FORM 27D – RESPONDENT'S SUBMISSIONS

(Rule 44.03.3)

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M185 of 2016

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

BETWEEN:

ESSO AUSTRALIA PTY LTD

Appellant

and

AUSTRALIAN WORKERS' UNION

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues in the Appeal

2. The appeal raises the issue of the proper construction of s.413(5) of the *Fair Work Act 2009* (Cth) (**FW Act**) with regard to the following questions:
   (a) Must the order(s) referred to in the sub-section be in operation at the time when the industrial action is being organized or taken?
   (b) Must the organizing or taking of the intended protected industrial action itself be in contravention of the order(s) referred to in the sub-section?
   (c) Must the contravention of the order(s) referred to in the sub-section be occurring at the time of organizing or taking the intended protected industrial action?

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Part III: Judiciary Act 1901

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

Part IV: Narrative Statement of Relevant Facts

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4. The Respondent **(AWU)** does not take issue with the Appellant's (**Esso**) statement of material facts.

Part V: Applicable Legislation

5. The Appellant's statement of applicable statutes is incomplete. The Respondent contends that a proper understanding of s.413(5) of the FW Act requires reference to the following additional statutory provisions:

LEGISLATION	SECTIONS
Acts Interpretation Act 1901 (Cth)	S 15AA
Industrial Relations Act 1988 (Cth)	ss 170PA, 170PC, 170PD, 170PG, 170PM
Workplace Relations Act 1996 (Cth)	s 170ML
Fair Work Act 2009 (Cth)	ss 3, 171, 408, 410, 411, 420, 443, 539

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Part VI: Respondent's Argument[1]

Principles of Statutory Construction

6. As indicated in paragraph 2 above, the issue in this appeal is one of statutory construction. The accepted principles of statutory interpretation are not controversial. They were explained in *Project Blue Sky v Australian Broadcasting Authority*. In summary, the Court held that:

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1 Terms defined in the Appellant's Submissions have the same meaning in these submissions.

(a) the process of construction of a provision must always begin by examining the context of the provision within the statute as a whole, so that:

(i) a statutory provision should be construed so that it is consistent with the language and purpose of other provisions of the statute;

(ii) the meaning of a provision must be determined by reference to the language of the statute viewed as a whole;

(iii) the context, general purpose and policy of a provision and its consistency with fairness should be considered;

(b) a statute must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals;

(c) a Court construing a statutory provision must strive to give meaning to every word of the provision, and avoid a result which deprives any part of the provision or the statute of meaning, operation or utility.[2]

7. In *CIC Insurance Ltd v Bankstown Football Club,*[3] the plurality explained that:

> *"...the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance."*[4]

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2 (1998) 194 CLR 355 at [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ.

3 (1997) 187 CLR 384.

4 (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). See also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 (Mason J), cited by the plurality in *ICAC (NSW) v Cunneen* (2015) 256 CLR 1 at [57] (French CJ, Hayne , Kiefel and Nettle JJ).

(Citations omitted)

8. Where a literal reading of the particular provision does not accord with the discerned legislative intention, a court may depart from that reading. Mason and Wilson JJ so held in *Cooper Brookes v FCT* (1981) 147 CLR 297 at 320-321, where they stated:

> *"(w)hen the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative operation must be preferred. But the propriety of departing from the literal interpretation is not confined to such situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to legislative intent as ascertained from the provisions of the statute, including the policy which is to be discerned from those provisions."*

9. In *Project Blue Sky* the plurality also stated:

> *"...the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."*[5]

10. There is an abundance of High Court authority which supports this approach.[6]

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5 (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby and Hayne JJ).

6 *K & S Lake City Freighters v Gordon & Gotch* (1985) 157 CLR 309 at 315 per Mason J, 319 per Brennan J and 321 per Deane J; *Saraswati v R* (1991) 172 CLR 1 at 21-22 per McHugh J, with whom Toohey J agreed; *Parramore v Duggan* (1995) 183 CLR 633 at 644 per Toohey J (citing *Saraswati*), with whom Deane, Dawson and McHugh JJ agreed; *Certain Lloyd's*

11. Where more than one interpretation of a provision is open:

> *"The best that can be done is to reason in terms of relative consistency – internal logical consistency and overall consistency in accordance with the principles of statutory interpretation adumbrated in Project Blue Sky – to determine which of the two competing constructions …is more harmonious overall."*[7]

Statutory Context – Enterprise Bargaining

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12. Part 2-4 of the FW Act deals with the making of enterprise agreements by bargaining.[8] Enterprise bargaining has a central place in the industrial regulation of workplaces under the FW Act.[9]

13. Division 8 of Part 2-4 describes the role of the Fair Work Commission (**FWC**) in facilitating bargaining for enterprise agreements. Section 228 defines "good faith bargaining requirements" that a bargaining representative must meet. It is to be noted that the section does not require the making of concessions during bargaining or that an agreement be reached.

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14. Section 229 allows a bargaining representative to apply to FWC for a bargaining order if one or more of the other bargaining representatives have not met or are not meeting the good faith bargaining requirements. Section 231 specifies the type of bargaining orders that the FWC may make and s.232 provides that a bargaining order comes into operation on the day that it is made and ceases to be in operation if it is revoked, when the proposed agreement is approved by the FWC, or when the bargaining representatives agree that bargaining has ceased.

Underwriters v Cross (2012) 248 CLR 378; *Legal Services Board v Gillespie-Jones* (2013) 300 ALR 430 at [48] per French CJ, Hayne, Crennan and Kiefel JJ; *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 at [37]-[38] per French CJ, Crennan and Bell JJ and at [65]-[66] per Gageler and Keane JJ.

7 *ICAC (NSW) v Cunneen* (2015) 256 CLR 1 at [35] (French CJ, Hayne, Kiefel and Nettle JJ).

8 FW Act s.171 sets out the objects of the Part.

9 See FW Act, s.3(f) and s.171.

15. Section 233 is a civil remedy provision which prohibits contravention of a term of a bargaining order by any person to whom it applies. Civil remedy provisions may be sued upon under Part 4-1[10] and injunctive relief and pecuniary penalties may be ordered.

Statutory Context – Protected Industrial Action

16. The ability to take protected industrial action has for many years been an element of Commonwealth industrial legislation dealing with collective bargaining. The current statutory regime for the taking of protected industrial action is contained in Division 2 of Part 3-3.

17. The provisions in Division 2 of Part 3-3 of the FW Act may be traced back to Division 4 of Part VIB of the *Industrial Relations Act 1988* (Cth) (**IR Act**). Part VIB of the IR Act was inserted by the *Industrial Relations Reform Act 1993* (Cth). These provisions ushered in "a fundamental shift in the emphasis of the entire system, away from conciliation and arbitration, and in favour of collective bargaining".[11]

18. Division 4 of Part VIB of the IR Act was entitled "Immunity from Civil Liability". Its object was "to give effect, in particular situations, to Australia's international obligation to provide for a right to strike".[12]

19. The proposition advanced in Esso's submissions at para 72(a) that access to protected industrial action "is not some form of 'right'" is contradicted by the statutory language.[13] Section 170PG(2) of the IR Act provided that

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10 See Item 6 in the table appended to s.539.

11 Stewart et al, *Creighton & Stewart's Labour Law* (6th ed, 2016), p. 351. The differences between the Australian system of conciliation and arbitration and the system of collective bargaining in England were discussed by Evatt J in *McKernan v Fraser* (1931) 46 CLR 343 at 373-374 (cited in *NSW v Commonwealth* (2006) 229 CLR 1 at 134 [236] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

12 Section 170PA(1). The obligations arose under the various international instruments referred to in s.170PA(1)(a)-(e). See now s.3(a) of the FW Act.

13 The plurality judgment in *Davids Distribution v National Union of Workers* (1999) 91 FCR 463 at [62] refers to a 'right to strike' when discussing s.170MT of the WR Act. See also the discussion of the 'right to strike' under international law in Stewart et al, *Creighton & Stewart's Labour Law* (6th ed, 2016), at p. 917.

organisations of employees and employees themselves are "entitled, for the purpose of supporting or advancing claims made by the organisation that are the subject of [an] industrial dispute", to organise or engage in "industrial action". The sub-section provided that any such industrial action was "protected action".[14]

20. For industrial action under the IR Act to be "protected action", the organisers of the action had to comply with the requirements in the remainder of Division 4.[15] Industrial action that met those requirements was "protected" in the sense that, subject to certain exemptions,[16] it was immune from civil suit.[17]

21. Far from being "radical",[18] these provisions were not only consistent with Australia's obligations under international law, they reflected law and practice in many jurisdictions including the United Kingdom. The "right" of workers to strike has long been recognised by the United Kingdom Courts as "an essential element in the principle of collective bargaining".[19] Immunity from civil suit for action taken "in contemplation or furtherance of a trade dispute" was first conferred in the United Kingdom by the *Trade Disputes Act 1906.*[20]

22. Both the *entitlement* of negotiating parties to organise or engage in protected action[21] and the immunity from civil suit for so doing[22] have been maintained in subsequent Commonwealth industrial legislation.

23. Under the FW Act, s.408 provides that protected industrial action, must be:
(a) employee claim action (s.409);

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14 A similar entitlement was conferred on employers by s.170PG(3).
15 See s.170PC (Industrial Relations Commission must have found an industrial dispute exist); s.170PD (a bargaining period must have been initiated); s.170PH (72 hours' notice); s.170PI (negotiation must precede industrial action); s.170PJ (ballot of members may be required); and s.170PK (industrial action must be duly authorised).
16 Section 170PM(3)(a)-(c).
17 Section 170PM(3).
18 Appellant's submissions at [21] and [69].
19 *Crofter Harris Tweed v Veitch* [1942] A.C. 435 at 463 (Lord Wright). This proposition is described as "obvious" in Davies & Freeland, *Kahn-Freund's Labour and the Law* (3rd ed, 1983), p. 292.
20 Sections 1-4. A similar immunity was conferred by the *Trade Disputes Act 1915* (Qld).
21 WR Act, s.170ML; FW Act, ss 408-411.
22 WR Act, s.170MT(2); FW Act, s.415.

(b) employee response action (s.410); or

(c) employer response action (s.411).

24. All the forms of protected industrial action must meet the common requirements set out in Subdivision B of Division 2 of Part 3-3.[23] Section 413 forms part of that subdivision. Before dealing with s.413 specifically, we refer to the following other provisions of Part 3-3 which are relevant contextually.

25. Firstly, s.418 provides for application to be made to FWC for orders to stop industrial action which is not protected industrial action. Upon an application under s.418, FWC may make interim orders pursuant to s.420. Section 421(1) creates a civil remedy provision which prohibits contravention of a term of an order made under s.418 or s.420. The section also empowers the Court to grant an injunction to restrain such contraventions and to impose penalties.

26. Secondly, in the case of employee claim action, which is the most common form of protected industrial action, Division 8 of Part 3-3 sets out the procedure for protected action ballots which must be ordered by the FWC and held before protected industrial action can be taken.[24] A necessary precondition for the making of a protected action ballot order by the FWC, is that it be satisfied that the bargaining representative applying for the order is and has been genuinely trying to reach an agreement with the employer of the employees who are to be balloted (s.443(1)).[25]

Section 413

27. Section 413 sets out the common requirements for industrial action to be protected industrial action.

28. Section 413(3) requires that the bargaining representative organising the proposed industrial action must be genuinely trying to reach an agreement.

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23 See s.409(1)(c), s.410(1)(c) and s.411(c).

24 See s.409(2).

25 Protected Action Ballots are further discussed at paragraphs 36-38 below.

Subsection (4) deals with the requirement to give notice of proposed industrial action under s.414 and then there is subsection (5).

29. Section 413(5) requires that bargaining representatives organizing industrial action "must not have contravened any orders that apply to them" and that are of a kind described in the subsection. The controversy in this case arises from the interaction between the phrases "must not have contravened" and "orders that apply to them".

30. Esso contended below, and continues to contend, that s.413(5) should be given what it calls its "literal" meaning with the result that the taking of protected industrial action is not permitted at any time after a contravention of any of the types of orders identified in that subsection.

31. If applied as Esso would have it, the provision would have the effect that any bargaining representative who has contravened any order at any time and irrespective of the circumstances, would be precluded from organising or engaging in any protected industrial action. That is an extreme result which has the real potential to produce incongruous, irrational and unjust results.

32. The facts in the *AMMA* proceeding[26] demonstrate the point acutely. The contravention alleged against the Respondent in that case was that it had failed to comply with interim bargaining orders that required it to file documents setting out particulars of its negotiation claims by 21 July 2014. The orders were complied with on 25 July 2014.

33. Similarly, if the Respondent in the *AMMA* proceeding had filed its documents in time but it transpired that they did not fully meet the content requirements of the order (whether intentionally or unintentionally)[27] that would also have constituted a contravention of the orders.

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26 The judgments in the AMMA proceeding were *Australian Mines and Metals Association Inc v Maritime Union of Australia* [2015] FCA 677; (2015) 251 IR 75 (***AMMA Judgment***) and *Australian Mines and Metals Association Inc v Maritime Union of Australia* [2016] FCAFC 71; (2016) 242 FCR 210 (***AMMA Appeal***).

27 Such an argument arose in the *AMMA* proceeding as well.

34. Having regard to the context in which s.413(5) appears, it is necessary to discern its purpose within the scheme for enterprise bargaining and the taking of protected industrial action.

35. In this regard it is to be noted that other provisions of the FW Act deal with the failure of a party to bargain in good faith including by providing for the making of good faith bargaining orders, and court imposed sanctions for contravention of those orders, which include injunctions to act in accordance with them.[28]

36. Another contextual consideration to which the primary Judge did not advert and which bears on the harmony between s.413(5) and other provisions relating to taking protected industrial action, is the process for initiating such action in the first place. As noted above, under Division 8 of Part 3-3 of the FW Act, approval must be sought from the Commission for the holding of a "protected action ballot" and the Commission's powers to make an order for such a ballot are prescribed in s.443.

37. The only prerequisite under s.443 of the FW Act for the Commission to grant the application is that the applicant has been and is genuinely trying to reach an agreement with the employer of the employees who are to be balloted. Importantly, there is no preclusion from obtaining a protected action ballot order because of a past contravention of an order of the kind referred to in s.413(5). This raises the rhetorical question of why the FW Act would allow the whole of the ballot process to occur when the ultimate industrial action sought to be taken could never be taken because of a contravention of an order that is no longer in operation.[29] This is a powerful indicator of the correctness of the approach of the Full Court in its finding that s.413(5) is focused on the time when the industrial is proposed to be taken and contraventions that are then occurring.

38. A contravention of a good faith bargaining order at some time in the past does

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28 See ss 230-233.

29 See the example referred to by Barker J at [101] of *AMMA Judgment*.

not preclude a conclusion that the relevant bargaining representative is at a subsequent time genuinely trying to reach agreement. One may hypothesise a situation where the bargaining representative has failed to comply strictly with a bargaining order in, say, January, and then shortly thereafter has complied. The bargaining representative may then engage in further good faith negotiations with the employer and be genuinely trying to reach agreement over a period of months. The hypothetical bargaining representative may, for example, in July of the same year, apply for a protected action ballot order. The fact that in January there was a non-compliance, and arguably a contravention, of an order, is not a stated preclusion from obtaining a ballot order. Yet, when that bargaining representative seeks to organise or engage in protected industrial action approved in the ballot, Esso submits that s.413(5) should be read as precluding its ability to do so because of the earlier contravention. It strains credulity that such a result was intended by the legislature. Such a construction does not produce a harmonious operation of the statutory scheme.

39. The examples in paragraphs 32, 33 and 38 serve to demonstrate that Esso's proposed interpretation of s.413(5) would produce incongruous, irrational and unjust results. Such outcomes are to be avoided and the Courts are entitled to do so by modifying the literal meaning of a provision to give it a meaning which is more harmonious with relevant surrounding provisions.[30]

40. A further contextual consideration is the extremely important role of protected industrial action in the statutory enterprise bargaining scheme. It is the only economic weapon available to employees in support of their bargaining. Davies and Freedland observe that "if the workers could not, in the last resort, collectively refuse to work, they could not bargaining collectively". As they explain, "there can be no equilibrium in industrial relations without a freedom to strike".[31] Under the FW Act, the ability to take protected industrial action is

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30 See paragraphs 6-11 above.

31 Davies & Freeland, *Kahn-Freund's Labour and the Law* (3rd ed, 1983), p. 292; see also Stewart et al, *Creighton & Stewart's Labour Law* (6th ed, 2016), p. 918.

particularly significant because there is no statutory obligation on an employer to concede claims made by employees or to reach agreement.[32]

41. This function of protected industrial action, namely, that it be in aid of claims in relation to a proposed enterprise agreement, is built into the definition in s.409.[33] Further, s.413(3) requires that the relevant bargaining representatives are genuinely trying to reach agreement when they seek to organize and engage in protected action.

42. Given that contraventions of orders of the kind referred to in s.413(5) are already and separately amenable to punishment and restraining orders, one must ask what additional purpose may reasonably be attributed to s.413(5).

43. The AWU submits that in the overall statutory context, the intended purpose of s.413(5) is to focus on the point of time at which the protected industrial action is proposed to be arranged or taken, and at that time to prevent the bargaining representatives from approbating and reprobating about their bargaining obligations by continuing contravening conduct while simultaneously seeking to take protected industrial action. It is not intended to be a further means of punishment for contraventions.

Reasoning of the Full Court

44. In the Full Court, Buchanan J adopted the reasoning and explanation for his preferred construction of s.413(5) which he set out in *AMMA Appeal.*[34] In *AMMA Appeal,* his Honour rejected the construction proposed by the appellants, which is essentially that now proposed by Esso. His Honour noted that that construction was based on the view that the purpose of the subsection is to deprive bargaining representatives of the "privilege" of protected industrial action if they break "the rules governing bargaining and

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32 See s.228(2) of the FW Act.
33 See s.409(1)(a).
34 See *Judgment* at [162]. (Siopis and Bromberg JJ agreed with Buchanan J at [1] and [370] respectively).

industrial action".[35] Buchanan J rejected that submission about the purpose of s.413(5), and held that the subsection is "concerned with an assessment of the particular industrial action which is being considered to see whether it meets the common requirements stated in s.413".[36]

45. The Inquiry under s.413(5) is an inquiry about whether the proposed industrial action will be protected. In order for employee claim action to be protected, it must meet the requirements in s.409. Among other requirements, the industrial action must:

a. be organized or engaged in for the stated purpose in s.409(1)(a);
b. be organized or engaged in by the people identified in s.409(1)(b);
c. meet the common requirements identified in s.409(1)(c); and
d. be authorized by a protected action ballot (s.409(2)).

46. Whether the proposed industrial action meets these requirements is to be assessed at the time the action is proposed. The requirements are concerned with the quality of the industrial action being organized. That explains the reasoning of Buchanan J in *AMMA Appeal* at [92]:

> *"...s 413(5) is concerned with an assessment of the particular industrial action which is being considered to see whether it meets the common requirements stated in s 413. In that context, what is relevant to establish, for the purpose of s 413(5), is whether organizing or engaging in that industrial action has contravened an order which applies to the person concerned. Section 413(5), like s 413 as a whole, is in my view concerned with a contemporary 'point of time' assessment as the primary judge found."*

47. It is submitted that the contextual analysis by the Full Court of how the provision fits into the Act provides a harmonious operation for s.413(5) with its neighbouring provisions. For example, Esso's construction of the provision

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35 See *AMMA Appeal* at [91]. Esso makes the identical submission to this Court at [85] of its Submissions.

36 *AMMA Appeal* at [92].

would leave s.413(7)(c) with no work to do because a "serious breach declaration", which is made under s.235 of the FW Act, requires proof, inter alia, of a contravention of one or more bargaining orders which is serious or sustained and has significantly undermined the bargaining. On Esso's preferred construction, section 413(7)(c) would always be pre-empted by s.413(5) which would operate on any breach, whether serious or trivial, whether sustained or one-off and whether or not the breach had any effect on the bargaining (as exemplified in the *AMMA* proceeding).[37]

10 48. There is simply no need for s.417(3)(c) if Esso's construction of s.413(5) is correct. This is a strong indicator that it is not.

49. Finally, as noted by the Full Court in the *AMMA Appeal*,[38] a construction of s.413(5) that focusses on the time at which it is proposed that the industrial action be organised or taken also finds support in the Explanatory Memorandum for the *Fair Work Bill* **(EM)**. As Buchanan J concluded after setting out the relevant provisions of the EM, "the focus on current compliance is unmistakable."[39]

20 50. It follows that the construction of s.413(5) favoured by the Full Court is a construction which promotes the object or purpose of the FW Act.[40]

51. It is submitted that the reasoning of the Full Court ought to be upheld as a proper approach to the construction of s.413(5). It is a sensible and rational interpretation of s.413(5) that gives it an operation which is harmonious with its statutory context and is supportive of the overall enterprise bargaining scheme in the legislation.

Reasoning of the Primary Judge

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52. In advancing its argument that the sub-section is concerned with past contraventions, Esso relies on the reasoning of the primary Judge. The

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37 *AMMA Appeal* at [88].
38 *AMMA Appeal* at [103]-[105].
39 *AMMA Appeal* at [108].
40 *Acts Interpretation Act 1901* (Cth), s.15AA.

primary Judge in turn based his reasoning on what he said was the clear grammatical meaning of the provision and a review of some of the legislative history.

53. However, the grammatical meaning is not clear because at one point the provision uses the phrase "not have contravened" and later "orders that apply". There is a need to reconcile the different tenses of the two phrases.[41]

54. In *AMMA Judgment*, Barker J held that s.413 was concerned with events at the time of protected industrial action being proposed.[42] Barker J relied on the grammatical form (present tense) of the phrase "orders that apply" in finding that the orders must be in operation at the time of organizing or taking the industrial action. His Honour also drew on the context of s.413(5).

55. The primary Judge erred at [144] in failing to give attention to the tense of the phrase and to that context and when holding that the phrase "orders that apply" was not central to the meaning of the provision. His Honour wrongly treated the phrase as only indicating that the orders were orders that bound the contravenors, even though that rendered the words otiose because there could be no contravention unless they "applied" in that sense. The contrary meaning adopted by the Full Court and Barker J, was that the phrase pointed to the time at which the orders apply. In that sense, the phrase has work to do and is consistent with the focus of the section on the time at which the proposed protected industrial action is being organized or taken.

56. As Jessup J's analysis reveals, each prior iteration of what is now s.413(5) contained the phrase "before the person begins to engage in the industrial action".[43] The focus was clearly on whether there was compliance at the time at which the proposed industrial action was to occur.[44] His Honour's reasoning about the significance of the change in wording from compliance to

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41 Primary Judgment at [141].
42 *AMMA Judgment* at [150], [157]. The approach was approved on appeal.
43 See Primary Judgment at [131]-[133].
44 This demonstrates the flaw in his Honour's criticism at [138] that such an outcome was not one which would be countenanced or intended by the legislature.

contravention is wrong in that it fails to account for the context and purpose of the various provisions. That purpose was to remove the availability of protected action when a party was not meeting its obligations under relevant orders. Whether that is described as "contravention" of, or "non-compliance" with, the orders is irrelevant to the purpose of the provision.

57. To the extent that the EM assists in understanding the underlying policy in s.413(5), it supports the construction adopted by the Full Court rather than that adopted by the Primary Judge. The relevant parts of the EM, which are set out in the *AMMA Appeal*,[45] are at odds with the reasoning of the Primary Judge.

58. This Court has long recognised that it is permissible to depart from the literal meaning of a statutory provision in circumstances where that meaning does not accord with the discerned legislative intention.[46]

59. There are two reasons which arise contextually from the FW Act why the literal meaning of s.413(5), as explained by the primary Judge and contended by Esso, does not accord with its correct legal meaning.[47]

60. The first is the inconsistency with the provisions for protected action ballot orders discussed in paragraphs 36 to 38 above. The second is the inconsistency created with another of the "common requirements" found in s.413(7)(c), as discussed in paragraph 47 above.

61. Where a literal reading of a statutory provision gives rise to conflict with other provisions in the same statute, "the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that

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45 *AMMA Appeal* at [103]-[107].

46 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321 (Mason and Wilson JJ); see also *K & S Lake City Freighters v Gordon & Gotch* (1985) 157 CLR 309 at 315 (Mason J), at 319 (Brennan J) and at 321 (Deane J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25] (French CJ and Hayne J).

47 AWU maintains its submission at paragraph 53 above that the literal meaning of the sub-section is not clear.

result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions".[48]

62. In relation to s.413(5) of the FW Act, this is best achieved by focusing, as the Full Court did, on s.413 as a whole. Adopting that approach, it is clear, as stated by Buchanan J in the *AMMA Appeal*, that s.413(5), "like s.413 as a whole, is ... concerned with a contemporary "point in time" assessment ...".[49] As his Honour noted, the conditions [in s.413] all relate to, or impose, a contemporary requirement and not a historical one".[50] Contrary to the submissions of Esso, the sub-section is not concerned with past contraventions.

Part VII: Respondent's Argument on Notice of Contention

63. In the event that the Court does not accept the Full Court's interpretation of s.413(5), AWU seeks to rely on its Notice of Contention dated 23 December 2016.

64. The construction of s.413(5) proposed in AWU's Notice of Contention, like that adopted by the Full Court and Barker J, also focuses on the point in time at which the industrial action is proposed.

65. It differs from that adopted by the Full Court in that it requires only that the contravening conduct be occurring when the protected industrial action is being organised or taken. It is submitted that in this respect it is consistent with the relevant passages from the EM which are referred to above.

66. AWU submits that to the extent that its proposed interpretation calls for a departure from the literal meaning of "have contravened", that is within the permitted limits under the authorities referred to above.

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48 *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70].
49 *AMMA Appeal* at [92].
50 *AMMA Appeal* at [110].

Part VIII: Time for Oral Argument

67. It is estimated that 2 hours will be required for the presentation of oral argument of the respondent.

10 DATED: 17 February 2017

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