

**ESSO AUSTRALIA PTY LIMITED v. THE AUSTRALIAN WORKERS' UNION
(M185/2016);**
**THE AUSTRALIAN WORKERS' UNION v. ESSO AUSTRALIA PTY LIMITED
(M187/2016)**

Court appealed from: Full Court of the Federal Court of Australia
[2016] FCAFC 72

Date of judgment: 25 May 2016

Special leave granted: 16 December 2016

These appeals are being heard together as they arose from the same industrial action. They involve statutory interpretation of different sections of the *Fair Work Act* 2009 (Cth) ("the FWA").

At all material times Esso and the AWU were bargaining for a new proposed enterprise agreement to apply at several of Esso's operational sites. In support of its claims the AWU organised various forms of industrial action against Esso, commencing in early February 2015. The AWU asserted that all of this industrial action was 'protected industrial action' under the FWA; Esso contended that some of it was not. One form of industrial action contested by Esso was a ban on 'equipment testing, air freeing and leak testing' which it asserted was not protected because it was not captured by the term 'de-isolation of equipment' specified in the AWU's requisite written notice under the FWA.

Section 418 of the FWA empowers the Fair Work Commission to make orders stopping 'unprotected' industrial action. On 6 March 2015 Esso obtained an order from the Commission under s 418(1) stopping the disputed industrial action between 6 and 20 March 2015. In contravention of the order the AWU continued to organise the disputed industrial action. Esso argued that flowing from these contraventions, *all other forms of industrial action* being organised by the AWU for the proposed enterprise agreements, from that point onwards, *including those forms which were otherwise notionally 'protected'*, could not be 'protected' because of the operation of s 413(5). Esso sought a declaration to this effect. The trial Judge upheld that argument. However Esso's claim for an injunction restraining the AWU from organising further industrial action was rejected by the trial Judge. Esso's claim was rejected by the Full Court for different reasons based on different constructions of s 413(5) by and it is those rejections which found the first appeal (*Esso v. AWU*).

In relation to the second appeal (*AWU v. Esso*), the issue is whether the intent to coerce referred to in ss 343 and 348 refers to a subjective intent to take unlawful, illegitimate or unconscionable action in order to overbear the will or negate the choice, of another. Esso contended that by organising the bans in the written notice, the AWU contravened s 343 by organising 'action' against Esso 'with the intent to coerce Esso ...to make an enterprise agreement...on terms acceptable to the AWU'. The primary Judge held that "the intent of Mr D, and therefore the AWU in organising the action ...was to apply sufficient pressure on Esso to cause it to act otherwise than in the exercise of its own free choice". Because of the way the Judge construed the relevant section *the actual belief* of Mr D that the action would be protected was

“irrelevant to the question of whether he intended to coerce Esso”. The Full Court upheld the primary Judge’s approach in this regard.

As to the first appeal (in which Esso is the appellant) the ground of appeal is:

- That the Full Court erred in its construction of s 413(5) by concluding that it only operated with respect to the engagement in or organisation of industrial action which was of itself in contravention of an order of the kind referred to in that section, and when those orders still currently operated and applied to the contravention at the time of that action.

In this appeal the respondent has filed a Notice of Contention whereby the respondent wishes to contend that the decision of the Full Court should be affirmed but on the ground:

- That the Full Court erred by failing to construe s 413(5) as being limited in its operation to contraventions where the contravening conduct is continuing or occurring at the time when the relevant bargaining representative is seeking to organise or arrange protected industrial action.

As to the second appeal (in which the AWU is the appellant) the grounds of appeal include:

- That the majority of the Full Court erred in holding that it is unnecessary in the establishment of ss 343 and 348 contraventions to prove that the person said to have acted with an intent to coerce intended to take action that was unlawful, illegitimate or unconscionable and hence coercive;
- That the majority of the FC erred by excluding from its consideration, the appellant’s actual intent, which was to take protected industrial action and not to take coercive action prohibited by ss 343 and 348.