fine of \$1,000 for the first day on which the action constituting the offence takes place plus \$500 for each subsequent day on which the action continues.

(3) In a prosecution for an offence against this section, it is not necessary for the prosecution to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but, where a reason or intent is specified in the charge, it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole

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or in part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge.

(4) For the purposes of this section, action done by:

- (a) the committee of management of an organisation or branch of an organisation;
- (b) an officer, employee or agent of an organisation or branch of an organisation acting in that capacity;
- (c) a member or group of members of an organisation or branch of an organisation acting under the rules of the organisation or branch; or
- (d) a member of an organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity;

shall be taken to have been done by the organisation.

(5) For the purposes of this section, a direction given by:

- (a) the committee of management of an organisation or branch of an organisation;
- (b) an officer, employee or agent of an organisation or branch of an organisation acting in that capacity;
- (c) a member or group of members of an organisation or branch of an organisation authorised to give the direction by:
 - (i) the rules of the organisation or branch;
 - (ii) the committee of management of the organisation or branch;
or
 - (iii) an officer, employee or agent of the organisation or branch acting in that capacity; or
- (d) a member of an organisation or branch of an organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation or branch, acting in that capacity;

shall be taken to have been given by the organisation.

Offences in relation to independent contractors etc.

336. (1) An organisation shall not:

- (a) advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person because the eligible person is not a member of an organisation;
- (b) take, or threaten to take, industrial action against an employer with the intent to coerce the employer to take discriminatory action against an eligible person because the eligible person is not a member of an organisation; or
- (c) take, or threaten to take, industrial action against an eligible person who is an employer, with intent to coerce the employer to join an organisation.

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(2) A contravention of subsection (1) is an offence punishable, on conviction, by a penalty not exceeding a fine of \$1,000 for the first day on which the action constituting the offence takes place plus \$500 for each subsequent day on which the action continues.

(3) In a prosecution for an offence against this section, it is not necessary for the prosecution to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but, where a reason or intent is specified in the charge, it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or in part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge.

(4) For the purposes of this section, action done by:

- (a) the committee of management of an organisation or branch of an organisation;
- (b) an officer, employee or agent of an organisation or branch of an organisation acting in that capacity;
- (c) a member or group of members of an organisation or branch of an organisation acting under the rules of the organisation or branch; or
- (d) a member of an organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity;

shall be taken to have been done by the organisation.

(5) In this section:

"discriminatory action", in relation to an eligible person, means:

- (a) a refusal to make use of, or to agree to make use of, services offered by the eligible person; or
- (b) a refusal to supply, or to agree to supply, goods or services to the eligible person;

"eligible person" means a person who is not an employee, but who is or, if the person were an employee, would be eligible to join an organisation.

False representation as to membership of organisation

337. A person shall not knowingly make, in an application made under this Act, a false representation that he or she is a member of an organisation.

Penalty: \$500 or imprisonment for 6 months, or both.

Contracts entered into by agents of employers

338. A person carrying on the business of an employment agency shall not, as agent for an employer, make an agreement for the employment of an employee on terms and conditions less favourable to the employee than the terms and conditions of an award, or an order of the Commission, binding on the employer and employee.

Penalty: \$500.

Part VID Inspectors

Division 9 Miscellaneous

Section 170WF

Division 9—Miscellaneous**170WF Hindering AWA negotiations**

- (1) A person who is not a party to negotiations relating to an AWA must not use threats or intimidation with the intention of hindering the negotiations or the making of the AWA. For this purpose *party to negotiations* includes a bargaining agent.
- (2) This section does not apply to conduct by or on behalf of an organisation of employees for the purpose of negotiating a certified agreement, if the conduct is authorised by another provision of this Act.

170WG Persons must not apply duress or make false statements in connection with AWA etc.

- (1) A person must not apply duress to an employer or employee in connection with an AWA or ancillary document.
- (2) A person must not knowingly make a false or misleading statement to another person with the intention of persuading the other person to make, or not to make, an AWA.

170WH Employer must give copies of documents to employee

- (1) As soon as practicable after an employer receives any of the following documents from the Employment Advocate or Commission, the employer must give the employee a copy of the document:
 - (a) a filing receipt;
 - (b) an approval notice, refusal notice or referral notice;
 - (c) an AWA or ancillary document, as approved.
- (2) The employer must give the employee any other document prescribed by the regulations, within the period required by the regulations.

170WHA Intervention not permitted

A person other than:

- (a) a party to an AWA; or
-

Part VIII A—Payments in relation to periods of industrial action

187AA Payments not to be made or accepted in relation to periods of industrial action

- (1) An employer must not make a payment to an employee in relation to a period during which the employee engaged, or engages, in industrial action if:
 - (a) the employer or employee was or is a member of an organisation during that period; or
 - (b) the employer was or is a constitutional corporation bound by an award, a certified agreement or an AWA during that period; or
 - (c) the industrial action was taken, or is being taken, in connection with work regulated by an award, a certified agreement or an AWA; or
 - (d) the industrial action was taken, or is being taken, in relation to an industrial dispute; or
 - (e) the industrial action was or is of a kind referred to in paragraph (a), (b) or (c) of the definition of *industrial action* in subsection 4(1); or
 - (f) the industrial action was taken, or is being taken, in a Territory.

Note: For *constitutional corporation*, see subsection 4(1).

- (2) An employee must not accept a payment from an employer if the employer would contravene subsection (1) by making the payment.
- (3) A contravention of subsection (1) or (2) is not an offence.

187AB Organisations not to take action for payments in relation to periods of industrial action

- (1) An organisation, or an officer, member or employee of an organisation, must not:
 - (a) make a claim for an employer to make a payment to an employee in relation to a period during which the employee engaged, or engages, in industrial action; or

Part VIII A Inspectors

Division 3 Miscellaneous

Section 187AC

- (b) organise or engage in, or threaten to organise or engage in, industrial action against an employer with intent to coerce the employer to make such a payment.
- (2) For the purposes of subsection (1), action done by one of the following bodies or persons is taken to have been done by an organisation:
 - (a) the committee of management of the organisation;
 - (b) an officer, employee or agent of the organisation acting in that capacity;
 - (c) a member or group of members of the organisation acting under the rules of the organisation;
 - (d) a member of the organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity.
- (3) Paragraphs (2)(c) and (d) do not apply if:
 - (a) a committee of management of the organisation; or
 - (b) a person authorised by the committee; or
 - (c) an officer of the organisation;has taken reasonable steps to prevent the action.
- (4) A contravention of subsection (1) is not an offence.

187AC Applications to the Court

- (1) An application may be made to the Court for orders under section 187AD in respect of contraventions of section 187AA or 187AB.
- (2) The application may be made by:
 - (a) the Minister; or
 - (b) a person who has an interest in the matter; or
 - (c) any other person prescribed by the regulations.
- (3) In the case of a contravention of section 187AB, the application may also be made by the employer in question.
- (4) A regulation prescribing persons for the purposes of paragraph (2)(c) may limit its application to specified circumstances.

Division 5—Conduct by industrial associations etc.

298P Industrial associations acting against employers

- (1) An industrial association, or an officer or member of an industrial association, must not organise or take, or threaten to organise or take, industrial action against an employer because the employer is an officer or member of an industrial association.
- (2) An industrial association, or an officer or member of an industrial association, must not organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer or person:
 - (a) to become a member of an industrial association of employers; or
 - (b) to cease to be an officer or member of such an association; or
 - (c) not to become an officer or member of such an association.
- (3) An industrial association, or an officer or member of an industrial association, must not:
 - (a) advise, encourage or incite an employer; or
 - (b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;to take action in relation to a person that would, if taken, contravene section 298K.
- (4) An industrial association, or an officer or member of an industrial association, must not, because a member of the association has refused or failed to comply with a direction given by the association:
 - (a) advise, encourage or incite an employer; or
 - (b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;to prejudice the member in the member's employment or possible employment.
- (5) For the purposes of subsection (4), a direction given by one of the following bodies or persons is taken to have been given by an industrial association:

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Division 5 Miscellaneous

Section 298Q

- (a) the committee of management of the association;
- (b) an officer or agent of the association acting in that capacity;
- (c) a member or group of members of the association authorised to give the direction by:
 - (i) the rules of the association; or
 - (ii) the committee of management of the association; or
 - (iii) an officer or agent of the association acting in that capacity;
- (d) a member of the association, who performs the function of dealing with an employer on behalf of the member and other members of the association, acting in that capacity.

298Q Industrial associations acting against employees etc.

An industrial association, or an officer or member of an industrial association, must not take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment or possible employment with intent:

- (a) to coerce the person to join in industrial action; or
- (b) to dissuade or prevent the person from making an application to an industrial body for an order under an industrial law for the holding of a secret ballot.

298R Industrial associations acting against members

An industrial association, or an officer or member of an industrial association, must not impose, or threaten to impose, a penalty, forfeiture or disability of any kind on a member of the association:

- (a) with intent to coerce the member to join in industrial action;
or
- (b) because the member has refused or failed to join in industrial action; or
- (c) because the member has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
- (d) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law.

Section 298S

298S Industrial associations acting against independent contractors etc.

(1) In this section:

discriminatory action, in relation to an eligible person, means:

- (a) a refusal to make use of, or to agree to make use of, services offered by the eligible person; or
- (b) a refusal to supply, or to agree to supply, goods or services to the eligible person.

eligible person means a person who is not an employee, but who:

- (a) is eligible to join an industrial association; or
- (b) would be eligible to join an industrial association if he or she were an employee.

(2) An industrial association, or an officer or member of an industrial association, must not:

- (a) advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person because the eligible person is not a member of an industrial association; or
- (b) take, or threaten to take, industrial action against an employer with intent to coerce the employer to take discriminatory action against an eligible person because the eligible person is not a member of an industrial association; or
- (c) take, or threaten to take, industrial action against an eligible person with intent to coerce the person to join an industrial association.

Chapter 3 Rights and responsibilities of employees, employers, organisations etc.

Part 3-3 Industrial action

Division 2 Protected industrial action

Section 415

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.

Subdivision C—Significance of industrial action being protected industrial action

415 Immunity provision

- (1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:
- (a) personal injury; or
 - (b) wilful or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

416 Employer response action—employer may refuse to make payments to employees

If an employer engages in employer response action against employees, the employer may refuse to make payments to the employees in relation to the period of the action.

Note: If an employee engages in protected industrial action against his or her employer, the employer must not make a payment to an employee in relation to certain periods of action (see Subdivision A of Division 9 of this Part).

416A Employer response action does not affect continuity of employment

Employer response action for a proposed enterprise agreement does not affect the continuity of employment of the employees who