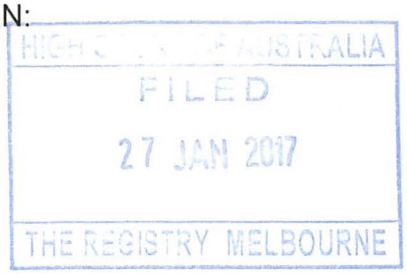
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M185 of 2016

BETWEEN:



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

and

THE AUSTRALIAN WORKERS' UNION
Respondent

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APPELLANT'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 raises one ultimate issue, which in turn identifies several sub-issues. The ultimate issue can be stated thus: in circumstances where the respondent (as bargaining representative) has contravened an order of the kind referred to in section 413(5) of the *Fair Work Act 2009* (Cth) (**FW Act**), does that section have the effect that further/future industrial action organised by the respondent (as bargaining representative) in relation to the proposed enterprise agreement(s), fails to meet the "common requirements" for the purposes of section 409(1)(c) of the FW Act, so that such industrial action is not "employee claim action" and thereby, not "protected industrial action"?

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3. The appellant contends that the answer to that question is "yes".

4. At least three sub-issues arise for consideration, having regard to the reasons for judgment below and the respondent's Notice of Contention dated 23 December 2016:

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(a) does the relevant order said to have been contravened have to continue to be in operation *vis a vis* the respondent contravener at the time of the taking of any future intended protected industrial action, in order for that action to fail to meet the "common requirement" in section 413(5) of the FW Act?;

(b) does the organisation/taking of the future intended protected industrial action itself have to contravene the relevant order, in order for that action to fail to meet the "common requirement" in section 413(5) of the FW Act?; and

(c) does the contravention of the relevant order have to be continuing or occurring at the time of the taking of any future intended protected industrial action, in order for that action to fail to meet the "common requirement" in section 413(5) of the FW Act?

5. The appellant contends that the answer to each of those questions is "no".

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

6. The appellant 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: Judgments Below

7. The judgment of the Full Court of the Federal Court of Australia is reported as *Esso Australia Pty Ltd v Australian Workers' Union* [2016] FCAFC 72; (2016) 258 IR 396 (**Judgment**). However, the reasons for judgment of the Full Court on the issues which arise in this appeal were incorporated from another judgment delivered at the same time by the same Full Court dealing with similar issues,[1] which is reported as *Australian Mines and Metals Association Inc and Others v Maritime Union of Australia* [2016] FCAFC 71; (2016) 242 FCR 210 (**AMMA Appeal**).

8. The judgment of the primary judge is reported as *Esso Australia Pty Ltd v*

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1 Judgment at [162] (Buchanan J, with Siopis J agreeing (at [1])) and [370] (Bromberg J).

Australian Workers' Union [2015] FCA 758; (2015) 253 IR 304 (**Primary Judgment**).

Part V: Facts

9. At all material times, the appellant and the respondent (for and on behalf of its members employed by the appellant) were bargaining for a new proposed enterprise agreement or agreements to apply at the appellant's offshore platforms in Bass Strait, its onshore processing plants at Longford and Long Island Point and its marine terminal at Barry Beach (Primary Judgment at [5]-[6]). Each of the appellant and respondent were "bargaining representatives" in relation to the proposed enterprise agreement(s) within the meaning of section 176 of the FW Act (Primary Judgment at [6]).

10. In support of its claims (and those of its members) for the proposed enterprise agreement(s), the respondent as bargaining representative organised, and many of its members took, various forms of industrial action against the appellant, which action commenced in early February 2015 (Primary Judgment at [29]-[30]). The respondent asserted that all of this industrial action was "protected industrial action" under section 408(a) the FW Act, whereas the appellant contended that some of it was not.

11. One form of industrial action which was contested by the appellant was a ban on the performance of particular work activities at Longford normally performed by members of the respondent, namely equipment testing, air freeing and leak testing (Primary Judgment at [46]). This industrial action commenced on 4 March 2015. The appellant contended that this industrial action was not "protected" because it was not the subject of a relevant written notice under section 414 of the FW Act (Primary Judgment at [50]). The respondent had issued such a notice banning the "de-isolation of equipment" (Primary Judgment at [31]) and the parties were in dispute as to whether equipment testing, air freeing and leak testing were captured by the term "de-isolation of equipment" (Primary Judgment at [50]).

12. Section 418 of the FW Act empowers the Fair Work Commission (**Commission**) to make orders stopping unprotected industrial action that is

happening, threatened, impending or probable, or is being organised. On 6 March 2015, the appellant obtained an order from the Commission made under section 418(1) of the FW Act in relation to this industrial action (**Order**) (Primary Judgment at [51]-[52]).

13. Clause 4.1 of the Order required the respondent (and its delegates, officers, employees and agents) to stop organising "industrial action", including the ban on equipment testing, air freeing and leak testing (clause 3.1(b)). The Order (and this prohibition) came into effect at 6.00pm on 6 March 2015 and ceased to have effect at 6.00pm on 20 March 2015 (clause 6). The terms of the Order are set out in the Primary Judgment at [52].

14. In contravention of the Order, the respondent continued to organise "industrial action" in the form of:

    (a) a ban on air freeing and leak testing from 6.00pm on 6 March 2015 until 9.30am on 7 March 2015;[2] and

    (b) a ban on the manipulation of bleeder valves from 9.30am on 7 March 2015 until 17 March 2015.[3]

15. Flowing from these contraventions of the Order, the appellant alleged that all other forms of industrial action being organised by the respondent for the proposed enterprise agreements(s) from that point onwards, including those forms which were otherwise notionally "protected", could not be "protected industrial action" because of the operation of section 413(5) of the FW Act (Primary Judgment at [129]). The appellant sought a declaration to this effect.

16. The appellant further alleged that any other industrial action sought to be organised by the respondent thereafter in support of its proposed replacement enterprise agreement(s), could also not be "protected industrial action" because of the operation of section 413(5) of the FW Act (Primary Judgment at [129]). The appellant sought a permanent injunction restraining any such action.

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2 Declaration 1 of the Order made by the primary judge on 13 August 2015. See also Primary Judgment at [119].

3 Declaration 2 of the Order made by the primary judge on 13 August 2015. See also Primary Judgment at [120].

17. The primary judge found that because of the operation of section 413(5) of the FW Act, all forms of industrial action organised by the respondent from 6.01pm on 6 March 2015 until 6.00pm on 20 March 2015 (subject to an erroneous limitation which was corrected on appeal), were unprotected (Primary Judgment at [153]).

18. All of these findings were upheld by a majority in the Full Court (Buchanan J, Siopis J agreeing). However, the appellant's claim for an injunction restraining the respondent from organising further industrial action in support of its proposed enterprise agreement(s), based on its contention as to the continuing effect of section 413(5) of the FW Act, was rejected by the primary judge and rejected (for different reasons) by the Full Court. Those rejections were based on differing views (as between the primary judge and the Full Court) as to the proper construction of section 413(5) of the FW Act.

19. It is those rejections which found this appeal.

Part VI: Argument

20. The FW Act provides for "protected industrial action", which permits the organisation and taking of "industrial action" by employees, unions and employers which is largely immune from civil or statutory suit (section 415 of the FW Act).

21. Not surprisingly, this "radical" concept[4] (the immunity) requires a number of statutory prerequisites to be satisfied. Access to "protected industrial action" (and hence, the immunity) is regulated by, *inter alia*, the "common requirements" contained within section 413 of the FW Act. Section 413(5) is one such "common requirement" for employee claim action (one form of "protected industrial action"). Industrial action of this type (employee claim action) must "meet" that common requirement (see section 409(1)(c) of the FW Act), along with all of the other relevant statutory requirements, in order for it to be "protected industrial action".

22. This appeal concerns the proper construction of the "common requirement" in

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[4] As to which, see paragraph 69 below.

section 413(5) of the FW Act. The question of construction is to be answered by reference to "*the text, context and purpose of the Act*".[5]

The various constructions of section 413(5)

23. Before turning to section 413(5) of the FW Act and the arguments the appellant advances, the various competing constructions ought be identified. As is apparent from the statement of the issue (and sub-issues) in paragraphs 2 and 4 above, at least four constructions of section 413(5) of the FW Act have been articulated.

24. Three of these are to be found in the Primary Judgment, the AMMA Appeal and the first instance judgment in the AMMA matter, reported as *Australian Mines and Metals Association Inc and Others v Maritime Union of Australia* [2015] FCA 677; (2015) 251 IR 75 (**AMMA Judgment**). The fourth is advanced by the respondent by way of its Notice of Contention.

25. The primary judge (would have) construed section 413(5) of the FW Act consistent with the construction urged upon him by the appellant (encapsulated in paragraphs 15-16 above) (Primary Judgment at [127]-[138]).

26. In the AMMA Judgment, Barker J construed section 413(5) of the FW Act in a similar fashion, except that his Honour required the relevant order which had been contravened to continue to "apply" at the time of the intended protected industrial action (paragraph 4(a) above). According to that construction, section 413(5) of the FW Act was not engaged where orders which had been contravened were "spent" by the time the future intended protected industrial action was to be taken (Primary Judgment at [140], citing AMMA Judgment at [171]-[172] (see also AMMA Judgment at [174])).

27. The primary judge did not agree with the construction favoured by Barker J (Primary Judgment at [144]-[147]), but followed it for reasons of comity (Primary Judgment at [147]).

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5 *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19; (2016) 90 ALJR 626 at 629 [10] (French CJ, Kiefel, Nettle and Gordon JJ). See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41; (2015) 256 CLR 569 at 581 [11] (French CJ, Kiefel and Bell JJ).

28. The Full Court in the AMMA Appeal (Buchanan J, Siopis and Bromberg JJ agreeing) adopted Barker J's construction (AMMA Appeal at [45] and [93]), but added a further limitation to the circumstances in which section 413(5) was engaged. That further limitation was expressed by the Full Court thus:

    (a) that the relevant order "*would need to be one which could be said to be contravened by the conduct or action of organising or taking the particular industrial action in question*" (AMMA Appeal at [45]), namely, the future intended protected industrial action (paragraph 4(b) above); and/or

    (b) that the relevant order was itself contravened (or would be contravened) by organising or engaging in *that* industrial action (AMMA Appeal at [92] and [94]), namely, the future intended protected industrial action (paragraph 4(b) above).

29. Both parties had, for differing reasons, submitted to the Full Court that this construction of section 413(5) of the FW Act was wrong.

30. The final alternative construction is one advanced by the respondent by way of Notice of Contention. It requires that the contravention of the relevant order be continuing or occurring at the time of the taking of any future intended protected industrial action.

31. The argument that the contravention be "continuing" was not accepted by Barker J (AMMA Judgment at [144]-[158]) and rejected by the primary judge (Judgment at [134]-[138]). Given the further limitation adopted by the Full Court (paragraph 28 above), it followed that a contravention of the relevant order would be "occurring" at the time of the future intended protected industrial action. The Full Court reasoned that this in essence captured the respondent's argument, such that nothing further needed to be said about it (AMMA Appeal at [46]-[51]). Those paragraphs have obviously led to the particular framing of the Notice of Contention in this Court.

<u>The proper construction: text</u>

32. The inquiry posed by section 413(5) of the FW Act is a "point in time" one. The question of whether this particular "common requirement" has been met, is

always to be asked by reference to the particular intended industrial action to be organised or taken.[6] It is that industrial action for which the protection (and the immunity) is being sought. In the judgments below, this has not been controversial.[7]

33. When an industrial protagonist, Commission or Court comes to consider this common requirement by reference to potential/actual "industrial action", the question must be asked:

> "*Has a relevant person [bargaining representative/employee] contravened any [relevant] orders that apply to them?*"[8]

10 34. That is, at the time of making the assessment, "*The [relevant] persons must not have contravened any [relevant] orders that apply to them…*"

35. From a purely syntactical and linguistic point of view, this form of words potentially raises two relevant questions of "tense", both of which have found particular voice in some of the judgments below:

(a) "*must not have contravened*"; and

(b) "*any orders that apply*".

36. These two questions of "tense" give rise to the four competing constructions of the provision identified above.

37. In the appellant's submission, two of these constructions (that adopted by the
20 Full Court and that the subject of the respondent's Notice of Contention) can be shortly put to one side. They each involve substantial violence to the text of the provision where such violence cannot be justified by any clear,[9] or even discernible, legislative purpose or intention.

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6 As it is with each of the other common requirements, and indeed, all of the statutory prerequisites/conditions to taking "protected industrial action".

7 AMMA Judgment at [150] and [154]-155]; AMMA Appeal at [45] and [74]-[75].

8 There is no dispute in this case that the respondent was a bargaining representative for the agreement(s) (section 413(5)(a)) or that the Order was of a kind to which section 413(5) is directed.

9 See Primary Judgment at [137].

38. Turning to the Full Court's construction first, the justification for the Full Court's additional limitation (paragraph 28 above) is, with respect, unconvincing. It is one thing to observe, uncontroversially, that the question posed is a "point in time" assessment (AMMA Appeal at [92]). However, that does not mean, nor lead to, the proposition that "*what is relevant to establish, for the purpose of s 413(5), is whether organising or engaging in* that *industrial action has contravened an order which applies to the person concerned*" (AMMA Appeal at [92]).[10] Why that would be so (or follow) is never explained by the Full Court.[11]

39. It is a construction which involves considerable surgery to the statutory language actually employed (AMMA Appeal at [100]-[101]),[12] when no clear purpose is apparent which would justify such surgery. Further and most tellingly, it excludes from its sphere of operation, a large number of the very orders which would meet the specific statutory descriptor used by Parliament in the body of the provision: orders "*that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement*".

40. It is plain that the legislature had in its mind when framing section 413(5), among others, "bargaining orders" made pursuant to Subdivision A of Division 8 of Part 2-4 of the FW Act (sections 228-232). These are the very type of orders which would relate to "*the agreement or a matter that arose during bargaining for the agreement*".[13] Indeed, this was the type of order under consideration in the AMMA matter.

41. It is also plain that the legislature had in its mind when framing section 413(5), orders made under section 418 of the FW Act. These are the very type of orders which would "*relate to industrial action relating to, the agreement*" or bargaining. This is the type of order involved in this matter.

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10 Note too, a similar and critical *non sequitur* advanced by Barker J: AMMA Judgment at [150]-[151].

11 The Full Court explains what its construction means in practice, but never explains why that construction ought be adopted.

12 More completely, "*By organising or engaging in the industrial action, the following persons must not contravene, be contravening or have contravened any orders that apply to them...*"

13 The statutory roots of the provision were directed to orders of this type dealing with negotiations and bargaining: Primary Judgment at [131]-[133].

42. When regard is had to sections 228-231 of the FW Act, it is readily apparent that a considerable number of the orders which the Commission might make under those provisions, would not (or could not) be contravened merely by a party to them organising or taking industrial action. None of the specific orders identified in section 231(2) of the FW Act for example, would engage section 413(5) (on the Full Court's construction). It is possible (or at least arguably so) that a bargaining order could contain such prohibitions on industrial action, but it is not going to be likely or even common.

43. On the Full Court's construction however, unless a bargaining order took that form and contained such prohibitions, contraventions of it would never engage or be captured by section 413(5),[14] despite those orders being of a kind which were self-evidently intended to be captured or within the scope of the particular drafting of that provision. No explanation or justification for why such a counter-intuitive construction is preferable (or even likely) is ventured by the Full Court.

44. Further, to the extent that the Full Court embraced Barker J's construction of the word "apply" from the AMMA Judgment, its reasoning and conclusion is infected by the same textual difficulties as are explained in paragraphs 52-56 below.

45. Turning to the respondent's Notice of Contention, the type of surgery to the language involved in this construction has been identified below (Primary Judgment at [137]-[138]; AMMA Judgment at [106] and [147]). Some of the significant difficulties with that construction were identified by the primary judge (Primary Judgment at [133]-[138]).

46. There are others. First, it involves a dramatic change in tense (from the past to the present) in circumstances where the immediately surrounding provisions

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[14] It is noted that paragraphs [94]-[96] of the AMMA Appeal suggest that some other forms of bargaining orders might be captured, but do so in a way which is inconsistent with its own stated limitation. For example, a bargaining order "*imposing ongoing requirements about how bargaining should occur*" (AMMA Appeal at [94]), is unlikely to be contravened by organising or taking industrial action. Further, a contravention of a bargaining order (including "*with current requirements*") during industrial action which was otherwise protected (AMMA Appeal at [95] and [96]), is not going to be a contravention because the industrial action was organised or taken in the first place. A type of bargaining order which might meet all of these descriptors is one requiring a party to attend bargaining meetings or prepare/exchange relevant documents. They will not be contravened by organising or engaging in industrial action.

(among others)[15] demonstrate that the legislature uses differing tenses when it wishes to.[16]

47. Second (and to take the example from paragraph [138] of the Primary Judgment a little further), it would enable a contravener to remain in continuous defiance of an order of the Commission, but still be able to access "protected industrial action" provided they stopped contravening such an order a minute before such action was due to commence.

48. Third (and as noted by the primary judge (Primary Judgment at [145] and [148])), orders which required something to be done "once and for all" by a particular point in time (such as attend a meeting or disclose particular information), would not be caught by the respondent's proposed construction. Before the time for compliance passes, there is no contravention, whereas after the time for compliance passes, the obligation in the order no longer speaks (it is "spent").

49. This is another construction which excludes a range of orders from the reach of section 413(5), which orders would otherwise be comprehended by the particular language used within that provision.

50. Turning to the appellant's preferred construction, it had been widely accepted below, including by the respondent, that the ordinary and literal meaning of the language used in section 413(5), tended to support the appellant's favoured construction.[17] Indeed, the primary judge described the provision by reference to the appellant's favoured construction, as "*clear*" (at [129]) and "*Grammatically, the provision is perfectly clear...*" (at [135]).

51. From a purely textual point of view, the next most likely construction after the appellant's preferred construction, is that adopted by Barker J in the AMMA Judgment. This approach focusses attention on the apparent present tense of the word "apply" in the phrase "*orders that apply to them*" and resolves that at

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15 See for example, sections 424(1), 443(1)(b), 421(3), 545(1), 546(1) and 706(1) of the FW Act.

16 Compare sections 413(2), (3), (6) and (7) (present tense) with sections 413(4) and (5) (past tense). The words "has contravened" are routinely used in the FW Act in the past tense (for example, sections 167(3), 235(2), 270(5), 423(1)(e) and 510(1)).

17 Primary Judgment at [129]-[130], [135] and [137]; AMMA Judgment at [95], [102] and [149].

the time of making the assessment of the relevant industrial action, the orders which *have been contravened* (including in the past) must still *apply* to the contravener, presumably in the sense of being "operative" or "live" (as opposed to "spent"). Barker J opined that the appellant's preferred construction involved some variation to the text of the provision (AMMA Judgment at [169]).[18]

52. There are however textual difficulties with Barker J's construction, not the least of which are those essayed by the primary judge (Primary Judgment at [144]-[146]). With respect, the whole of paragraph [144] of the Primary Judgment is correct, especially the sentence commencing with the word "Indeed".

53. The statute uses the word "apply" in the sense of "applicable to", "bound by" or "scope of operation", as opposed to the "period of operation". That is, the Commission makes orders and as part of doing so, identifies those persons to whom the orders "apply", usually being those upon whom obligations are imposed and those to whom the benefits of those obligations are given. Applied in this case, that is clause 2 of the Order ("*This order is binding on and applies to...*").

54. Once the word "apply" is understood in this way, which is consistent with an ordinary meaning of that word (not one focussed on a time period and hence, the present tense), the reasoning of Barker J falls away in favour of the appellant's preferred construction and no question of competing "tenses" arises.

55. Construing the word in a way which attaches significance to the tense, leads to incongruous results, including those identified by the primary judge (see also paragraphs 48-49 above). Further, it is not a construction which is consistent with the surrounding context.

56. Barker J's construction uses the word "apply" as equivalent to "operative" or "live" (see paragraph 51 above). Contextually, this is not the way in which the FW Act uses that word. For example, when regard is had to the two main kinds of orders likely to be caught by section 413(5) ("stop orders" (section 418) and

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[18] This variation however, "*depends on the implicit auxiliary verb*": *Suntory (Aust) Pty Ltd v Federal Commissioner of Taxation* [2009] FCAFC 80; (2009) 177 FCR 140 at 149 [37] (Finn, Emmett and Stone JJ).

"bargaining orders" (section 230)), the FW Act uses the word "apply" (and its variants, such as "applies") in the way described by the primary judge and contended for by the appellant,[19] whilst tending to use the words or concepts "period" and "operation" to capture notions of being "operative" or "live".[20]

57. Not surprisingly, the Commission adopted this same distinction here when framing its order (compare clauses 2 and 6 of the Order).

The proper construction: context

58. An appreciation of the contextual place which section 413(5) of the FW Act takes in the overall industrial scheme (both legislative and the common law) is important.[21]

The concept of "industrial action" and its unlawfulness

59. The concept of "industrial action", both in its popular/ordinary denotation and its statutory one, has a long history. The *Conciliation and Arbitration Act 1904* (Cth) (**C&A Act**) defined two particular forms of what would now be called "industrial action": "lock-out" and "strike".[22] At that time, "lock-outs" and "strikes" were generally prohibited by statute (section 6(1) of the C&A Act).

60. Further and in many cases, organising and/or engaging in conduct which amounted to a "lock-out" or "strike" would be "unlawful" at common law. It might involve a breach of contract or several of the so-called "industrial torts".[23] In this sense and as early as 1904, whether by way of the C&A Act or at common law,

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19 Sections 233 ("applies") and 421(1) ("applies") of the FW Act. There are many, many other examples, including sections 14, 26-31, 47(1), 52(1), 58, 121 and 123 to name but a few. See too the heading to section 413 of the FW Act (although it does not form part of the FW Act because of the operation of section 40A of the FW Act, which excludes the amendments made to section 13(3) of the *Acts Interpretation Act 1901* (Cth)).

20 Sections 232 ("comes into operation" and "ceases to be in operation") and 418(1) ("for a period (the stop period) specified in the order") of the FW Act.

21 Footnote 5 above. See also *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; (2016) 90 ALJR 376 at 379 [8] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

22 Defined in section 4 of the C&A Act.

23 Such as nuisance, inducing/procuring breach of contract, interference with contractual relations/trade or business by unlawful means or conspiracy. See for example, *Lumley v Gye* (1853) 2 El & Bl 216; (1853) 118 ER 749, *Allen v Flood* [1898] AC 1; *Taff Vale Railway Company v Amalgamated Society of Railway Servants* [1901] AC 426 and *Quinn v Leathem* [1901] AC 495. More recently, see *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 at 160 [19] (Jessup, Tracey and Perram JJ).

"industrial action" in its popular/ordinary denotation (or at least a large part thereof) was proscribed.

61. The common law position in this respect has not materially changed. What would now be described as "industrial action", whether popularly or as defined in the FW Act (section 19), would in most respects be unlawful at common law (as would the organisation of it) and potentially the subject of civil suit.

62. The statutory position since 1904 and prior to 1994 underwent some structural reform, although the substance of the position remained the same.[24]

63. The first relevant statutory definition of "industrial action" was introduced into the C&A Act in 1977, with the passage and commencement of the *Conciliation and Arbitration Amendment Act (No. 3) 1977* (Cth).[25] The substance of this definition was carried through the C&A Act, the *Industrial Relations Act 1988* (Cth) (**IR Act**) and the *Workplace Relations Act 1996* (Cth) (**WR Act**).[26] The current statutory definition adopted by the FW Act in section 19 is not materially different to these statutory predecessors.

64. In 1988, the IR Act introduced the first statutory predecessor to what is now section 418 of the FW Act, providing a direct power to the (then) Commission to stop or prevent "industrial action" by order. At that time, the power was limited to public sector employment only.[27]

65. In 1996, section 127 of the IR Act was re-enacted as section 127 of the WR Act and its application was extended to "industrial action" in relation to an industrial dispute, the negotiation of a certified agreement (what is now called an enterprise agreement) or work regulated by an award or certified agreement. In 2006,[28] section 127 was amended and renumbered as section 496 of the WR

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24 Prior to 1996, "bans clauses" could be inserted into awards by the Australian Conciliation and Arbitration Commission which in effect (and among other things), prohibited conduct which would amount to industrial action, a breach of which was punishable as a breach of the award.

25 Act No. 108 of 1977. See section 3(b) thereof.

26 Both before and after the substantial amendments to that Act through the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

27 Section 127 of the IR Act.

28 Pursuant to amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which amendments substantially commenced on 27 March 2006.

Act, which again extended the (then) Commission's power to all industrial action which was not "protected". Section 496 of the WR Act is not relevantly or materially different to section 418 of the FW Act.

66. Further, in the WR Act both before and after the Work Choices amendments in 2006, various other forms of industrial action were specifically prohibited by statutory provision. The broadest of these statutory prohibitions was section 170MN of the pre Work Choices WR Act (section 494 of the post Work Choices WR Act), which essentially prohibited all "industrial action" during the nominal life of what is now called an "enterprise agreement".[29] The successor to these provisions in the FW Act is section 417.

67. It can be seen therefore that ever since 1904 (and earlier in the case of the common law), many/most forms of "industrial action" have been specifically prohibited by statute (punishable as an offence or civil penalty) and unlawful at common law.

68. Specifically, industrial action in the form of complete or partial work bans organised and taken in support of claims for improved terms and conditions of employment, has almost always been unlawful at common law and/or under statute.[30]

The concept of "protected industrial action"

69. On 30 March 1994, the *Industrial Relations Reform Act 1993* (Cth) substantially commenced. It amended the IR Act in many respects, including by introducing a radical (and hitherto unknown)[31] concept: "protected [industrial] action" (section 170PG). Affecting almost all of these relevant existing common law and statutory rights, the amendments conferred a broad immunity from civil suit on persons who engaged in "industrial action" which was "protected" within the

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29 Previously called a "certified agreement" or "collective agreement". Similar prohibitions applied during the life of individual statutory agreements, called Australian Workplace Agreements (section 170VU and section 495).

30 See the discussion, albeit at a relatively early stage of this continuum, of Evatt J in *McKernan v Fraser* [1931] HCA 54; (1931) 46 CLR 343 at 373-5 and 380.

31 At least in Australia. A form of union immunity for industrial action has existed in the United Kingdom since 1906 (*Trade Disputes Act 1906* (UK)). See *New South Wales v The Commonwealth* [2006] HCA 52; (2006) 229 CLR 1 at 134 [236].

meaning of the IR Act (section 170PM).

70. The substantive immunity in section 170PM was largely re-enacted as section 170MT of the WR Act in 1996, was renumbered as section 447 in the post Work Choices WR Act and continues in section 415 of the FW Act in materially the same form.

71. For the purposes of context, there are two important features of this history that bear particular note:

(a) first, the concept of "protected industrial action" and its attached immunity fundamentally alters existing (but not yet accrued) common law and statutory rights, including by in most cases removing the ability of a person who suffers loss and damage from that action, from bringing civil proceedings to recover its loss;[32] and

(b) since 1994, the prerequisites or conditions which must be fulfilled before a person can engage in "protected industrial action" and attract the immunity, have expanded on each occasion that the legislature has turned its mind to the issue.[33]

72. Two related things can be gleaned from this:

(a) first, access to "protected industrial action" (and the immunity) is not some form of "right", but should be permitted in particular confined circumstances (such that the interference with well-established rights is as limited as the circumstances require), by not construing the disentitling prerequisites or conditions to attract the immunity narrowly;[34] and

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32 In *Victoria v The Commonwealth* [1996] HCA 56; (1996) 187 CLR 416, section 170PM was held not to acquire property ("*choses in action*") other than on just terms, because the rights to bring proceedings for loss and damage were future rights in the abstract which had not yet accrued, as opposed to "*valuable rights and interests as protected by s 51(xxxi) of the Constitution*" (at 558-9).

33 The IR Act contained around six requirements (sections 170PH-170PL and 170PO(4)), the pre Work Choices WR Act about eight requirements (sections 170MM-170MS and 170MW(9)), the post Work Choices WR Act about 10 requirements (sections 436-441 and 443-446) and the FW Act about 12 requirements (sections 409(1)-(6) and 413(2)-(7)).

34 *Commissioner of Taxation v Citibank Ltd* [1989] FCA 126; (1989) 20 FCR 403 at 432-433 (French J, as he then was); *Balog v Independent Commission Against Corruption* [1990] HCA 28; (1990) 169 CLR 625 at 635-6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ). See

(b) the legislature has over time, consistent with this approach, itself sought to limit access to the immunity, by erecting more and more prerequisites and conditions to the ability to take "protected industrial action".

73. Neither of these matters were adverted to by the Full Court. In fact, the Full Court appears to have placed some weight on the proposition that industrial action outside the nominal life of an enterprise agreement was not itself prohibited.[35] This overstates the true position and has a tendency to undervalue the interference with existing statutory and common law rights.

74. As identified above, most forms of industrial action, particularly those of the type identified at paragraph [72] of the AMMA Appeal, are unlawful at common law and are indeed, most likely unlawful under the FW Act (through the operation of the very provisions contravened in this proceeding, namely sections 343/348 and 340/346) (and in that sense, prohibited).

The proper construction: purpose

75. The search for statutory purpose or intent has its difficulties. Too often it involves competing *a priori* assumptions about what the legislature was attempting to achieve, and then refashioning the "surest guide" to that "metaphorical" intent (the actual language used) to accord with that assumption.[36]

76. Having said that, it is perhaps uncontroversial that the substantive purpose of section 413(5) is to encourage compliance with relevant orders,[37] including in particular, orders of the Commission.[38] The differing extents to which that purpose might be carried into effect, is reflected in the various competing

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also *Davids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108; (1999) 91 FCR 463 at 489 [62] and 491-2 [71]-[73].

35 AMMA Appeal at [56] and [72]-[74].

36 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 390 [26] (French CJ and Hayne J); *Corporate Affairs Commission (NSW) v Yuill* [1991] HCA 28; (1991) 172 CLR 319 at 339-40 (Gaudron J); *Lacey v Attorney General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at 591-2 [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

37 Note for example, the heading to section 413(5) of the FW Act.

38 The body at the centre of enterprise bargaining disputation.

constructions of the section.

77. It should be noted in the context of compliance, that the relevant orders will generally only have been made where there has been relevant conduct by a bargaining representative or employee warranting the making of such an order in the first place, for example, not meeting the good faith bargaining requirements (section 230(3)) or organising, threatening or engaging in industrial action which was not protected (section 418(1)).

78. When the consequences of the competing constructions are considered however, the appellant submits that its preferred construction is the most harmonious with the overall substantive purpose.

79. For reasons already adverted to above, the respondent's construction advanced in the Notice of Contention reduces the pursuit of that purpose almost to nought. In fact, it would promote the antithesis of compliance. In terms of the "bite" imposed by section 413(5) of the FW Act, compliance with orders is optional. Section 413(5) would have no effect where a party was in continuing contravention of an order for days, weeks or months, but stopped contravening one minute before seeking to take further "protected industrial action". Why would the legislature "*clearly, or even probably*"[39] intend that result?

80. Similar difficulties plague the construction adopted by Barker J in the AMMA Judgment. His Honour gave no consideration to what the apparent purpose of the "legislative intention"[40] he identified was, nor whether it was logical or harmonious with the broader statutory scheme. It is neither. Why would the legislature preclude access to the immunity, but only during the time within which a relevant order spoke?

81. Insofar as section 413(5) is concerned, an order could be consistently contravened (or simply ignored) for days, weeks or months, but as soon as it stopped "applying" (or was "spent"), section 413(5) would have no work to do.[41] Again, compliance would be optional and only relevant if a contravener wanted

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39 Primary Judgment at [138].

40 AMMA Judgment at [174].

41 Primary Judgment at [138].

to organise or take further industrial action whilst a contravened order was still "operative" (but not afterwards).

82. A contravention of an order of the Commission which was made with a long duration (say, six months) would have far more-wide reaching effect (in terms of the impact and efficacy of section 413(5)), than a major and deliberate contravention of an order made with a considerably shorter duration (say, one week). How does that promote or further "compliance"?

83. Further, where the order imposes "once and for all" obligations which are spent once the time for compliance passes, section 413(5) does not attach at all. In terms of section 413(5), compliance with orders of that type is discretionary.

84. These same difficulties apply to the Full Court's construction, even more so. In addition, any relevant order which does not by its terms prohibit organising or engaging in industrial action, need not be complied with in any sense when it comes to considering the effect of section 413(5).

85. None of these difficulties confront the appellant's preferred construction. It adopts as its premise, the proposition that bargaining representatives, employers and employees who comply with and respect the rules governing bargaining and industrial action, and who comply with orders imposed on them by (among others) the Commission, are entitled to the statutory privilege of "protected industrial action" in support of the enterprise agreement(s) they are proposing, whereas those who do not comply with those rules or respect the authority of the Commission (by contravening orders) lose that privilege.

86. It puts no time limit or boundary on the types of orders or levels of compliance required and treats all orders and all obligations equally. Apart from having the capacity to lead to outcomes which some might describe as "harsh" (depending largely on one's subjective perspective),[42] it is otherwise logical, coherent, consistent, reflective of the statutory language and respects historical and surrounding context.

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[42] By the time a contravention of an order has occurred, the contravener will ordinarily have failed to comply with the "norms" of conduct established by the FW Act once initially (to justify the making of the order) and then a second time by contravening the order.

87. Finally, the Full Court's contextual criticism of this construction (AMMA Appeal at [88]) is, with respect, not pertinent. There is not an "irrelevant" overlap between sections 413(5) and 413(7)(c). The reason why they are each disentitling "common requirements" is different. Section 413(5) is most logically directed towards compliance and the consequences of non-compliance. Section 413(7) is a disentitling "common requirement" because once one of these three events has occurred (subsections (a)-(c)), the "cut and thrust" of bargaining is at an end (as is the need to take "protected industrial action"). The parties thereafter have a short period to reach agreement and if not, the Commission arbitrates their new "agreement" (called a "workplace determination") for them.[43]

Part VII: Applicable Constitutional and Statutory Provisions

88. See attached Annexure 1 to these submissions.

Part VIII: Orders Sought

89. The appellant seeks orders conformably with its Notice of Appeal.

Part IX: Time for Oral Argument

90. It is estimated that 1.5 hours will be required for the presentation of the oral argument of the appellant.

Dated: 27 January 2017

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[43] Sections 266 (sections 413(7)(a) and (b)) and 269 (section 413(7)(c)) of the FW Act. Such was recognised by the Full Court: AMMA Appeal at [89].