IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P26 of 2013

BETWEEN:

CONSTRUCTION FORESTRY MINING & ENERGY UNION

Appellant

and

MAMMOET AUSTRALIA PTY LTD (ACN 075 483 644)

Respondent

RESPONDENT'S SUBMISSIONS

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Part I – Suitability of submissions for publication

1. The Respondent (**Mammoet**) certifies that this submission is in a form suitable for publication on the Internet.

Part II – Issues presented by the appeal

Issue presented by the Notice of Appeal

20 *Question I*

*Whether the provision of accommodation pursuant to cl 6 of Appendix 7 of the Mammoet Australia Pty Ltd Pluto Project Greenfields Agreement 2008 (**Agreement**) is a "payment to an employee" within the meaning of s 470(1) of the* Fair Work Act *2009 (Cth) (**FW Act**), such that Mammoet's non-provision of accommodation was authorised under s 342(3) of the FW Act and hence not "adverse action" under s 342(1) of the FW Act and was not a contravention of cl 6 of Appendix 7 of the Agreement pursuant to item 2(2) in Schedule 16 to the* Fair Work (Transitional Provisions and Consequential Amendments) Act *2009 (Cth) (TPCA Act)?*

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Issues presented by the Notice of Contention

Question 2

Whether a Distant Worker has a legal right to accommodation or living away from home allowance (LAHA) pursuant to cl 6 of Appendix 7 of the Agreement when that Distant Worker is not at least "ready, willing and available for work" or is on unauthorised leave?

Question 3

If the answer to Question 2 is no, whether Mammoet contravened cl 6 of Appendix 7 of the Agreement pursuant to item 2(2) in Schedule 16 to the TPCA Act by not providing accommodation to the employees the subject of this claim (the ***Relevant Employees)*** *during the period of protected industrial action?*

Question 4

If the answer to Questions 2 and 3 is no, whether Mammoet engaged in "adverse action" within the meaning of s 340(1) of the FW Act by not providing accommodation to the Relevant Employees during any part of the period of protected industrial action?

Part III – Notice under s 78B of the *Judiciary Act 1903* (Cth)

2. Mammoet considers that notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV – Material facts that are contested

3. Mammoet does not contest any material facts set out in the Appellant's narrative of facts or chronology, but seeks to supplement them as follows.

4. On 28 April 2010, the Relevant Employees commenced a 28-day period of protected industrial action. On 27 April 2010, Mammoet informed the Relevant Employees that, for the duration of any protected industrial action, Mammoet would cease to pay for the Relevant Employees' accommodation at Searipple Village or Gap Ridge Village; and, if they so sought, the Relevant Employees could make payment arrangements directly with the management of Searipple Village or Gap Ridge Village.[1]

[1] Reasons of Gilmour J at [11]-[12] **AB195**; Letter from Mammoet to Relevant Employees **AB41**.

Part V – Applicable constitutional provisions, statutes and regulations

5. The Appellant's statement of applicable legislation is agreed and accepted.

Part VI – Summary of argument

Question 1

Whether the provision of accommodation pursuant to cl 6 of Appendix 7 of the Agreement is a "payment to an employee" within the meaning of s 470(1) of the FW Act, such that Mammoet's non-provision of accommodation[2] was authorised under s 342(3) of the FW Act and hence not "adverse action" under s 342(1) of the FW Act and was not a contravention of cl 6 of Appendix 7 of the Agreement pursuant to item 2(2) in Schedule 16 to the TPCA Act?

Mammoet's contention

6. Gilmour J was correct to find in relation to s 470(1) of the FW Act that:

   (1) "payment" includes both payment of money and payment in kind;[3]

   (2) "payment" has a meaning different from "wages", or "earnings";[4] and

   (3) "payment" includes accommodation provided "to enable the employees to be in a position to perform their employment and earn their pay".[5]

7. The Appellant here contends that Gilmour J erred on the basis that "payment" in s 470(1) means only payments made to an employee as a *quid pro quo* for labour and either is:[6]

   (1) limited to payment of money by reason of s 323 of the FW Act; or

   (2) to be equated to remuneration (but not extending to *this* accommodation).

8. For the reasons that follow, Gilmour J was correct in his construction of s 470(1).

Proper approach to statutory construction

9. Statutory interpretation begins with the ordinary meaning of the words of the statute read within their statutory context.[7] Where there is more than one interpretation open, the

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[2] The Appellant's pleaded case did not involve the non-provision of travel benefits **AB16-17**.

[3] Reasons of Gilmour J at [40] and [44] **AB202-203**.

[4] Reasons of Gilmour J at [40], [44] and [48] **AB202-204**.

[5] Reasons of Gilmour J at [48] **AB204**.

[6] Appellant's submissions at [27].

interpretation that would best achieve the purpose or object of the provision (whether or not that purpose or object is expressly stated in the Act), in particular the mischief the provision is seeking to remedy,[8] is to be preferred to each other interpretation.[9]

The word "payment"

10. The definition of the word "payment" is as follows:

(1) The Second Edition of the Oxford English Dictionary (**OED**), which Lucev FM adopted,[10] defines "payment" as "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."[11]

10 (2) The Online Edition of the OED, which Gilmour J adopted,[12] defines "payment" as "a sum of money (or equivalent) paid or payable, esp. in return for goods or services or in discharge of a debt; wages, pay."[13]

The purpose and object of s 470(1) of the FW Act

11. The legislative history of s 470 can be divided into two parts.[14]

(1) During the first period, from 1979 to 1996, the federal industrial tribunal was not empowered to deal with a claim for the making of a payment to employees in relation to a period of industrial action.[15] The Appellant is correct to note

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[7] *Stevens v Kabushiki Kaisha Sony* [2005] HCA 58; (2005) 224 CLR 193, 206 [30] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[8] *Alcan (NT) v Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

[9] *Acts Interpretation Act* 1901 (Cth), s 15AA.

[10] Reasons of Lucev FM at [72] **AB166**.

[11] Simpson, JA and Weiner, ESC (eds), *The Oxford English Dictionary, volume XI* (Clarendon Press, 2nd ed, 1998), 379.

[12] Reasons of Gilmour J at [44] **AB202**.

[13] Simpson, J (ed), *The Oxford English Dictionary* (Oxford University Press, Online ed, 2013).

[14] Section 470 of the *Fair Work Act* 2009 (Cth) (**FW Act**) and its prohibition on "payments" may be traced to s 25A of the *Conciliation and Arbitration Act* 1904 (Cth), which was inserted by the *Conciliation and Arbitration Amendment Act* 1979 (Cth).

[15] Section 25A of the *Conciliation and Arbitration Act* 1904 (Cth), which was in force from 25 October 1979 to 28 February 1989, provided:

> [t]he Commission is not empowered to make an award, certify a memorandum of agreement, make a recommendation or take any other action, whether by way of conciliation or arbitration, in respect of a claim for the making of a payment to employees in respect of a period during which those employees were engaged in industrial action.

This provision "clearly reflected a policy of completely curtailing the Commission's jurisdiction to offset the costs to employees of engaging in industrial action": *Industrial Relations Commission Decision 174/1992* [1992] AIRC 117, (4 March 1992), 5. It would appear that the effect of s 25A was to send disputes about

that during this period there was no prohibition upon the making of a payment by an employer to an employee in relation to a period of industrial action. This aspect of the legislative history is of little assistance.

(2) During the second period, from 1996 to present, Parliament enacted a more comprehensive regime[16] which prohibited employers from making, or employees from claiming, payments in relation to periods of industrial action and other related matters.

(3) Section 187AA of the *Workplace Relations Act* 1996 (Cth) (**WR Act**),[17] s 507 of the post-reform WR Act[18] and s 470 of the FW Act, are expressed in relevantly identical terms that prohibit the making of payments by employers to employees relating to periods of industrial action.

12. The legislative purpose of Division 9 of Part 3-3 (ss 470-476 of the FW Act) is to encourage employers and employees to negotiate and resolve disputes by ensuring each bears the costs of the industrial action: the employer bears the cost of lost production and

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payments falling within its terms to private arbitration: *Dec 435/87 S Print G8850* [1987] AIRC 255, 6; *Industrial Relations Commission Decision 206/1989* [1989] AIRC 195, 7. Section 25A was reenacted, with an express carve-out for industrial action relating to health and safety concerns, as s 124 of the *Industrial Relations Act* 1988 (Cth) (**IR Act**).

Section 124 of the IR Act, which was in force from 1 March 1989 to 30 December 1996, provided:

> (1) Subject to this section, the Commission is not empowered to deal with a claim for the making of a payment to employees in relation to a period, whether before or after the making of the claim, or before or after the commencement of this section, during which those employees engaged, or engage, in industrial action.
>
> (2) Subsection (1) does not prevent the Commission dealing with a claim for the making of a payment to employees in relation to a period before the making of the claim but after the commencement of this section during which those employees were engaged in industrial action where the Commission is satisfied that the industrial action was justified by a concern on the part of the employees: (a) that was reasonable; (b) that was about their health or safety; and (c) that arose in relation to matters within the reasonable responsibility of the employer concerned.
>
> (3) Where the Commission is satisfied as to the matter mentioned in subsection (2) in relation to some, but not all, of the employees, the Commission is only empowered to deal with so much of the claim as relates to the employees in relation to whom the Commission is satisfied.

[16] Section 124 of the *Workplace Relations Act* 1996 (Cth) (**WR Act**) re-enacted s 124 of the IR Act and operated from 31 December 1996 to 11 September 2005.

[17] Section 187AA(1) of the WR Act, which operated from 31 December 1996 to 26 March 2006, was contained in Part VIIIA of the WR Act. It provided that "[a]n employer must not make a payment to an employee in relation to a period during which the employee engaged, or engages in industrial action."

[18] Section 507 of the WR Act as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (**WR (WC) Act**) operated from 27 March 2006 to 30 June 2009. It was contained in Part 9 Division 9 of the WR (WC) Act. Section 507(1) provided that "[t]his section applies if an employee engaged, or engages, in industrial action (whether or not protected action) in relation to an employer on a day." Section 507(2) provided that "[t]he employer must not make a payment to an employee in relation to: (a) if the total duration of the industrial action on that day is less than 4 hours - 4 hours of that day; or (b) otherwise - the total duration of the industrial action on that day."

the employee receives no payments. This is expressly borne out in judicial consideration of these relevantly identical predecessor provisions to s 470(1) of the FW Act.[19] Correctly, Gilmour J at [35] and [37] **AB201** adopted this purpose as applying to s 470(1) of the FW Act.

The legislative context

13. Part 3-3 of the FW Act establishes a regime whereby employees may take lawful industrial action as part of the negotiations for a proposed enterprise agreement ("protected industrial action" – s 408 FW Act). Within that regime, Division 9 ensures that employees do not receive any payment for periods during which they are engaged in protected industrial action by: prohibiting an employer from making a payment to an employee in relation to the total duration of the industrial action on that day: s 470(1); prohibiting an employee from accepting a payment from an employer if the employer would contravene s 470(1) by making the payment: s 473(1)(a); prohibiting an employee from asking the employer to make the payment: s 473(1)(b); and prohibiting an employee organisation (or an officer of same) from asking an employer to make the payment: s 473(2). Each provision is a civil penalty provision. And importantly, s 415 provides that an employee who engages in protected industrial action is given immunity for certain actions in relation to that protected industrial action.

14. Part 3-3 also establishes a regime whereby employers may take lawful industrial action as part of the negotiations for a proposed enterprise agreement in response to employee industrial action ("employer response action"[20]). Section 416 provides that an employer "may refuse to make payments to the employees in relation to the period of the action". That is, s 470(1) prohibits the employer making payments during protected industrial action, whereas s 416 authorises the employer to refuse to make such payments during employer response action. Section 416A then limits the scope of s 416 by providing that employer response action taken pursuant to s 416 does not affect the continuity of employment of the employees who will be covered by the proposed enterprise agreement for certain prescribed purposes, being: superannuation; remuneration and promotion, as affected by service; and any entitlements under the National Employment Standards.[21]

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[19] *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49, 73-74 (Ryan J); *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, 557-558 [83]-[84] (Lander J); *O'Shea v Heinemann Electric Pty Ltd* (2008) 172 FCR 475, 486 [25]-[26] (Middleton J).

[20] FW Act, s 411.

[21] *Fair Work Regulations* 2009 (Cth), reg 3.09.

15. Finally, Part 3-3 establishes a regime whereby employers may take action in response to industrial action that is not protected industrial action (**unprotected industrial action**). Division 9 provides for employer responses to unprotected industrial action. Section 474(1) provides that where an employee engages in unprotected industrial action, an employer "must not make a payment to an employee in relation to" the period of industrial action, subject to there being a minimum non-payment period of four hours. Section 475 then prohibits the employee from accepting payment, or an employee or employee organisation (or an officer of same) from asking for a payment if the employer would contravene s 474(1) by making the payment.

16. Importantly, Parliament has used the same wording for protected industrial action ("make payment to an employee" in s 470(1)), employer response action ("make payments to the employees" in s 416) and unprotected industrial action ("make a payment to an employee" in s 474(1)). Further, in relation to s 416, Parliament has expressly limited the scope of the words "make a payment to an employee" by the insertion of s 416A. It follows (contrary to the Appellant's submission at [37]-[41] of its Submissions) that the statutory context supports a broad reading of the words "payment to an employee" so as to take account of the various uses of that collocation. In particular, it must take account of the regime for unprotected industrial action, which, as the Appellant states at [38] of its Submissions, exhibits "a discernable policy ... directed to deterring unprotected industrial action".

The word "payment" means payment of money or payment in kind

17. There is no basis to read down "payment" in s 470(1) (or ss 416 and 474(1)) to mean only money.

(1) The history, context and purpose of s 470(1) and 474(1) set out below above that "payment" includes payment in kind. This meaning is also well established.[22]

(2) The use of the word "payment" in s 470(1), as compared to "pay the money" in s 323(3), "payment of fees" in s 30A(1), and "payment of wages and other monetary entitlements" in s 139(1)(f)(ii), indicates that Parliament did not intend the word "payment" in s 470(1) to mean only payment of money.

[22] *Maillard v Duke of Argyle* (1843) 6 Man & G 40, 45; 134 ER 801, 803.

Further, if "payment" meant only money the express carve-out in s 416A, which picks up non-monetary entitlements, would be unnecessary.[23]

(3) Section 471, which provides a mechanism for calculating the reduction in payments for partial work bans, does not provide any support for reading down "payment" to mean money. Gilmour J at [51] **AB205** correctly stated that there is no reason why reduced payments towards provision of accommodation could not be made by an employer, and if the amount of any such reduction were disputed, s 472 provides for resolution by the Fair Work Commission.

Payment does not mean "amounts payable" in s 323 or "earnings" in s 332

18. The Appellant also submits at [52] and [73] of its Submissions that "'payment' in s 470 is primarily limited by what is able to be made 'payable' under s 323". There is no textual basis for that reading: s 323 refers to "amounts payable" whereas s 470(1) refers to a "payment."[24] Whereas the notion of a "payment" used in s 470(1) may be traced back to s 25A of the *Conciliation and Arbitration Act* 1904 (Cth) or at least to s 187AA of the WR Act, s 323 of the FW Act was first introduced in federal industrial legislation in 2009.[25] Division 2 of Part 2-9 should not be construed as altering arrangements that provide for the provision of non-monetary payments, irrespective of whether those arrangements stem from statute, industrial instruments or contract.[26] The suitable board and lodging to which Distant Workers become entitled upon mobilisation[27] does not constitute an "amount payable" for the purposes of s 323.

19. The Appellant submits at [73] of its Submissions, alternatively, that "'payment' in s 470(1) is limited by what can be 'earned'" in s 332. There is no proper basis for that submission: s 332 refers to "earnings" within the context of guaranteed annual earnings whereas s 470(1) refers to "payments". Division 3 of Part 2-9 frees employers of high-income employees from the unfair dismissal regime[28] and from the burden of modern

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[23] *Fair Work Regulations* 2009 (Cth), reg 3.09.

[24] Explanatory Memorandum to the Fair Work Bill 2008 (Cth) at [1279].

[25] The relevant predecessors to these provisions in Western Australia are contained in Part 3A of the *Minimum Conditions of Employment Act* 1993 (WA). Part 3A was inserted in 1995 as the successor to the *Truck Act* 1899 (WA). The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) notes at [1278] that:

> [c]urrently, these issues are dealt with primarily by State and Territory legislation. This has led to a patchwork of obligations for employers. The payment of wages provisions in this Division draw upon the protections that exist in State and Territory legislation to provide a simple, national scheme.

[26] FW Act, ss 332(1)(b), 332(3).

[27] Agreement, Appendix 7 (cll 6, 13), **AB101-102**.

[28] FW Act, ss 382(b)(iii) and s 333.

awards.[29] It includes its own method of assessment as to whether an employee meets the high income threshold,[30] and is a high income employee and thus not entitled to the benefits of a modern award, [31] nor entitled to make a claim for unfair dismissal[32] under the FW Act. The proposition, advanced at paragraphs [69]-[73] of the Appellant's Submissions, that this method of classifying employees, unique to this Division, as regulation free, limits the meaning of payment in another Division of the Act, with a separate purpose, a different history and which does not use the defined terms – as if it did use the defined terms – cannot be sustained. Since the introduction of protection from unfair dismissal into the federal industrial legislation, at least since 30 June 1994, there has been a system of ensuring so-called "high income earners" could not access the unfair dismissal regime.[33] Division 3 of Part 2-9 of the FW Act is the successor regime. Therefore, it is irrelevant whether or not the suitable board and lodging or LAHA[34] to which Distant Workers become entitled upon mobilisation[35] constitutes "earnings" for the purposes of s 332.

Payment does not mean remuneration, or alternatively, remuneration includes accommodation

20. The Appellant contends at [27(b)] and [66] of its Submissions that "payment" connotes "remuneration". It is clear that Parliament did not intend "payment" in s 470(1) to mean "remuneration".

(1) It is contrary to principles of construction to replace "payment" with "remuneration", especially as "remuneration" is itself a term that may take its precise meaning from the context in which it is used.[36]

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[29] FW Act, s 47(2).

[30] FW Act, ss 329 and 330.

[31] FW Act, s 47(2).

[32] FW Act, s 382(b)(iii).

[33] On 30 June 1994 the *Industrial Relations Amendment Act (No 2)* 1994 (Cth) commenced. It amended Division 3 of Part VIA of the IR Act to enable regulations to be enacted which can extend the range of categories of employees which can be excluded from the operation of the unfair dismissal provisions.

[34] In any event, accommodation provided to the Relevant Employees under the Agreement does fall within the meaning of "earnings" in s 332(1)(b), which provides that "earnings include amounts applied or dealt with in any way on the employee's behalf or as the employee directs." Mammoet applied amounts to Woodside on the Relevant Employees' behalf such that the Relevant Employees were provided with the benefit of accommodation.

[35] Agreement, Appendix 7 (cll 6, 13), **AB101-102.**

[36] See, eg *Dothie v Robert MacAndrew & Co* [1908] 1 KB 803; *Skailes v Blue Anchor Line Limited* [1911] 1 KB 360, 363; *Quality Lodges International Pty Ltd v Bibby and Kelm [No 2]* [2002] SASC 147, [30], [31].

(2) Parliament has used the term "remuneration" in the FW Act where it so intended that meaning,[37] indicating that it did not intend that meaning in s 470(1).

(3) Parliament used the term "remuneration" in the predecessor provisions to s 416 of the FW Act, and expressly changed the prohibition from "remuneration" to "payment" in the FW Act to mirror the wording used in ss 470(1) and 474(1).[38]

21. Alternatively, the accommodation provided to the Relevant Employees under the Agreement does fall within the meaning of "remuneration" as Lucev FM found at [77]-[79] and [82]-[89], [96]-[97] **AB167-171,173**.

10 ***The word "payment" does not require a* quid pro quo**

22. The word "payment" in s 470(1) should not be read as limited to those payments given in return for something. There is no requirement for a *quid pro quo*,[39] because:

(1) if Parliament had intended "payment" in s 470(1) to be read narrowly, such as to mean "earnings",[40] "wages"[41] or "remuneration"[42] which terms are otherwise used in the FW Act, Parliament would have used those terms instead of "payment";

(2) Parliament has provided the relevant limitation to the word "payment" with the collocation "in relation to the total duration of the industrial action on that day";

(3) the limitation as suggested by the Appellant does not best achieve the purpose
20 of s 470(1).

23. Alternatively, if "payment" in s 470(1) is given the narrower meaning that there must be something for something,[43] Mammoet provided accommodation to the Relevant

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[37] See, eg, ss 62(3)(d), 114(4)(d), 134(1)(e), 284(1)(d), 302-306, 386(2)(c)(i), 392(3) & (4), 392(2) & (6) of the FW Act.

[38] Section 416 of the FW Act may be traced to s 435(4) of the WR Act (current 27 March 2006 to 30 June 2009), s 170ML(5) of the WR Act (current 31 December 1996 to 26 March 2006) and s 170PG(5) of the IR Act (current 30 March 1994 to 30 December 1996).

[39] *Quid pro quo* means "'something for something'; an action or thing that is exchanged for another action or thing of more or less equal value; a substitute": Garner, B (ed) *Black's Law Dictionary* (Thomson West, 8th ed, 1999) 1282.

[40] See, eg ss 316, 328-331 and 332 of the FW Act.

[41] See, eg ss 135, 139, 157, 166, 172, 206, 284-299, 323 and 332 of the FW Act.

[42] See, eg ss 62, 114, 300-306, 386, 391, 635, 637, 642, 661 and 688 of the FW Act.

[43] Garner, B (ed) *Black's Law Dictionary* (Thomson West, 8th ed, 1999) 1282; Simpson, HA and Weiner, ESC (eds), *The Oxford English Dictionary, volume XI* (Clarendon Press, 2nd ed, 1998) 379.

Employees in return for their working or at least in return for their readiness, willingness and availability for work (subject to authorised leave): see Part VII below.

The words "payment to the employee" includes payments to or on behalf of the employee

24. The Appellant contends at [87] that the words "the employer must not make a payment to an employee" in s 470(1) prohibit only direct payments from employer to employee.

25. Gilmour J was plainly correct at [46]-[47] **AB203-204** to hold, as he appeared to, that s 470(1) includes payments by an employer to or on behalf of an employee.

(1) The purpose of ss 470(1) and 474(1) could easily be frustrated if the "payment" had to be direct. Section 324(1) provides circumstances whereby an employer may pay an employee otherwise than directly. If only direct payments were prohibited, s 470(1) and 474(1) would not stop salary sacrifice or other benefits being provided. Further, if only direct payments were prohibited, pursuant to s 324(1)(a) an employer and employee could simply arrange that the employee's remuneration be paid indirectly.

(2) It is contrary to the policy and purpose of s 470(1) and 474(1) to draw a distinction between an employer making payments under a salary sacrifice arrangement for the benefit of an employee and an employer making equivalent payments directly to the employee. It produces an illogical result when the entity providing the economic benefit to the employee is the same.

26. Assuming, contrary to the foregoing and contrary to the decisions below, that payment in s 470(1) refers to only a payment in money, or alternatively a payment in money or in kind, then in any event such a payment was made to the employee as it was made to Woodside[44] for the employee's benefit[45] on the employee's behalf[46] or for his credit.[47]

Failure to construe payment narrowly does not put at risk employee's health and safety

27. The Appellant contends at [41], [57] and [91]-[92] of its Submissions that a broad reading of "payment to an employee" might result in the health or safety of employees being put at risk on a remote location by reason of the employer being forced to stop the provision of all non-monetary benefits. This is incorrect and in any event, is hypothetical. The

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[44] Extract from contract between Woodside Burrup Pty Ltd and Mammoet cl 4.1 **AB133**.

[45] *Fringe Benefits Tax Assessment Act* 1986 (Cth) s 25; *May v Lilyvale Hotel Pty Ltd* (1995) 68 IR 112, 116-117; *Roffin Australia Pty Ltd v Newton* (1997) 78 IR 78, 80-81. See also *Commonwealth of Australia v Goodfellow* (1980) 31 ALR 533, 552.

[46] *Commonwealth of Australia v Goodfellow* (1980) 31 ALR 533, 552.

[47] *Commonwealth of Australia v Goodfellow* (1980) 31 ALR 533, 552.

accommodation was in Karratha, the Relevant Employees stayed at other accommodation in Karratha and no issue of health and safety arises.

28. **First**, s 414(1) & (2) of the FW Act provide that an employee must give a period of notice of at least three days prior to taking protected industrial action. Thus, an employer has sufficient time to ensure that an employee's health or safety will not be put at risk during the period of protected industrial action.

29. **Second**, ss 27(1)(c) & 27(2)(c) of the FW Act provide for the continued operation of State occupational health and safety laws.[48] Such laws compel an employer to protect the occupational health and safety of employees.[49]

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Part VII – Notice of Contention

Question 2

Whether a Distant Worker has a legal right to accommodation or LAHA pursuant to cl 6 of Appendix 7 of the Agreement when that Distant Worker is not at least "ready, willing and available for work" or is on unauthorised leave?

Approach to the construction of the Agreement

30. The proper approach to the construction of the Agreement is to look to its language,
20 understood in the light of the statutory and legal context in which it was created, as well as its industrial context and purpose.[50]

31. The Agreement is an employer greenfields agreement made under s 330 of the WR Act and against the background provided by Part VIII of the WR Act, titled "Workplace Agreements".[51] The Agreement bound the employer, and all persons whose employment

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[48] See *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* (2006) 158 IR 17, 50-53 [108]-[118]; *Construction, Forestry, Mining, and Energy Union (NSW) (o/b of Hemsworth) v Brolrik Pty Ltd* (2007) 167 IR 214, 234 [58].

[49] See s 19 of the *Occupational Health and Safety Act* 1984 (WA); s 19 of the *Work Health and Safety Act* 2011 (NSW); s 21 of the *Occupational Health and Safety Act* 2004 (Vic); s 19 of the *Work Health and Safety Act* 2011 (Qld); s 19 of the *Work Health and Safety Act* 2012 (SA); s 19 of the *Work Health and Safety Act* 2012 (Tas); s 19 of the *Work Health and Safety (Uniform Legislation) Act* 2011 (NT); and s 19 of the *Work Health and Safety Act* 2011 (ACT). The interaction of such laws and the FW Act would be resolved according to normal principles: see *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 145-149 [47]-[58].

[50] *Amcor v CFMEU* [2005] HCA 10; (2005) 222 CLR 241, 246-247 [2] (Gleeson CJ, McHugh J), 253 [30] (Gummow, Hayne and Heydon JJ), 261-262 [64]-[66], 270-271 [96], 272-273 [102] (Kirby J).

[51] For a short history of certified agreements, see *Australasian Meat Industry Employees' Union v Hamberger* (2000) 102 FCR 74, 80-85 [15]-[27] (Full Court).

was subject to the Agreement, pursuant to s 351 of the WR Act. Its continued operation is provided for under item 2 of Schedule 3 of the TPCA Act.

32. The Agreement operates within the context of employment law.[52] The general rule in employment contracts is that consideration for work is wages and the consideration for wages is work (frequently put as "no work, no wages").[53] That is, an employer has no liability for payment to its employee unless earned by service. This presumptive approach has been applied to industrial instruments.[54]

33. The Agreement was created in the context of Mammoet being awarded a contract from Woodside Burrup Pty Ltd to perform the heavy lift and transportation of pre-assembled train modules for the transport of liquefied natural gas. The project, involving the piping of the gas from an offshore facility to an onshore facility on the Burrup Peninsula, Western Australia, had an overall cost of $12 billion. Mammoet commenced work on the project in September 2008 and employed 34 employees under the Agreement.[55]

Construction of cl 6 of Appendix 7 of the Agreement

34. Clause 6 of Appendix 7 of the Agreement provides:

> **Provision of board and lodging or payment of LAFHA**
>
> The Company shall have the choice of providing each Distant Worker with either suitable board and lodging or paying the [LAHA] set out in this Appendix.

35. Mammoet submits that, on its proper construction, a Distant Worker has no legal right to either accommodation or LAHA when that Distant Worker does not provide service or at least is ready, willing and available to serve[56] (subject to the authorised leave provisions).

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[52] *Gapes v Commercial Bank of Australia Ltd* (1980) 37 ALR 20, 26 (Deane J).

[53] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 452 (Latham CJ), 465 (Dixon J); *Miles v Wakefield Metropolitan District Council* [1987] AC 539, 561 (Lord Templeman), 570 (Lord Oliver of Aylmerton); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428 (Brennan CJ, Dawson and Toohey JJ); *Visscher v Guidice* [2009] HCA 34; (2009) 239 CLR 361, 380 [54].

[54] See, eg, *Gapes v Commercial Bank of Australia Ltd* (1980) 37 ALR 20, 21-22 (Smithers and Evatt JJ), 26 (Deane J); *Csomore v Public Service Board* (1986) 10 NSWLR 587, 597 (Rogers J); *Coal & Allied Mining Services Pty Ltd v MacPherson* (2010) 185 FCR 383, 401 [88], 403 [93] (Buchanan J).

[55] Gilmour J at [4]-[7] **AB194**.

[56] See, eg *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 466 where Dixon J adopted the phrase "[t]hey also serve who only stand and wait." See also *Clark v Chief of Defence Force* [1999] FCA 1252, [41]; *Seven Network (Operations) Ltd v Warburton (No 2)* [2011] NSWSC 386; (2011) 206 IR 450, 457 [13].

(1) The Agreement falls within the ordinary category of employment instruments that operate on the basis of "no work, no wages" (subject to the authorised leave provisions).[57]

(2) The Agreement does not then provide employees with a legal right to accommodation benefits when an employee is not at least ready, willing and available to serve or is on unauthorised leave.[58]

36. The predicate for the engagement of cl 6 of Appendix 7 is that the Distant Worker has travelled to Karratha and is present so as to be "ready, willing and available for work". It does not confer a legal right upon a Distant Worker to accommodation or LAHA when that worker is not at least ready, willing and available for work or on unauthorised leave.

(1) The express terms of the Agreement, specifically cll 2, 8, 38(6), 38(11), 38(12), and item (1)(e) to Appendix 4, as well as the structure of Agreement, confirm that Mammoet is not thereunder obliged to provide benefits to workers who are not at least ready, willing and available for work or on unauthorised leave. In this regard, cl 6 of Appendix 7 should be read consistently with the rest of the Agreement.

(2) The direct relationship between the entitlement in cl 6 of Appendix 7 and the provision of employment services is reflected in the leave provisions of the Agreement. LAHA is a benefit that accrues based upon continuous service for the purposes of annual leave (cl 31(1)(b)). Industrial action and unauthorised absences do not count for the calculation of continuous service (Appendix 1). LAHA is then paid at the start of annual leave (cl 31(1)(b)). In relation to other authorised leave, LAHA is only not paid during parental leave (cl 37(3)). That is, LAHA is a benefit that accrues based only upon the time the Distant Worker is engaged in continuous service, and is paid during authorised leave (excepting parental leave).

(3) There is no contrary construction that would operate so that a Distant Worker would necessarily be able to obtain an accommodation benefit while not at least

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[57] Relevant clauses of the Agreement include cls 1-7 (preliminary matters); cl 2 (objectives); cl 5 (which provides, in relation to work covered by the Agreement, that the Agreement "contains the complete statement of mutual rights and obligations" of those bound); cls 8-11(which provide for the parties' respective obligations); cls 12-20 (which provide for certain payments); cls 21-30 (which provide for the calculation of number of hours worked and the accrual of rostered days off); cls 31-37 (which provide for various types of leave) and cls 38-44 (which concern the conditions of service).

[58] Relevant clauses of the Agreement include cls 42- 43; Appendix 1; Appendix 7 (particularly cls 6, 10, 11); Appendix 8 (particularly cls 2(a), 5).

"ready, willing and available for work" or on unauthorised leave. Clause 6 of Appendix 7 gives Mammoet a choice whether to provide accommodation or LAHA. If, in relation to any Distant Worker, Mammoet chooses not to provide accommodation and instead provide LAHA, cl 11 of Appendix 7 provides that Mammoet shall deduct one seventh of the LAHA for each day or part thereof the Distant Worker is not "ready, willing and available for work" (subject to the authorised leave provisions).

Question 3

If the answer to Question 2 is no, did Mammoet contravene cl 6 of Appendix 7 of the Agreement pursuant to item 2(2) in Schedule 16 to the TPCA Act by not providing accommodation to the Relevant Employees during the period of protected industrial action?

37. If the answer to Question 2 is no, it necessarily follows that the answer to Question 3 is no. In any event, by reason of the operation of cll 6, 10, and 11 of Appendix 7 of the Agreement, there was no breach of cl 6, because cll 6 and 10 provide a choice to Mammoet whether to provide accommodation or LAHA, and cl 11 provides that LAHA is not payable when the worker is not at least ready, willing and available to work (subject to the authorised leave provisions).

Question 4

If the answer to Questions 2 and 3 is no, did Mammoet engage in "adverse action" contrary s 340(1) of the FW Act by not providing accommodation to the Relevant Employees during any part of the period of protected industrial action?[59]

38. No, the non-provision of accommodation did not constitute "adverse action".[60]

39. Item 1 to 342(1) relevantly provides that "adverse action" is taken by an employer against an employee if the employer:

(b) injures the employee in his or her employment; or

(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee and other employees of the employer.

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[59] The Appellant pleaded that Mammoet's threat to remove, and removal of accommodation constituted "adverse action" within the meaning of item (1)(b)-(d) of s 342(1) of the FW Act in breach of s 340(1)(a) of the FW Act: Amended Statement of Claim, [32]-[33] and [36]-[37] **AB19-20.**

[60] The High Court of Australia considered s 342 of the FW Act in detail in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 290 ALR 647.

40. The definition of "adverse action" is important in limiting the operation of s 340(1) of the FW Act. The purpose of s 340(1) of the FW Act is to ensure that the relationship of employer and employee can resume or continue unaffected after circumstances arise involving an employee's exercise of a workplace right.[61]

41. In relation to items 1(b) & (c) to s 342(1), the following principles have been applied:

(1) the phrase "injures the employee in his or her employment" in item 1(b) extends to injury of any compensable kind, a legal injury, or an adverse effect on an existing legal right;[62]

(2) the phrase "alters the position of the employee to the employee's prejudice", in item 1(c), is a broad additional category of "adverse action" which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question;[63]

(3) an employee's position is to be taken at the time the conduct occurred and is to be assessed by reference to the employee's then existing entitlements under the relevant industrial instrument;[64]

(4) the employee must be in a worse situation after the relevant conduct than before it and the deterioration must have been caused by the employer's conduct;[65] and

(5) if the deterioration occurs by operation of the law or an industrial instrument the employer will not have altered the position of the employee.[66]

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[61] *Independent Education Union of Australia v Canonical Administrators, Barkly Street, Bendigo* (1998) 87 FCR 49; (1998) 157 ALR 531, 548 (Ryan J).

[62] *Patrick Stevedores v MUA* [1998] HCA 30; (1998) 195 CLR 1, 18 [4] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); *Australian and International Pilots Association v Qantas Airways Ltd* (2006) 160 IR 1, [13]–[14] (Tracey J); *Unsworth v Tristar Steering and Suspension Australia Ltd* (2008) 175 IR 320, [25] (Gyles J).

[63] *Patrick Stevedores v MUA* [1998] HCA 30; (1998) 195 CLR 1, 18 [4] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

[64] *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440, 445 [23] (Wilcox, Kiefel and Merkel JJ) and *Australian Liquor, Hospitality & Miscellaneous Workers Union v Liquorland (Aust) Pty Ltd* (2002) (2002) 114 IR 165, [25] (Cooper J).

[65] *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97, 108-109 [35]–[37] and 111-112 [45]–[48] (Black CJ, Beaumont and Ryan JJ); *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482, 498-499 [52]–[54] (Kenny J); *Australian Liquor, Hospitality & Miscellaneous Workers Union v Liquorland (Aust) Pty Ltd* (2002) 114 IR 165, [25] (Cooper J); *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93, 100-101 [17]–[21] (Black CJ, Ryan and Merkel JJ).

[66] *Independent Education Union of Australia v Canonical Administrators, Barkly Street, Bendigo* (1998) 87 FCR 49 (1998) 157 ALR 531, 548 (Ryan J); *Australian Liquor, Hospitality & Miscellaneous Workers Union v Liquorland (Aust) Pty Ltd* (2002) 114 IR 165, [24]–[26], [30] and [37] (Cooper J).

42. In relation to item 1(d) to s 342(1) the "adverse action" concerns an employer treating one employee more favourably than another employee, and includes both direct discrimination and "facially neutral" or indirect discrimination.[67]

43. The Relevant Employees' legal right to accommodation or LAHA arose pursuant to cl 6 of Appendix 7 of the Agreement. That legal right had a condition that each Relevant Employee must be at least "ready, willing and available for work" (subject to the express leave provisions in the Agreement). The Relevant Employees were not "ready, willing and available for work" (or on authorised leave) for the duration of the protected industrial action. By operation of the Agreement, the Relevant Employees had not satisfied the precondition in consideration for the right to accommodation or LAHA and Mammoet did not provide accommodation or LAHA.

44. It follows that there was no "adverse action" within items 1(b) and (c) to s 342(1) of the FW Act for the reasons that:

(1) the Relevant Employees were not injured in their employment as they suffered no adverse effect on an existing legal right;

(2) their position was not altered to their prejudice because their rights under the Agreement were unchanged; and

(3) in any event, the Relevant Employees, not Mammoet, caused any deterioration that they may have suffered by reason of not being "ready, willing and available for work" and thereby not satisfying cl 6 of Appendix 7 of the Agreement.

45. It also follows that there was no "adverse action" within item 1(d) to s 342(1) of the FW Act because the Relevant Employees were not treated less favourably than any other worker who was not "ready, willing and available for work" or on unauthorised leave.

Part VIII – Estimate for oral argument

46. Mammoet estimates that two hours are required for the presentation of its oral argument.

Dated: 7 June 2013

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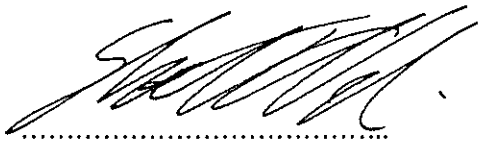
[67] *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178, 201-206 [88]-[102] (Gordon J).



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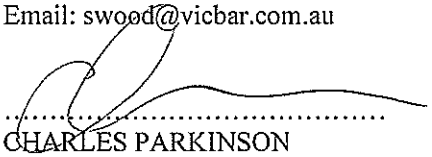

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