HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S153 of 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Applicant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Applicant

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and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

APPELLANTS' REPLY

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Reply

20 2. These submissions respond to the TWU's submissions of 17 February 2023 (**RS**) and the Minister's submissions of 3 March 2023 (**MS**).

Factual findings (cf RS [6]–[9])

3. At RS [6]–[9], the TWU ignores how the factual and legal findings made below bear upon the issues before this Court. The primary judge accepted that Mr David was aware of an increased implementation risk in 2021 but did not accept Qantas had proven that the increased implementation risk was not an additional operative reason for Mr David having made the decision *when* he did.[1] In the context of s 361, it is unclear how a well-informed employer is to defeat a s 340(1)(b) case. There is no clear dividing line on the facts between merely identifying comparative risks at
30 different points in time (which is said to be lawful) and taking comparative risks into account as a reason for a decision *at a given point in time* (which is said not to be lawful). It will be difficult to disentangle the former from the latter on the facts (made even harder by the operation of the reverse onus).

[1] PJ [194], [263], [265], [270] (**CAB 84, 101, 102, 103**) as against PJ [272], [277], [280], [281] (**CAB 104, 105, 106, 106-107**).

4. On the Full Court's and the TWU's construction (RS [9], [49], [52]), an appreciation, or even a taking advantage of, the *absence* of a present workplace right, is to be treated differently to a decision made with an awareness of the future possibility of such a workplace right. There is no proper reason the FW Act was intended to allow an employer to *identify* potentially favourable timing considerations but not allow those considerations to become *operative reasons*, nor any proper reason why a distinction between these concepts should matter for the purposes of contravention under s 340(1)(b), given neither involves a "prevention" in the relevant sense.

5. The real issue on this appeal is whether s 340(1)(b) should be construed so that a decision to terminate an employee at a time the employee does *not* have a workplace right as defined in s 341, but with an appreciation that to defer the decision may mean that, at a future time, the employee may have a workplace right which might be used to resist termination, constitutes a decision to prevent the exercise of a workplace right. This issue does not hinge on Qantas' failure below to discharge the onus placed on it in relation to the facts. Qantas' loss *was* attributable to an "extreme construction of s 340(1)(b)" (cf RS [6]) unsupported by the text, context or purpose of the FW Act.

The competing cases (cf RS [10]–[13])

6. Contrary to RS [10], there is no obscurity in Qantas' position. Section 340(1)(b) does not extend to the protection of a right that is not presently existing. A presently existing right is one that, at the relevant time, a person *has*. A right which a person cannot hold as a matter of law at a particular time does not presently exist.

7. RS [11] erects a straw man. Nowhere does Qantas describe the protection under s 340(1)(b) as extending to "contingent rights". Rather, it is the TWU in its proposed Notice of Contention that seeks to inject the category of "contingent rights" into the statutory scheme. There is no such category. "Workplace rights" in s 341 only extend to presently existing rights. However, consistently with basic law[2] and the Full Court's decision in *Burnie Port*[3] (see AS [67]), a present right can include a benefit payable in the future (e.g. overtime, annual leave), where that benefit accrues over time or is dependent on certain events occurring: see also AS [75]. The FW Act also states an

[2] "That which is *debitum in praesenti solvendum in futuro* is a present right": *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), [6-200].

[3] *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440 (***Burnie Port***).

employee "*is* entitled" for a variety of reasons to be absent from work (e.g., sick leave, community service leave). Again, those entitlements are existing, albeit the extent of their enjoyment may depend on future events: cf MS [51].

8. However, there is no meaningful comparison between such circumstances and PIA. The right to organise or engage in PIA does not exist until the various matters listed in AS [14] – almost all of which are outside the control of an employee – have been satisfied. Further, there are two overlapping constraints: s 417 prohibits *any* industrial action (defined in s 19) during the nominal life of an enterprise agreement, and s 418 requires the FWC to stop industrial action which is *not* PIA. The employees in this
10 case had no present right to organise or engage in PIA: PJ [211] (**CAB 88**).

9. RS [12] ignores that s 340 is concerned with "workplace rights" as defined in s 341, not some more general and fuzzy notion. Whether the other person has a "workplace right" is an anterior issue in the s 340(1)(b) analysis. Necessarily, it must be identified at the outset before one can determine whether the adverse action was in fact taken to prevent the exercise of a "workplace right". On the TWU's construction, a person can breach s 340(1)(b) because that person fails to disprove an intention to prevent another from exercising "rights" which that person does not and will never have. That construction has nothing to do with "workplace rights" in the statutory sense.

10. The example at RS [13] is nonsensical and irrelevant. It proceeds on an understanding
20 of "workplace right" fundamentally at odds with Qantas' position in this appeal. Further, an employer may legitimately wish to avoid PIA because it disrupts its business. It is unreal to suggest an employer would decide to terminate its workforce to prevent the very thing that would result from such a large-scale termination.

Section 340 as a civil remedy provision (MS [30]–[34], [40]–[41], [53]–[54])

11. The Minister's reliance upon the underlying character of s 340 as a civil regulatory provision (MS [30], [32]) supports, rather than detracts from, Qantas' position. As the Court stated in *Mammoet*, with reference to the FW Act, a provision imposing a civil penalty must be certain and ascertainable by those subject to it.[4] The approach advocated by the Minister – "to ensure protective coverage for a nearly limitless

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[4] *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [48]. See also *Qantas Airways Ltd v Flight Attendants' Association of Australia* (2020) 282 FCR 243, [70] (Jagot and Wheelahan JJ).

variety of possible circumstances" (MS [40]; see also MS [53]) – is directly at odds with that principle. So is the Minister's suggestion that any unfairness in the scope of s 340 will be dealt with at the penalty stage: MS [41], [54].

Text (cf RS [14]–[23]; MS [35]–[54])

12. **Section 340(1)(b):** At RS [14]–[17] the TWU argues that because s 340(1)(b) is concerned with purpose, rather than effects, it follows that s 340(1)(b) applies to possible future rights. This is a non sequitur. The whole of s 340 is concerned with purpose, but this does not bear on the scope of the rights protected by the provision.

13. Likewise, RS [18] merely begs the question. As explained at AS [31], the fact that
10 s 340(1)(b) is focused on the future does not assist in determining the meaning of "workplace rights". An acceptance that "workplace rights" must be presently held does not detract from a focus on the "purpose" of the adverse action.

14. In contrast to the TWU's position, it appears the Minister accepts that to contravene s 340(1)(b) the "other person" must have a workplace right: MS [54]. However, the Minister fails to explain how a person can have the right to initiate or participate in PIA when none of the statutory preconditions have been satisfied.

15. **Section 341:** The weakness of the TWU's construction is evident from its submissions at RS [20]–[23] concerning the meaning of "workplace rights". The submission at RS [23] that s 341 does not define "workplace rights" is wrong. Section 4(3) states: "Many
20 of the terms in this Act are defined. The Dictionary in s 12 contains a list of every term that is defined in this Act". Section 12 lists "workplace right" and refers the reader to s 341(1). What is obvious is further confirmed by the heading to s 341; the fact that the heading is not "part of the Act" is irrelevant: see AS [32]; cf RS [20].

16. The TWU's alternative submission at RS [21] that s 341(1) is not a "conventional definition" seems to assume that only a provision which says "X means Y" is a "conventional definition". This is also wrong. It has long been recognised that some definitions operate by "explanation rather than synonymous expansion"[5]: cf RS [22]. As explained at AS [32], definitions in narrative form are common in Commonwealth

5 *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, 69 (Windeyer J).

drafting. In any event, whether s 341(1) is "conventional" or not is a distraction from the key point that a "workplace right" has been defined in the present tense.

Context (cf RS [24]–[33])

17. **Section 340(1)(a)(iii):** The TWU suggests "workplace rights" in s 340(1)(b) cannot be confined to presently held rights because it would be incongruous to do the same for s 340(1)(a)(iii) – doing so would collapse (1)(a)(iii) into (1)(a)(i): RS [25]. That is wrong. Section 340(1)(a)(i) applies where the action is taken merely because the person *has* a workplace right, not because of any proposal to exercise the right. As defined, many workplace rights (see s 341(1)(a)) exist as a role or responsibility and do not require any exercise to be enjoyed. The Monday/Wednesday example given by the TWU in support of its construction of s 340(1)(a)(iii) again assumes the conclusion. It proceeds on the premise that Parliament intended liability to attach in relation to proposals to exercise rights that may never exist when that is the very matter in issue. Further, the example does not resemble PIA, where there is a statutory prohibition under s 417 on PIA during the nominal life of an enterprise agreement.

18. The example at RS [26] is misconceived. The TWU again misrepresents the consequences of Qantas' construction. The employee in that example has an existing entitlement to the benefits of the enterprise agreement (which is a "workplace instrument"). Therefore, the employee has a presently existing workplace right under s 341(1)(a). The employee's conduct involves a proposal to exercise in the future the employee's *existing* entitlement to the benefits of the enterprise agreement; namely, to perform work in accordance with the terms of the agreement and receive pay. Accordingly, the union's conduct would likely infringe s 340(1)(a)(iii) on Qantas' construction. It is thus unnecessary to treat workplace rights as including future possible rights to ensure the employee's relevant workplace right is protected. The same analysis applies to RS [30].

19. **Section 341(3)**: The submission at RS [27] does not answer the point made by Qantas at AS [36]; which is that if the Full Court's construction is correct, s 341(3), (4) and (5) are unnecessary because there is no need to deem prospective employees to have workplace rights. On the Full Court's construction, they already have them.

20. **Section 340(1)(a)(ii):** RS [28] is misconceived. Section 340(1)(a)(ii) is engaged where action is taken because a person has *in the past* exercised, or not exercised, a

workplace right. Qantas' construction does not suggest that to engage s 340(1)(a)(ii) the person must also *have* another existing workplace right; that is to confuse (a)(i) with (a)(ii).

21. **Section 342(2):** Contrary to RS [29], there is nothing incongruous between Qantas' construction and the fact that adverse action can extend to threatening to take, and to organising, the action described in s 342(1). Section 342 merely identifies the type of action that is prohibited if it is done with a proscribed purpose in relation to a particular workplace right. Qantas has already explained why the statutory object of protecting workplace rights does not control the analysis as to whether "workplace rights" extend

10 beyond presently existing rights: see AS [41].

22. **Section 343:** The supposed examples at RS [32] highlight the danger of relying on extreme scenarios and distorting possibilities to construe legislation. Qantas has not located any cases that have been brought in respect of alleged coercive action regarding "workplace rights" that were, at the relevant time, hypothetical only. The TWU's examples consist of fanciful scenarios where a union or employer acts with an "intent to coerce" an employee at a point in time when the employee is incapable of exercising a workplace right, but the "intent to coerce" ceases as soon as the employee can exercise the right.

23. More generally, the core of the statutory concept of "intent to coerce" involves the

20 *negation* of choice.[6] Unless the person has a meaningful ability to make a choice, there cannot be coercion. The TWU's broader notion there can be "coercion" in respect of a future scenario which may never exist is not consistent with the scope of s 343.

24. **Section 345:** At RS [33], the TWU identifies examples said to demonstrate that Qantas' construction gives s 345 too narrow an operation. That is not so. As explained above, most forms of leave involve existing workplace rights. It follows that s 345(1)(a) would apply to the "lie" about forms of leave. In addition, if an employee has the right to vote on a proposed enterprise agreement, and an employer deliberately or recklessly makes a false or misleading representation to employees about their

30 entitlements under the proposed enterprise agreement in order to affect the exercise of

[6] See *Esso Australia Pty Ltd v AWU* (2017) 263 CLR 551, [2], [60], [61] (Kiefel CJ, Keane, Nettle and Edelman JJ).

the employees' vote (for example), s 345(1)(b) will be engaged on Qantas' construction. The misrepresentation will be about the effect of the exercise of the employees' presently existing right to vote to make (or not to make) the agreement. Finally, the TWU's example in relation to PIA ignores that "lies" about the right to take PIA will contravene the good faith bargaining requirements in s 228(1)(e), which may result in the making of a bargaining order under s 229 and a breach of any such bargaining order could result in a civil penalty: s 233.

Purpose (cf RS [34]–[37])

25. At RS [34], the TWU assumes that the rights the subject of protection in s 340 are to be protected almost without qualification. That is not so. Limitations on the width of the protections offered by s 340(1) are imposed by ss 341 and 342. "That there are inbuilt limits to the scope of the protection [in s 340(1)] is unsurprising given that the object of the FWA is, under s 3, 'to provide a balanced framework for cooperative and productive workplace relations'".[7]

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26. The principle that beneficial and protective provisions should be construed broadly is of no real assistance: cf RS [36]. Section 340 is also a penal provision. In reconciling the conflict between a principle of strict construction of penal provisions, and a broad construction of beneficial provisions, the Court is thrown back to ordinary principles of construction.[8]

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27. The purpose of Part 3-1 of the Act stated in s 366(1)(a) is "to protect workplace rights". Contrary to RS [34]–[37], Qantas' construction achieves that purpose: see AS [58], [72]. It also seeks to achieve a "balanced framework for cooperative and productive workplace relations" (s 3). Contrary to RS [38], the TWU's position substantially alters the balance created by the FW Act in favour of employees. Although adverse action protections can apply to employees and unions, in the real world those provisions are typically applied against employers. The reverse onus in s 361 means the employer must disprove that a "substantial and operative reason" for the adverse action was a prohibited reason. The TWU downplays that task by suggesting the employee must "establish (with the benefit of the reverse onus …) … a 'substantial

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7 *SBP Employment Solutions Pty Ltd v Smith* [2021] FCA 601, [139].

8 *Waugh v Kippen* (1986) 160 CLR 156, 164 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 102–103 (Toohey, Gaudron and Gummow JJ), 109–110 (McHugh J).

and operative' reason". On the TWU's construction, the employee does not have to establish anything under s 340(1)(b); cf s 340(1)(a) where the employee must prove the existence of the workplace right.

History (cf RS [39]–[41]; MS [55]–[57])

28. At RS [39]–[41], the TWU appears to accept – correctly – that nothing in the legislative history supports the TWU's construction, and the Full Court erred by reasoning otherwise. None of the matters at MS [55]–[57] bear on the construction of s 340(1)(b). The question of history then is limited to whether the Full Court's decision in *Burnie Port* (see AS [67]) supports Qantas' case. The TWU appears to
10 accept at RS [41] that *Burnie Port* supports the proposition that paragraph (a) of the definition of "workplace right" in s 341(1) is limited to present or existing rights. However, it seeks to draw a distinction between paragraph (a) which uses the words "is entitled" and paragraphs (b) and (c) which both use the phrase "is able". No meaningful distinction can be drawn: each paragraph speaks in terms of present ability.

Consequences (cf RS [42]–[56])

29. **Parental leave:** The TWU's examples at RS [43]–[44] exposes that, in substance, the TWU construe s 340(1)(b) as if it read "to prevent a person from having a workplace right in the future". On the TWU's approach to s 340(1)(b), there is no need for the employee to have a workplace right at all. It is enough that the employee might
20 possibly have a workplace right at some point in the future, however unlikely or improbable. Action taken to prevent that hypothetical right arising is then treated as action to prevent the exercise of the hypothetical right. That approach radically expands the operation of s 340(1)(b) and undermines the operation of s 351.

30. Further, the TWU's examples assume erroneously that s 340 is the only provision by which the FW Act protects employees against adverse action. The first example does not undermine Qantas' construction because, where a person has not met the minimum 12 months' service to obtain a workplace right by operation of s 67(1), s 351 protects against adverse action for matters including, but not limited to, pregnancy. The second example does not undermine Qantas' construction either, because s 351 offers
30 protection against adverse action because of sex and/or family responsibility. In any

event, discrimination on the basis of "potential pregnancy" is prohibited under s 14 of the *Sex Discrimination Act 1984* (Cth).

31. **Community service leave:** The examples at RS [46]–[47] do not undermine Qantas' construction. Section 108 creates a statutory entitlement to community service leave, which is an existing entitlement under s 341(1)(a): see [7] above.

32. **Unfair dismissal:** The TWU's submissions at RS [48]–[49] do not engage with the example at AS [49] which postulates that a substantial and operative reason for the *timing* of the termination is to take advantage of a window in which an employee does not yet have unfair dismissal rights. The suggestion at RS [50] that Parliament
10 intended the deliberate limitations on unfair dismissal remedies to be circumvented by s 340(1)(b) is fanciful. Contrary to MS [45], ss 725, 728 and 729 say nothing about the present issue. Those sections prevent multiple proceedings in relation to a dismissal. They say nothing about whether Parliament intended that the deliberate statutory limits on unfair dismissal remedies could be completely avoided by the broad construction of s 340(1)(b) advanced by the TWU.

33. **PIA:** RS [51] dismisses as "irrelevant" Qantas' reliance on s 417, while conceding that a purpose of outsourcing/termination to prevent employees taking industrial action generally would not contravene s 340(1)(b). If that be so, the case against Qantas at least in respect of QAL employees should have failed. But more generally, when s 417
20 is read together with ss 418-421, one sees the deliberate architecture of the FW Act is to free the employer from the risk of *any* industrial action (defined in s 19) unless the conditions for it to be PIA are satisfied. That critical aspect of the scheme is never squarely grappled with by the TWU and, surprisingly, wholly ignored by the Minister.

34. **Sick leave** (RS [53]–[54]): AS [75] explained that sick leave is a presently existing workplace right, but the ability to enjoy it accrues over time. PIA is fundamentally different – the right to participate in PIA does not exist, nor does the ability to enjoy it – unless and until preconditions are satisfied.

35. **Health and Safety Representative:** Contrary to RS [56], the action taken in the example was to prevent the worker from exercising an existing entitlement to the
30 benefit of a workplace; namely, the ability to stand for election. Thus, the example falls within s 340(1)(b) on Qantas' construction.

TWU's Notice of Contention Ground One (cf RS [62]–[63])

36. Contrary to RS [63], the phrase "able to initiate" in s 341(1)(b) means what it says. Ability connotes the power or the means to do something. None of the affected employees had the power to initiate PIA or a protected action ballot unless various circumstances occurred which were beyond their control. The TWU's construction leads to the absurd consequence that an employee could be said to be "able to initiate" a process even though that process is positively prohibited. Given that s 341(1)(a) – which uses the language "is entitled to" – is limited to existing entitlements (see *Burnie Port*), there is no basis to construe the language in ss 341(1)(b) or (c) as extending
10 beyond present ability.

Relief (cf RS [57]–[61])

37. If Qantas' construction is upheld and ground one of the notice of contention is dismissed, the whole of the declaration ought to be set aside. The TWU did not run a case, and the primary judge and Full Court did not find, that Qantas did anything for the purpose of "preventing enterprise bargaining" *simpliciter* – one only needs to state, to dismiss as absurd, the notion that a substantial and operative reason for Qantas' decision was because it didn't want to attend bargaining meetings.

38. Employees do not have a workplace right to "participate in enterprise bargaining" within the meaning of s 341. The process of good faith bargaining contemplated in
20 s 228 is conducted by bargaining representatives, not employees. An employee has a separate workplace right to appoint himself or herself as a bargaining representative (s 341(2)(f)) and to participate by voting in making an enterprise agreement (ss 182, 341(2)(e)). However, there is no freestanding workplace right to participate in enterprise bargaining.

39. The TWU's case (as was accepted) was that Qantas could not disprove it made the outsourcing decision, at least in part, to prevent the possibility of employees organising and engaging in PIA and bargaining *in 2021*: FC [10]-[11], [19(a)], [72]-[75], [80] (**CAB 153, 155, 172-178, 180**). There was no reference to any present right to participate in enterprise bargaining. Enterprise bargaining was only relevant insofar
30 as any PIA would need to have been (see s 409) taken as part of bargaining for a proposed enterprise agreement: see DJ [13], [28] (**CAB 125, 130**). The case

summarised at DJ [4(6)] (**CAB 123**), which the declaration was to reflect, includes enterprise bargaining as the ultimate purpose of PIA; that is, bargaining arose only as a consequence of the PIA. That is why the declaration refers to PIA at (i) and enterprise bargaining at (ii); the second point flows inexorably from the first (**CAB 133-134**). Contravention based on the general concept of preventing employees from participating in enterprise bargaining was rejected expressly by the primary judge: DJ [4(5)], [19]-[21] (**CAB 123, 127-128**). The TWU finds no support in the FC judgment for this argument (and, unsurprisingly, provides no citations to the same).

The Minister has no right to intervene (cf MS [5]–[20])

10 40. Section 569(1) of the FW Act does not give the Minister a right to intervene in these proceedings. Section 569(1) is in Part 4-2 of the FW Act (ss 560-572), which is titled "Jurisdiction and powers of courts".[9] Part 4-2 has four divisions: Division 1 contains a "Guide" to Part 4-2 and states "[t]his Part is about the jurisdiction and powers of the courts *in relation to matters arising under this Act*" (s 560, emphasis added). Division 2 (ss 562-565) is titled "Jurisdiction and powers of the Federal Court" and confers jurisdiction on the Federal Court "*in relation to any matter … arising under this Act*" (s 562, emphasis added). Division 3 is titled "Jurisdiction and powers of the Federal Circuit Court" and confers jurisdiction on that Court "*in relation to any matter arising under this Act*" (s 566, emphasis added).[10] Division 4 (ss 569-572) is titled
20 "Miscellaneous". The clear purpose of Part 4-2 of the FW Act is to confer jurisdiction and powers on the Federal Court and the Federal Circuit Court in relation to matters arising under the FW Act. In the case of the Federal Court, this includes jurisdiction to hear specified appeals from "eligible State or Territory Courts" (see s 565).

41. There are two textual indications that s 569(1) does not apply to proceedings in this Court's appellate jurisdiction. The first is the word "court" in s 569(1), which is not defined in the FW Act or in any other Commonwealth Act. When read in its broader context and having regard to the purpose of Part 4-2 of the FW Act, it clearly includes the Federal Court and the Federal Circuit Court. The words in parentheses after "court"

[9] The headings to Parts, Divisions and Subdivisions are part of an Act: s 13(1) of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**) as at 25 June 2009 and s 40A(1) of the FW Act.

[10] After the primary judge's judgment, the FW Act was amended to reflect the establishment of the Federal Circuit and Family Court: see items 369-399 of Sch 2 to *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth). Those consequential amendments do not affect the parties' submissions on the Minister's right to intervene.

– "(including a court of a State or Territory)" – make clear that it also includes a court of a State or Territory notwithstanding that the purpose of Part 4-2 could support a construction of "court" limited to the Federal Court and the Federal Circuit Court.

42. In contrast, Parliament has not included the words "High Court" in s 569. When the purpose of Part 4-2 is considered together with words in parentheses in s 569, the absence of any reference to the High Court in s 569 indicates that "court" in s 569(1) does not include the High Court. This is confirmed by the "Guide" in s 560, which states that "Division 4 deals with intervention …. in relation to proceedings in the Federal Court, the Federal Circuit Court and, in some cases, a court of a State or
10 Territory" and which does not mention the High Court.[11]

43. This construction of "court" does not undermine the purpose of s 569(1) nor is it inconsistent with the Minister's right to be heard as a party in any appeal from proceedings in which they intervened (cf MS [12]-[13]). Parliament, as is the norm across statutes, has allowed the High Court to determine in accordance with *its* rules for intervention whether to allow the Minister to intervene in an appeal where the Minister did not intervene below. The policy considerations at MS [12]-[13] should not be used to construe "court" in s 569 more broadly than the text and context permit.

44. The second key textual indication is the words "in relation to any matter arising under this Act" in s 569(1). Those words must be read in the same way as they are to be read
20 in ss 560, 562 and 566. The purpose of Part 4.2 of the FW Act suggests that the words are based on s 76(ii) of the *Constitution* (cf MS [16]) which when read with s 77(i), empowers Parliament to make laws conferring jurisdiction on a federal court "in any matter arising under any laws made by the Parliament". For the purposes of s 76(ii) "a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement" but not if it merely involves "the interpretation of such statutes".[12]

45. There is not "a matter arising under a law made by Parliament" where the High Court has granted special leave to appeal from a decision of the Full Court under s 33(3) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and is exercising its

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[11] See also *Flageul v WeDrive Pty Ltd T/A WeDrive & Ors (No. 2)* [2022] HCASL 10, [8] (Gordon and Edelman JJ).

[12] See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ).

appellate jurisdiction in accordance with s 73 of the *Constitution*. That reflects the special nature of an appeal under s 73. Such an appeal is narrow because it is an appeal in its strict or true sense.[13] That is, the Court determines the correctness of the judgment, decree, order or sentence of the court from which the appeal has been brought, based on the law and evidence as it was at the time the judgment, decree, order or sentence was made.[14] This reflects the distinction between the original jurisdiction of the High Court (conferred by s 75 and supplemented by laws made pursuant to s 76 and the exercise of which can be appealed under s 73(i)) and the appellate jurisdiction conferred by s 73, from which there can be no appeal.[15]

10 46. An appeal under s 73 is in another sense broad. Section 73 is not subject to the common law principles of interpretation which, if applied, could limit its scope[16] and was intended to be broad given the word "all" before the words "judgments, decrees, orders and sentences".[17] Notwithstanding its breadth, the jurisdiction conferred by s 73 can be regulated by statute and subject to exceptions, although any exception must not "eat up or destroy the general rule" laid down by s 73 of appellate jurisdiction. [18] The special nature of a s 73 appeal means a statute may only alter the nature of the appeal with clear language and directness of operation.[19]

47. Consistent with a s 73 appeal being an appeal in the strict sense, the *subject matter* between the parties once special leave has been granted is the correctness of the

20 judgment, decree, order or sentence from which the appeal is brought.[20] The Minister's emphasis on the need for a "matter" to exist independently of the proceedings overlooks the special nature of a s 73(ii) appeal, which was not the subject of the passages upon which the Minister relies (cf MS [7], [18]).[21]

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13 *Eastman v The Queen* (2000) 203 CLR 1 (***Eastman***), [18] (Gleeson CJ), [104], [111], [164] (McHugh J).

14 See *Mickelberg v The Queen* (1989) 167 CLR 259 (***Mickelberg***), 267-271 (Mason CJ); *Eastman*, [18] (Gleeson CJ), [104], [111], [164] (McHugh J).

15 See *Mickelberg*, 269-271 (Mason CJ), 275 (Brennan J) 298 (Toohey and Gaudron JJ, with whom Brennan J agreed); *Eastman*, [68]-[69] (Gaudron J), [109], [111], [158] (McHugh J).

16 *Davern v Messel* (1984) 155 CLR 21 (***Davern v Messel***), 53-54 (Mason and Brennan JJ).

17 *Thompson v Master Touch TV Service Pty Ltd (No 3)* (1978) 38 FLR 397, 411 (Deane J with whom Smithers and Riley JJ agreed) approved in *Davern v Messel*, 54 (Mason and Brennan JJ).

18 See *Cockle v Isaksen* (1957) 99 CLR 155, 166 (Dixon CJ, McTiernan and Kitto JJ).

19 As is the case with s 33(3) of the FCA Act and Parts V and XB of the Judiciary Act.

20 See *Ruhani v Director of Police* (2005) 222 CLR 489, [115]-[117] (Gummow and Hayne JJ).

21 *Palmer v Ayres* (2017) 259 CLR 478 and *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 both concerned proceedings and matters in this Court's original jurisdiction.

48. In these proceedings, the correctness of the FC judgment and orders involves the interpretation of s 340(1)(b) of the FW Act and the relief sought is *not* the enforcement of any right or liability created or conferred by the FW Act but rather the correction of the Full Court's orders.[22] Without s 73(ii) and the grant of special leave Qantas' liability for breach of s 340(1)(b) of the FW Act would have been finally determined by the FC judgment and orders and any dispute about their correctness could be academic only. It follows that the "matter" in these proceedings does not "arise under the FW Act" but is rather characterised as arising under s 73(ii) of the *Constitution* following the grant of special leave.[23]

10 49. The above construction of s 569(1) is further supported by the special nature of a s 73 appeal. It can hardly be supposed that Parliament intended to regulate appellate proceedings in this Court (a) by using language that appears in s 76(ii) of the *Constitution*, being a provision about additional "original jurisdiction", (b) without referring expressly to the High Court and (c) in a division titled "Miscellaneous". The special nature of a s 73 appeal also means that no weight can be placed upon the word "appeal" in s 570(1) of the FW Act or the remarks in the Explanatory Memorandum about "appeal proceedings" (cf MS [11]). That broad language lacks the clarity necessary to apply to a s 73 appeal. In any case, s 570 and its legislative history do not assist the Minister (cf to MS [9]-[11]). The legislative history indicates that the purpose
20 of amending s 570 was to ensure it applied in an appeal to the Full Federal Court only.[24]

50. Finally, these proceedings cannot be characterised as "in relation to" a matter arising under the FW Act because they are an appeal from a decision of a court exercising appellate jurisdiction in respect of a matter arising under FW Act (cf MS [8], [14]). That reading cannot be accepted because it (a) places extraordinary weight upon the words "in relation to", (b) would produce a result inconsistent with the proper construction of the term "court" (see [41]-[43] above), (c) lacks the clarity necessary to apply to a s 73 appeal and (d) is not natural. As to (d), the natural reading of the

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22 See CAB 316; see also *Re McJannet and others; ex parte the Australian Workers' Union of Employees Qld (No 2)* (1997) 189 CLR 654, 657 (Brennan, McHugh and Gummow JJ).

23 See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA Trans 083 (29 March 2012) (***Board of Bendigo v Barclay***), lines 31–34, 3052–3060. Accordingly, the proposition stated by Gummow J in oral argument in that case correctly states the law.

24 See the Explanatory Memorandum to the Fair Work Amendment Bill 2012 (Cth), page 10 and [305]-[308], which do not refer to the High Court or to *Board of Bendigo v Barclay*.

words “in relation to” requires the matter to arise under the FW Act in the same proceeding in which the Minister intervenes.

51. It follows that the Minister can only intervene in these proceedings if he is granted leave. Consistent with the principles for intervention in this Court,[25] that leave should not be granted (cf MS [21]-[24]) or should at least be heavily confined. The parties are represented and have comprehensively dealt with the issues in their submissions. The Minister’s submissions, despite the attempt to frame them through the prism that the civil penalty nature of s 340(1)(b) assists in resolving constructional choices, are at best a work of supererogation. At worst, they have failed to assist the Court by offering submissions on the critical question of how the architecture of the FW Act rendering PIA as a “time bound” right bears on the construction of s 340(1)(b).

Costs and orders sought

52. Section 570 of the FW Act does not apply in these proceedings for the same reasons given above at [40]-[50].[26] The statement to the contrary at AS [84] was incorrect. While this Court has power to award costs on ordinary principles, since the appeal has proceeded to date with neither party seeking costs, absent a change of stance by the respondent, it remains appropriate that no orders as to costs be made irrespective of the outcome.

10 March 2023

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[25] See *Unions NSW v NSW* (2019) 264 CLR 595, [56] (Kiefel CJ, Bell and Keane JJ).

[26] See further *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 2)* (2012) 248 CLR 549, [3]-[5] (French CJ, Gummow, Hayne and Crennan J), [9] (Heydon J).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S153 of 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

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and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

ANNEXURE TO THE APPELLANTS' REPLY

Pursuant to Practice Direction No. 1 of 2019, the Appellants set out below a list of the statutes and statutory instruments referred to in this reply.

No.	Description	Version	Provision(s)
1.	*Constitution*	Current	ss 73, 75, 76, 77
2.	*Acts Interpretation Act 1901* (Cth)	Dated 4 December 2008	s 13
3.	*Competition and Consumer Act 2010* (Cth)	Compilation No. 142, dated 17 December 2022	s 18 in Sch 2
4.	*Fair Work Act 2009* (Cth)	Compilation No. 41, dated 27 November 2020	ss 3, 4, 12, 19, 40A, 67, 108, 182, 228-229, 233, 340-342, 343, 345, 351, 361, 366, 409, 417-421, 546, 560, 562-572, 725, 728-729
5.	*Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth).	Current	items 369-399 in Sch 2

6.	*Federal Court of Australia Act 1976* (Cth)	Compilation No. 56, dated 18 February 2022	s 33
7.	*Judiciary Act 1903* (Cth)	Compilation No. 49, dated 18 February 2022	Pts V and XB
8.	*Sex Discrimination Act 1984 (Cth)*	Compilation No. 44, dated 13 December 2022	s 14