IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 26 of 2013

BETWEEN: **CONSTRUCTION FORESTRY MINING & ENERGY UNION**
Appellant

and

MAMMOET AUSTRALIA PTY LTD ACN 075 483 644
Respondent

APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES IN THE APPEAL

2. The issues the Appellant contends that the appeal presents are as follows:

   a. Does s 470 of the *Fair Work Act 2009* (Cth) (**FW Act**) necessarily require the withholding of employer-provided accommodation and transport from employees at remote worksites, during periods of protected industrial action, due to the characterization of those matters as "payment"?

   b. Are economic benefits (including non-monetary services/things) provided by the employer to the employee necessarily "payments" within the meaning of that term in s 470:

      (i) regardless of whether or not they are provided as part of the remuneration of the employee (ie, as the *quid pro quo* for the provision of labour); and

      (ii) simply because they may be capable of valuation in monetary terms?

   c. Was the provision of board and lodging (**Accommodation**) to the Relevant Employees in this case a "payment" within the meaning of s 470(1) of the FW Act, such that the withholding of the Accommodation was authorised under s 342(3) FW Act and therefore not adverse action for the purposes of s 342(1) FW Act?

PART III: JUDICIARY ACT NOTICE

3. The Appellant does not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903*.

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PART IV: DECISIONS AT FIRST INSTANCE AND ON APPEAL

4. The reasons for judgment of the primary and intermediate courts in the case are as follows:

   a. *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2011) 254 FLR 59; [2011] FMCA 802 (**Lucev FM**)

   b. *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2012) 206 FCR 135; [2012] FCA 850 (**Gilmour J**)

PART V: RELEVANT FACTS

5. The Woodside Pluto Liquefied Natural Gas (**LNG**) Project (**Project**) involved the extraction and processing of natural gas in the Carnarvon Basin, about 190 kilometres north-west of Karratha, Western Australia. Woodside Burrup Pty Ltd (**Woodside**) is the Project principal[1].

6. The Respondent was awarded a contract from Woodside to perform the heavy lift and transportation of LNG train modules. It commenced work on the Project in September 2008, and employed 34 employees on the Project to perform these works, including 12 crane operators and forklift drivers, four of whom are specifically the subject of this proceeding (**Relevant Employees**)[2]. These operators/drivers were eligible to be (and were[3]) members of the Appellant[4], and had their terms and conditions of employment on the Project regulated by a workplace agreement made under the provisions of the *Workplace Relations Act 1996* (Cth), as it then was, entitled the Mammoet Australia Pty Ltd Pluto Project Greenfields Agreement 2008 (**Agreement**).

7. The Relevant Employees were all "Distant Workers" under the Agreement, and were on "fly in/fly out" arrangements in relation to the performance of their work on the Project[5]. A Distant Worker is defined[6] as an employee who "cannot return to their Usual Place of Residence each night" and includes an International Distant Worker[7]. The provision of the Accommodation distinguished Distant Workers from Local Workers.

8. The Respondent, at its expense, provided travel to the Relevant Employees between the Project and their normal place of residence on each "rostered swing"[8]. When working a rostered swing at the Project, the Respondent was obliged under the Agreement to provide the Relevant Employees with either suitable Accommodation, or if not, to pay to them a living away from home allowance (**LAHA**)[9]. Local workers were entitled to be paid a rental subsidy, called a "local living subsidy", which was $100 per week less than LAHA for Distant Worker allowance[10].

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[1] Gilmour J at [3].
[2] Gilmour J at [7].
[3] Lucev FM at [5].
[4] An organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).
[5] Distant Workers are referred to in Clause 42 of the Agreement.
[6] In the Glossary in Appendix 1 of the Agreement; Gilmour J at [8].
[7] A Local Worker is defined in Appendix 1 as neither a Distant Worker nor an International Distant Worker: Clause 43; Appendix 8 of the Agreement.
[8] Clause 18(b)(i) of Appendix 7 of the Agreement; see also clause 20 of Appendix 7.
[9] Clause 6 of Appendix 7 of the Agreement; Gilmour J at [8].
[10] Appendix 7, clause 10 for Distant Workers and Appendix 8, clause 2 for Local Workers.

9. Three of the Relevant Employees were provided with Accommodation at Searipple Village, Karratha and one was provided with Accommodation at Gap Ridge Village, Karratha[11]. The Accommodation at those locations was not exclusively for the Respondent's employees. Other sub-contractors on the Project resided there. The Accommodation was owned by Woodside. The Respondent paid Woodside to the extent that its employees resided there[12].

10. From September 2009, the Respondent's crane and forklift employees, including the Relevant Employees, engaged in negotiations with the Respondent for a new enterprise agreement[13]. The Appellant represented the Relevant Employees as their bargaining agent in the negotiations.[14]

11. On 24 December 2009, Fair Work Australia (**FWA**) made a majority support determination under s 237 of the FW Act in relation to a proposed enterprise agreement for the Project. They determined that a majority of employees of the Respondent wanted to bargain for the proposed enterprise Agreement[15]. On 22 March 2010, FWA made an order under s 443 of the FW Act that a protected action ballot of employees including the Relevant Employees be held. The resulting ballot authorised the taking of protected industrial action[16].

12. On 21 April 2010, the Respondent was notified of an intention on the part of its crane and forklift employees, including the Relevant Employees, to take protected industrial action with effect from 28 April 2010[17].

13. On 27 April 2010, the day before the protected industrial action commenced, the Respondent told the Relevant Employees that if they engaged in protected industrial action the Respondent would not provide them with Accommodation or pay LAHA during that period[18].

14. On 28 April 2010, the Respondent's crane and forklift employees, including the Relevant Employees, commenced a 28 day period of protected industrial action within the meaning of s 408 of the FW Act. The protected industrial action involved a complete cessation of work for 28 days from 28 April 2010 to 25 May 2010.

15. Upon the commencement of the protected industrial action, the Respondent ceased providing the Accommodation to the Relevant Employees, and did not pay them LAHA[19]. As a consequence, the Relevant Employees were required to vacate the Accommodation by 6.30am on 28 April 2010 and pay for their own way to their permanent places of residence, including interstate[20].

16. On 14 June 2010 the applicant lodged an application with the Federal Magistrates Court of Australia (the **FMC**) alleging that the removal of the Accommodation and LAHA was a contravention of clause 6 of Appendix 7 of the Agreement, and adverse action against

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[11] Gilmour J at [9].
[12] Gilmour J at [9]; Exhibit 12- Clause 4.2 of Contract between Woodside and the Respondent.
[13] Gilmour J at [10]; Exhibit 7- Letter from Respondent to Woodside.
[14] Lucev FM at [8]-[9]; Affidavit of Michael Landgren at [9]; Affidavit of Peter Schwarz at [8].
[15] Lucev FM at [8]-[9].
[16] Lucev FM at [10]; Affidavit of Landgren at [10]-[11].
[17] Lucev FM at [11].
[18] Gilmour J at [11]; Exhibit 7- Letter from Respondent to Woodside.
[19] Gilmour J at [12].
[20] Affidavit of Schwarz at [18]-[19]; Affidavit of Landgren at [21].

the Relevant Employees – within the meaning of s 342(1), and in contravention of s 340(1), of the FW Act – because they exercised a workplace right by participating in protected industrial action.

17. Following a no case submission at the conclusion of the applicant's case, Lucev FM in the FMC concluded that both the provision of the Accommodation and the payment of LAHA were "remuneration" paid to the Relevant Employees, and thus amounted to "payment" within the meaning of s 470(1) of the FW Act[21]. Consequently, his Honour concluded that the Respondent was prohibited from providing the Accommodation, and as such, the removal of the Accommodation was "authorised by or under" the FW Act within the meaning of s 342(3) of the FW Act[22]. This prevented the removal of the Accommodation from amounting to "adverse action". Further, Lucev FM concluded that the Agreement could not require that which the FW Act prohibited, namely, the provision of the Accommodation during the period of the protected industrial action[23]. Accordingly the application was dismissed.

18. The applicant appealed to the Federal Court. The appeal was heard by Gilmour J. His Honour refused the Appellant's application pursuant to s 25(1AA)(b) of the *Federal Court of Australia Act 1976* (Cth) that the matter be heard by a Full Court of the Federal Court[24].

19. His Honour dismissed the appeal with costs[25], concluding that both the provision of the Accommodation and the payment of LAHA constituted the making of a payment for the purposes of s 470(1) of the FW Act.

PART VI: ARGUMENT

The Proper Construction of s 470

20. The resolution of the issues in this appeal turns upon the construction of s 470(1) of the FW Act. It provides as follows:

> *(1) If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.*

21. Section 470 is a civil remedy provision[26].

22. The section does not apply to partial work bans, but may apply to overtime bans: s 470(3)-(5).

23. Employees are prohibited from asking the employer to make a payment if the payment would contravene s 470: s 474(1)(b).

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[21] Lucev FM at [81]; Gilmour J at [15].
[22] Lucev FM at [114].
[23] Lucev FM at [115].
[24] *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd* [2012] FCA 141 (29 February 2012).
[25] At [56]; Order 2. The Appellant successfully applied under the slip rule to have the costs order set aside: *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd (No 2)* [2012] FCA 1404 (11 December 2012).
[26] The penalty being 60 penalty units: see Item 21 of s 539(2).

24. The FW Act provides no definition of "payment".

25. Lucev FM at first instance construed the term "payment" in s 470(1) to mean the payment of "remuneration"[27]. His Honour found that the Accommodation was provided as remuneration (rejecting the Appellant's arguments to the contrary) and so held that s 470 was attracted in the circumstances[28].

26. On appeal, Gilmour J appears to have held that the term "payment", as employed in s 470(1), should be broadly construed to mean any benefit or thing that is provided "*to enable the employees to be in a position to perform their employment and earn their pay*"[29]. His Honour did not appear to consider that the phrase "payment to an employee" in the subsection should be limited by concepts of remuneration[30].

27. The Appellant contends that his Honour erred in this regard. In the Appellant's submission, the term "payment" in context should be construed as connoting a *quid pro quo* for work performed. More particularly, the effect of the provision should be understood to:

    a. prohibit the payment of monetary amounts that are payable to employees in relation to the performance of work, in accordance with the requirement in section 323 of the FW Act;

    b. alternatively, prohibit the payment of remuneration (not extending to the provision Accommodation in this case).

28. These contentions will be addressed in turn. Before doing so, it is appropriate to refer to the legislative history and purpose of s 470.

29. It is important to note from the outset that neither construction put by the Appellant would require an employer such as the Respondent to continue to provide accommodation throughout the period of a long strike. Whether or not – or for how long – an employee was entitled to retain such accommodation would fall to be determined by the terms of the legal relationship between them under contract or any applicable industrial instrument. The issue here is whether s 470 of the FW Act has the effect of prohibiting all such provision of accommodation (etc), and with immediate effect.

Legislative history and purpose

30. The term "payment" in the context in which it now appears originated in s 124 of the *Industrial Relations Act 1988* (Cth) (**IR Act**). That section provided that "*the Commission is not empowered to deal with a claim for the making of a payment to employees in relation to a period*" of industrial action.

31. Section 124 of the IR Act was intended to be invoked only where parties were in dispute over the non-payment of strike pay in periods of industrial action (there was no concept of "protected industrial action" under the IR Act prior to 1993[31]). The provision did not prohibit strike pay, as if the parties had agreed to make payments notwithstanding the

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[27] Lucev FM at [76] and [103]; Gilmour J at [23].
[28] Lucev FM at [79]-[81], [113]-[114].
[29] Gilmour J at [48].
[30] Gilmour J at [42] and [48]; *cf* at [37].
[31] The concepts of protected action and a limited right to strike within a bargaining period were introduced in the *Industrial Relations Reform Act 1993* (Cth), Act No. 98 of 1993.

industrial action, they were free to do so. Rather, it addressed a situation where employers ceased making payments during a strike by employees, and where the employees would subsequently make a claim in the Commission for those payments.

32. The scope of the term "payment" does not appear to have been necessarily broadened from the time it first appeared in s 124 of the IR Act. To the contrary, it thereafter became a civil penalty provision in subsequent iterations of the legislation.

33. The term "payment" as it appears in s 124 of the IR Act was carried over to s 187AA of the pre-reform *Workplace Relations Act 1996* (Cth) (**WR Act**) and s 507 of the post-reform WR Act.

34. The Second Reading Speech which accompanied the Bill introducing s 187AA of the pre-reform WR Act does not support the construction that "payment" included non-remunerative matters. The Speech relevantly provides:

> *It will be unlawful: for an employer to pay strike pay; a union, or its representatives, to take industrial action to pursue strike pay; or for an employee to accept strike pay.*[32]

35. The regime directed to addressing the issue of "strike pay" now appears in Division 9 of Part 3-3 of the FW Act in a significantly amended form.

36. The decisions relied upon by Gilmour J at [33]-[35][33] were decisions concerning predecessor legislation to the FW Act. In those iterations of the legislation, the relevant provision prohibited payment in relation to both protected and unprotected industrial action. In *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49[34] Ryan J decided (at p 73) that:

> *187AA operates to prevent an employer from making a payment to an employee where the employee has engaged in industrial action <u>whether such action is protected action or not</u>.*[35]

37. Section 507 of the post-reform WR Act was re-enacted in the FW Act as s 470 (relating exclusively to protected industrial action) and s 474 (relating to unprotected industrial action).

38. There is a discernable policy in the FW Act directed to deterring unprotected industrial action. For example:

    (i) Section 474 provides that, where there is unprotected industrial action of less than 4 hours duration, the employer must not make a payment relating to a full 4 hours;

    (ii) Where unprotected industrial action is taken, the FW Act provides mechanisms to stop the industrial action including orders made by the Fair Work

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[32] Commonwealth, *Parliamentary Debates House of Representatives,* 23 May 1996, page 1304 (The Hon Peter Reith).
[33] *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 (citing Lander J) and *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49 (Ryan J).
[34] Cited by Gilmour J at [34].
[35] Emphasis added; Ryan J also discussed "payment" in terms of payment of "remuneration" (at pp 73-74).

Commission[36] and injunctions[37]. The orders available under this Division are not able to be made in relation to action that is protected industrial action: s 418; and

(iii) A person must not organise or engage in industrial action while an unexpired enterprise agreement or workplace determination is in force. Section 417(1) is a civil remedy provision.

39. Protected industrial action[38] is subject to different policy considerations. In contrast to unprotected action, protected industrial action is established as a key ingredient of the parties' bargaining armoury as follows:

(i) Collective bargaining is "at the heart of the workplace relations system"[39];

(ii) Parties to collective bargaining negotiations are able to take protected industrial action to advance their claims for an enterprise agreement: ss 409-411;

(iii) There is immunity from suit for a party engaging in protected industrial action: ss 415 and 460;

(iv) Where an employer takes protected industrial action, the employer "may refuse to make payments" to employees in relation to the period of the response action: s 416;

(v) Protected action by employers in response to protected industrial action does not affect continuity of employment: s 416A; and

(vi) In contrast to s 474, s 470 does not require a minimum of 4 hours pay to be withheld in the case of protected industrial action of shorter duration.

40. It may be accepted that, as indicated in the Federal Court decisions referred to by Gilmour J, the purpose of s 470 and associated provisions is to act as some deterrent to the taking of even protected industrial action. But it does so in the context outlined, where a distinction is drawn between protected and unprotected industrial action; where protected action is entirely legitimate under the Act; and, importantly, where the taking of protected industrial action is provided for in a way that contemplates – indeed encourages – the ongoing maintenance of the employment relationship.

41. In that context, and taking account of the broader legislative history, s 470 should be understood as directed to preventing the payment of strike pay, such that the striking employee does not get paid for work not done. That does not require a broad and encompassing view of "payment". Moreover, it is inconsistent with a construction that tends to undermine the maintenance of the employment relationship, including by actions which tend to threaten the health, safety and dignity of the worker.

42. Gilmour J stated that the identified purpose of the provision would be "readily thwarted" if anything other than a broad construction of 'payment' was adopted (at [38], [43]) and

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[36] Section 418.

[37] Section 421(3).

[38] Protected industrial action is dealt with in Division 2 of Part 3-3 of the FW Act, from s 408ff.

[39] Explanatory Memorandum accompanying the *Fair Work Bill 2009* (**Explanatory Memorandum**) at r. 186; see also FW Act s 3(f) (Objects of the Act) which refers to achieving productivity and fairness "*through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action*".

if s 470 did not apply to the provision of the Accommodation: at [44] and [48]. There is no thwarting of that purpose simply because necessary incidents of being able to be employed are not prohibited from being provided throughout protected industrial action. If the employee is deprived of his/her remuneration, that achieves the purpose. In his reasoning in this respect, Gilmour J made an error of the kind identified by Gleeson CJ in *Carr v State of Western Australia* (2007) 232 CLR 138 at [5].[40] It cannot be assumed that the Parliament intended one particular purpose in a complex legislative scheme to be pursued at all costs and to the greatest degree possible.

43. A more nuanced construction of "payment", as put by the Appellant, interferes to a lesser degree with a party's right to participate in protected industrial action as authorised by the FW Act. Employees who engage in protected industrial action are immune from suit (s 415) and the continuity of their employment is not affected (s 416A). The ongoing employment relationship is sought to be preserved by the FW Act notwithstanding the engagement in protected industrial action. However, the loss of remuneration for the period of the industrial action remains a major disincentive.

Payment in s 470 means payment of remuneration in money

44. Gilmour J at [43] attached little significance to other provisions relating to pay and earnings in the FW Act. In this respect his Honour erred[41].

45. Section 323 of the FW Act provides an employer must pay an employee "*amounts payable to the employee in relation to the performance of work*" "in full" and 'in money": ss 323(1)(a) and (b) respectively. Subsection 323(1) is a civil remedy provision.

46. The phrase "*amounts payable to an employee in relation to the performance of work*" in s 323 is broad, being referable to the meaning of "full rate of pay" in s 18 of the FW Act[42]. It covers (eg) bonuses, loadings, allowances, overtime and leave payments. The scope of the phrase accords with ordinarily understood concepts of remuneration. This is to be contrasted with the narrower definition of "base rate of pay" in s 16 of the FW Act.

47. The exception provided for in s 324 involves "permitted deductions". An employer may only deduct an amount payable under s 323(1) as provided for in that section.

48. A deduction is permitted where an employee chooses to "*forgo an amount payable to an employee in relation to the performance of work*"[43] in return for the receipt of "*some other form of benefit or remuneration*": Note 1 to subsection 324(1)[44].

49. A permitted deduction that is authorised for the purposes of s 324(1) "*must specify the amount of the deduction*": s 324(2)(a). This provision has its history in *Truck Act*

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[40] See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51] per Hayne, Heydon, Crennan and Kiefel JJ.

[41] Cf *Project Blue Sky v ABA* (1998) 194 CLR 355 at [67]-[71].

[42] See Note 2 to the subsection; see Gilmour J at [48]. The Explanatory Memorandum at r. 1283 provides that "*The legislative note after this subclause makes clear that the payment rule covers a wide range of payments*".

[43] Emphasis added. See also s 332(4): non-monetary benefits "*are benefits other than an entitlement to a payment of money*".

[44] The example given is a "*salary sacrifice or other arrangement*".

legislation designed to protect employees from receiving payments in kind against their will[45].

50. Terms in contracts of employments, enterprise agreements or modern awards that are contrary to s 324 have "no effect" if they require unreasonable payments to be made by the employee, or deductions for the benefit of the employer: s 326. Reflecting this – for what it is worth – the *Fair Work Regulations 2009* provide (in Regulation 2.12(2)) that an employer is able to make a reasonable deduction from what is otherwise payable in the following case:

> *For subsection 326(2) of the Act, a circumstance in which a deduction mentioned in subsection 326(1) of the Act is reasonable is that the deduction is for the purpose of recovering costs directly incurred by the employer as a result of the voluntary private use of particular property of the employer by an employee (whether authorised or not).*[46]

51. Non-monetary benefits that are substituted for "*amounts payable to the employee in relation to the performance of work*" and that are not authorised deductions contravene s 323: s 327. For example, payments "in kind" contravene s 323. The Explanatory Memorandum accompanying s 327, dealing with the consequences of contravention of s 323, stated (in r. 1301):

> *1301. For example, if an employer purports to pay an employee 'in kind' by providing the employee with goods or services in lieu of wages, the value of the goods or services provided by the employer in lieu of wages would not discharge the employer's obligation to pay the employee wages in money under this Division.*

52. The effect of these provisions in Division 2 of Part 2-5 of the FW Act is that the starting point for the consideration of what "payments" can be made to an employee is the requirement that an employee receive full payment of remuneration in return for his or her services "in money". It is the undeducted (monetary) portion of the remuneration that is the subject of the relevant "payment". What is not the subject of "payment" in the manner prescribed is able to be "deducted"[47]. The payment of the balance is "forgone" where such a deduction is authorised.

53. As stated in the Explanatory Memorandum (at r. 1290):

> *1290. An authorised deduction does not have the effect of reducing an employee's minimum wage (e.g., under an award), but will have the effect of reducing the amount that an employer is required to pay to the employee. Other amounts may still be required to be paid by the employer to third parties on behalf of the employee; e.g., under a salary sacrifice arrangement.*[48]

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[45] Eg, *Abram Coal Company Limited v Southern* [1903] AC 306 where it was held that "earnings" for the purposes of compensation meant the full sum for which a worker was engaged, without deductions as "*there is no analogy between [the Truck Act] and the [Workmen's Compensation Act 1897] under consideration*": at p 308 per Lindley LJ.

[46] It was no part of the decision (at first instance or on appeal) that the Agreement permitted a deduction from the Relevant Employees' full rates of pay, or that deductions in fact occurred. The Regulation assumes that the use of an employer's property (albeit where "voluntary" and "private") gives rise to a "deduction".

[47] This case was not decided on the basis that the Accommodation was a deduction.

[48] Emphasis added.

54. Deducted amounts are therefore not the subject of "payment" for the purposes of the FW Act. Section 470 is concerned with "payment to an employee".

55. A construction of s 470 which treats the phrase "payment to an employee" as meaning "payments of remuneration payable in money" under s 323:

    a. treats remuneration as the *quid pro quo* for work performed;

    b. promotes certainty[49] as it is the monetary amount only that is the subject of the prohibition;

    c. achieves the policy objectives underpinning the section by depriving employees who take industrial action of the monetary component of their pay for the duration of the action, which is significant; and

    d. is consistent with the notion that s 470 is directed towards prohibiting "strike pay".

56. Protected industrial action may involve very short periods in which work ceases. For example, the protected action ballot voted on by the Respondent's employees in this matter authorized the taking of protected action in the form of "*2 hour stop work meetings*"[50]. At least 3 days notice is required to be given to an employer prior to commencing such protected industrial action: s 414(1)-(2).

57. In the case where a very short period of industrial action is taken, it cannot be supposed that the employer is required to remove the employee's accommodation (including belongings from the accommodation) lest it be said that some benefit was received in contravention of s 470. If the employee is based on a remote mine site where there are no nearby townships of amenities, and the only the mode of transport away from the mine site is provided by the employer (as was the case in *HWE Contracting Pty Ltd v Young* (2007) 153 NTR 77), what is the employer required to do?

58. In that example, the non-monetary benefits the subject of deductions from remuneration pursuant to an existing arrangement (for example accommodation or the use of a company car, as part of the remuneration package or otherwise) should not be understood to be the subject of a payment "*in relation to the total duration of the industrial action on that day*": s 470(1). Such benefits are typically not referable to a payment, the value of which is not able to be discerned in terms of hours or particular parts of days.

59. That an employee who engaged in protected industrial action would not be deprived of all of the incidents of the employment by reason of s 470 is consistent with the notion that the employment relationship is intended to continue unaffected: s 416A.

60. This construction is further supported by the fact that s 470 can, in the circumstances enumerated in subsection 470(4), apply to an overtime ban. An employee who is entitled to the benefit of accommodation or a company car as part of the base salary maintains that entitlement irrespective of whether "overtime" is worked. If overtime is worked in that example, an employee is paid overtime pay (the value of the car or the

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[49] cf *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20 (8 May 2013) where the Court stated at [48] that the criminal law "*should be certain and that its reach should be able to be ascertained by those who are the subject of it*". The same principle should apply to civil penalty/remedy provisions.

[50] Lucev FM at [9(e)(v)]; Exhibit 7- Letter from Respondent to Woodside (attaching Result of Protected Industrial Action Ballot).

accommodation is not increased). Section 470 however would prohibit the payment of the overtime pay only, as the non-monetary benefits are not provided in relation to "*the period of overtime to which the ban applies*" and would fall outside of the scope of the prohibition: s 470(5). It would be a strange result were the employer to be required to remove that night's accommodation (or such like) for some period of time by reference to the fact that the employee had declined to work overtime.

61. Similarly, s 471 provides that in the case of partial work bans "payments" are able to be reduced by a proportion upon the giving of notice by the employer.[51] The Fair Work Commission[52] has jurisdiction to assess the proportion of any reduction in employee payments based on notions of fairness: s 472(3). On Gilmour J's construction of the term "payment", a partial work ban would necessitate a proportionate reduction to be applied to the "payment of accommodation" where s 471 is engaged.

62. Gilmour J stated at [51] that there "*is no obvious reason why reduced payments towards provision of accommodation or LAHA could not be made by an Employer*". This statement assumes that all such matters can be reduced to monetary values. It also avoids the real problem that "accommodation" and other non-monetary items themselves are not able to be "reduced" *per se*. His Honour's reference to "*reduced payments towards provision of accommodation*" did not deal with the immediate situation where accommodation was provided directly.

63. Items that are not readily convertible into monetary amounts, or that have no agreed value assigned by the parties, are not readily amenable to "reduction" in "payment". Such a construction is also consistent with the Explanatory Memorandum relevant to s 471 which is couched in terms of payment of "wages" that are able to be "deducted", as opposed to a broader concept of payment[53].

64. Section 524 of the FW Act deals with stand-downs. An employer may stand down an employee where the employee cannot be usefully employed because of (eg) industrial action or machinery breakdown[54]. If an employer stands down an employee, "*the employer is not required to make payments to the employee for any period*"[55]. It would be an anomalous outcome if, on Gilmour J's construction[56], this provision empowered an employer to cease paying all benefits to an employee during a period in which the employee is stood down through no fault of the employee. To the contrary, the provision contemplates a temporary situation where the relationship is intended to resume unaffected by the stand down.

65. In this statutory context, the most consistent and reasonable construction of "payment" in s 470(1) is that it applies to payments in money.

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[51] Specified in the employer's notice or alternatively as ordered by FWA. Regulation 3.21 provides the method for calculating the proportion. FWA may determine the proportion to be applied pursuant to s 472, however there is no provision in Division 9 of Chapter 3-3 which provides a means for FWA to calculate the value of remuneration where that is disputed: R 310 of the Explanatory Memorandum; *cf* Reg 3.05(6).

[52] The FWC was known as Fair Work Australia and referred to as "FWA" in the FW Act.

[53] Gilmour J at [39]; RR 309-311 of the Explanatory Memorandum.

[54] Subsection 534(1)(a)-(b).

[55] Subsection 524(3).

[56] As the provision is, like s 470, not couched in terms of "*amounts payable to the employee in relation to the performance of work*": *cf* s 323(1).

Remuneration

66. The Appellant's alternative construction involves the term "payment" in s 470(1) connoting the "payment of remuneration including non-monetary benefits" where such benefits are paid as a *quid pro quo* for work performed. The appeal must also be allowed if based on the appellant's alternative construction because the Accommodation was not paid as a *quid pro quo* to the Relevant Employees.

67. In *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49 Ryan J, in dealing with the intended consequences of taking industrial action by reference to s 187AA of the pre reform WR Act, explained the underlying policy in terms of "loss of remuneration" (at p 73-74).

68. For the reasons submitted above, remuneration under the FW Act should be informed by s 323. Other than the case of permitted deductions in s 324, the concept of non-monetary benefits is dealt with under the FW Act in s 332. Section 332 of the FW Act deals with earnings. The definition of earnings has relevance in the FW Act limited to cases of (eg) unfair dismissals[57] and where there is a "guarantee of annual earnings"[58]. Subsection 332(2) excludes certain amounts from the definition of earnings including:

    a. Payments the amounts of which cannot be determined in advance: s 332(2)(a). Such amounts may include incentive based payments, bonuses and overtime[59];

    b. Reimbursements (which may include living away from home allowances[60]); and

    c. Superannuation contributions.

69. Earnings in s 332 may be a narrower concept than "*amounts payable to the employee*" in s 323. So much is clear from the Note to s 332(2) which confirms that earnings do not include amounts (such as commissions, incentive-based payments, bonuses and overtime) that are expressly stated to be included in the amounts payable under s 323.

70. Non-monetary benefits are defined in s 332(3) as "*benefits other than an entitlement to the payment of money*", to which "*the employee is entitled, in <u>return</u> for the performance of work*"[61] and for which "*a reasonable money value has been agreed by the employee and the employer*".

71. It is apparent that non-monetary benefits for the purposes of s 332(3) may fall within the meaning of permitted deductions under s 324.

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[57] Part 3-2 of the FW Act, from s 379ff. An employee is not protected from unfair dismissal if, *inter alia*, an employee's annual rate of earnings is greater than the "high income threshold": Section 382(b)(iii); s 333.

[58] Section 330 of the FW Act .

[59] The Note to s 332(2).

[60] *The Midland Railway Company v Sharpe* [1904] AC 349 (PC) at 353-354; *Sheehy v Mitchell Crane Hire Pty Ltd* (1991) 104 FLR 96 at p 102; *Mr Lee C v CLS Pty Ltd* [2009] FWA 779 (23 October 2009) at [16]; *NT86/10044-47 and Ors and Commissioner of Taxation* [1988] AATA 79; (1988) 19 ATR 3413 at 3431-3432.

[61] Emphasis added; that is, the *quid pro quo* for work performed. Contrast s 323 which prescribes what the employer must pay an employee "*in relation to*" the performance of work.

72. Gilmour J did not decide the appeal on the basis that the Accommodation was a non-monetary benefit provided in return for the performance of work under s 332(3)[62]. Rather, his Honour decided (at [48]) that "*[t]he Accommodation was provided to enable the employees to be in a position to perform their employment and earn their pay, not for their use whilst on strike*". Accordingly, his Honour appears to have had in mind a wider concept of non-monetary benefits that were the subject of the prohibition in s 470. However, if a non-monetary benefit is not one that is deducted from remuneration (in accordance with s 324) or earned in return for the performance of work (s 332(3)), then it cannot be a payment or earnings recognised under the FW Act.

73. On the Appellant's alternative construction, remuneration (including payments in kind or non-monetary benefits[63]) is paid as the *quid pro quo* for work performed[64]. That is, "payment" in s 470 is primarily limited by what is able to be made "payable" under s 323, but alternatively it is limited by what can be "earned" to the extent that this term admits non-monetary remunerative items outside of the scope of ss 323-324.

74. Gilmour J relied at [44] on a partial definition of "payment", being "*a sum of money (or equivalent) paid or payable...*" (from the *OED*, online version). His Honour's ellipsis is significant. The full statement of that definition is as follows: "a sum of money (or equivalent) paid or payable, *esp in return for goods or services or in discharge of a debt; wages, pay*" (emphasis added).

75. Lucev FM quoted a similar fuller definition from the 1989 OED at [72], as follows: "The action, or an act, of paying; the *remuneration* of a person with money or its equivalent; the giving of money, etc *in return for something* or in discharge of a debt" (emphasis added). And, in relation to the meaning of "remuneration", Lucev FM at [77] quoted from Blackburn J in *R v The Post-Master General* [1876] 1 QBD 658 at 663-4, to the effect that "[t]he word 'remuneration' is a wider term and means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them...".

76. It is necessary, thus, to determine whether or not a service/thing provided to the employee is provided as a *quid pro quo* or not. Gilmour J erred in not taking any account of the need for the provision of that service/thing to be in return for the provision of employment.

77. In *Paterson v Stanmorr Pty Ltd*[65], Winneke P stated in relation to the value of earnings in kind which were intended to form a valuable part of the reward for the Appellant's services, that such amounts could be understood in the sense that "*it can be inferred that the value of the non-pecuniary benefits played a part in depressing the amount of monetary wages paid to her*". Here, that notion is significant. The provision of the Accommodation did not have the effect of depressing the wage. The very definition of Distant Worker involved the employee having a residence elsewhere, and thus having to pay for accommodation elsewhere. The provision of the Accommodation or a LAHA did not have the effect, and was not intended to have the effect, of giving the worker an ordinary place of residence, such as to save significant sums. Rather, the provision of

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[62] Section 332 is referred to by Gilmour J at [39] as part of the appellant's submissions to the effect that the Accommodation was not the subject of an agreement by the parties and so could not be either wages or earnings.

[63] Subject to s 323 of the FW Act.

[64] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 465.7 per Dixon J

[65] (2000) 2 VR 460 at [19].

the Accommodation was simply the necessary condition of getting the employees to work at the remote location in question.

78. In *Batley v Cocos Islands Co-operative Society Ltd* [2010] FWA 2289 (29 March 2010) Cloghan C was required to decide whether accommodation provided to an employee working in a remote location was to be considered part of an employee's "earnings" for the purposes of s 332 of the FW Act. The Commissioner held that the provision of accommodation in the circumstances was "*an attraction or retention cost associated with the position, particularly given its location and unique circumstances*", and did not form part of the employee's earnings[66]. At [35] the Commissioner stated:

> *While the Act has been framed in such a way to describe a benefit as something which an employee is "entitled" to in return for the performance of work, employers would probably cast many "benefits" as a cost of doing business. For example, most employers in the mining sector would see the provision of accommodation in remote locations as an essential prerequisite to having a workforce to undertake mining activity. Simply not to provide the accommodation, would be unthinkable. In such circumstances, the cost of travel, food and accommodation for workers is an expense incurred in bringing the stuff out of the ground. In my view, employees in the mining sector do not see such matters as a benefit, any more than office workers would see an air conditioned office, as a benefit.*

79. The approach in *Batley v Cocos Islands* is consistent with the following principles:

a. A payment is not income unless it can be turned into money: *Tennant v Smith* [1892] AC 150 at 157;

b. Where an employee is required to occupy accommodation in the performance of his contract, it is not remuneration: *Reed v Cattermole* [1937] 1 KB 613 at 628-9;

c. A non-pecuniary receipt can be income if it can be converted into money; but if it be inconvertible, it does not become income: *Heaton (Inspector of Taxes) v Bell* [1968] 2 All ER 1156 at pp 1166 – 1167; *Federal Commissioner of Taxation v Cooke & Sherden* (1980) 29 ALR 202 at 213;

d. Benefits that cannot be attributed wholly or proportionally to the one employee are not remuneration: *Glynn v Commissioner of Inland Revenue* [1990] 2 AC 298 at 310;

e. A payment which covers special expenses imposed on the employee by nature of the employment, as opposed to a sum paid by way of additional remuneration, does not form part of the employee's earnings: *Sheehy v Mitchell Crane Hire Pty Ltd* (1991) 104 FLR 96 at 102;

f. Payments in reimbursement of expenditure are no part of the employee's remuneration: *S&U Stores Ltd v Wilkes* [1974] 3 All ER 401 at 404;

g. Accommodation provided for the more effectual performance of the service required is not necessarily remuneration: *H A Warner Pty Ltd v Williams* (1946) 73 CLR 421 at 429.

80. Based on these principles, neither the Accommodation nor the LAHA (as it is paid to compensate for additional expenses that the employee could reasonably be expected to

[66] At [34] ff.

incur in paying for accommodation[67]) would fall within the commonly understood meanings of remuneration or earnings.

81. When a public servant's interstate hotel bill, flight or taxi is paid for by his/her employer, that does not constitute part of the public servant's remuneration; it is not part of the *quid pro quo* for their labour. It is simply meeting a necessary expense which is a condition precedent to having the public servant perform some work interstate. That would also be the case, say, if a university provided its employees with food and drink on a research trip to a remote location. Conversely, if a university provided a vice-chancellor with a house to live in, or a car, that would be capable of being regarded as part of his/her remuneration.

82. Employee "benefits" on Gilmour J's broad construction could be taken to include (eg) crèches, free car parking on the employer's property, or disability services or assistance to employees[68]. It is unclear from Gilmour J's decision how these matters are able to be excluded from the scope of s 470 based on his Honour's broad construction to the extent that they may be the subject of "*use whilst on strike*".

83. It is necessary to take account of the particular facts, and there may be issues of fact and degree. That is hardly an unusual characteristic in applying a statutory criterion. To state, as Gilmour J did at [45], that the possibility that sometimes accommodation will be a payment and sometime it will not is "a very unattractive result" is to fail to acknowledge that point.

84. On the facts here, under the Agreement only "Distant Workers" had the entitlement to either accommodation or LAHA. The remuneration for work performed which was paid to all employees (that is, irrespective of whether they were Distant Workers or local workers) was comprised of the amounts included in "Section 3: Income" of the Agreement from clause 12ff.

85. The provisions for the Accommodation/LAHA are contained within Appendix 7 of the Agreement, headed "Distant Work Provisions", and under a subheading "Provision of Board and Lodging or Payment of LAFHA". Employees whose usual place of residence was within commuting distance had no entitlement to Accommodation, the LAHA, or any equivalent. There was no suggestion that the Accommodation or LAHA was to be provided as some kind of bonus for good work, or extra work, or for senior or special employees.

86. It was thus evident from the facts here that the provision of the Accommodation or the LAHA was not part of the remuneration – the *quid pro quo* – for the provision of employment services. If it were, Local Workers performing the same tasks would have received some equivalent recompense. This provision of Accommodation (or the payment of an LAHA allowance) was a practical condition precedent to employment of those workers who could not commute to the workplace[69].

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[67] *Sheehy v Mitchell Crane Hire Pty Ltd* (1991) 104 FLR 96 at p 102; Section 332(2)(b) of the FW Act.

[68] Which matters can be characterized as "accommodation" of the employee's disability: *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4; 277 DLR (4th) 577; [2007] 1 SCR 161 at [11] and [15].

[69] *H A Warner Pty Ltd v Williams* (1946) 73 CLR 421; *Tennant v Smith* [1892] AC 150; *Reed v Cattermole* [1937] 1 KB 613; cf *HWE Contracting Pty Ltd v Young* and *Newmont v Kasteline* (2007) 153 NTR 77; [2007] NTSC 42 (27 August 2007).

87. In relation to the claimed equivalence of the Accommodation to money payments because the Respondent was paying Woodside in turn for the Accommodation (see Gilmour J at [46]-[47]), s 470 prohibits a "payment to an employee". No such "payment" was made "to employees" for the Accommodation. The payment referred to by Gilmour J was made by the employer "to Woodside". The parties themselves described the Accommodation as a thing that was "provided" or "supplied", and not paid[70].

88. That the thing provided to the employee was paid for by the employer merely indicates it had economic value. To re-assert that fact does nothing to engage with the arguments put by the Appellant, which did not dispute that the accommodation might have economic value but argued that nevertheless it was not remuneration for the work done. Further, it would be odd for the application of s 470 to depend on whether or not the employer owned the accommodation (or the airline or the taxi).

89. The same may be said about the fact, much emphasized by the Respondent in the Courts below, that it had the option of providing the LAHA in lieu of the Accommodation. If this option had been taken it would have involved a shifting of the onus for arranging the accommodation onto the employees; it would not have altered the substance of the arrangement. In any event, there was no evidence that any LAHA payments were made to the Relevant Employees.

90. As for claimed "extraordinary result[s]" (Gilmour J at [48]), it may well be that an employee in the context here could not reasonably expect the employer to continue to provide accommodation during an extended period of protected industrial action. These are matters that the parties are able to deal with by way of contracts of employment or enterprise agreements.

91. It is surprising however that an employer might fly an employee to a remote location on the understanding that accommodation will be provided, but then the employer is not permitted but *required* by the FW Act to deprive the employee of that accommodation at short notice, following the taking of protected industrial action, without offering to fly the worker back to their usual place of residence.

92. It is equally surprising that the Act might be construed as exposing such an employee to a potential civil penalty of 60 penalty units under s 473 if he/she had the temerity to ask to be flown home, or to have at least a night or two's grace in the accommodation. The point is even starker if the contract or enterprise agreement had provided for the provision of basic sustenance in remote locations.

PART VII: LEGISLATION

93. The applicable sections of the FW Act as they existed at the relevant time are attached as Annexure 1.

94. Subject to amendments[71] which involved changing references to Fair Work Australia ("FWA") to the Fair Work Commission ("FWC") and the insertion of ss 443(3A), those provisions are still in force, in that form, at the date of making these submissions.

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[70] Agreement, Appendix 7, clause 6, 7 and 9.

[71] In ss 324(1)(c); 471(2)(b); 472; and 570(2). There is no change to s 470.

PART VIII: ORDERS SOUGHT

95. The Orders sought are as follows:

1. Appeal upheld, with costs.

2. Set aside the orders of the Federal Court of Australia and, in lieu thereof, orders:

   a. Upholding the appeal from the orders of the Federal Magistrates Court of Australia made on 20 October 2011;[72]

   b. Setting aside the order of the Federal Magistrates Court;

   c. Remitting the matter to the Federal Circuit Court for further hearing and determination according to law.

3. Such further or other orders as the Court thinks fit.

PART IX: TIME ESTIMATE

96. It is estimated that counsel for the Appellant will require approximately two hours to present oral argument.

Dated: 17 May 2013

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[72] In its notice of appeal the Appellant sought an order for costs in the appeal to the Federal Court. It no longer does so, in light of the argument accepted by Gilmour J on December 2012 that the special costs provision in s 570 of the FW Act extends to appeals to the Federal Court: *CFMEU v Mammoet Australia Pty Ltd (No 2)* [2012] FCA 1404. However, it follows from this Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]* (2012) 291 ALR 665 that this Court can award costs. Thus the appellant maintains its claim for costs incurred in this Court.