HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S153/2022
File Title:	Qantas Airways Limited & Anor v. Transport Workers Union o
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	17 Feb 2023

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **QANTAS AIRWAYS LIMITED ACN 009 661 901**
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

and

TRANSPORT WORKERS' UNION OF AUSTRALIA
Respondent

SUBMISSIONS OF THE RESPONDENT

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUES

2. Does s 340(1)(b) of the *Fair Work Act 2009* (Cth) (**FW Act**) prohibit a person from taking adverse action against another person for the purpose of preventing the future exercise of a workplace right which does not "presently exist" at the time of the action (whatever that may mean on the appellants' (collectively **Qantas**) case): see [**AS67**])?

3. If a "contingent" right is one which "presently exists" on Qantas' case, are participating in a protected action ballot and organising and taking protected industrial action (**PIA**) in the future contingent rights?

4. In the event that Qantas' appeal in relation to the PIA is upheld, what relief follows?

PART III SECTION 78B NOTICE

5. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV MATERIAL FACTS IN DISPUTE

6. Qantas' summary of the factual background at **AS[6]-[18]** inadequately describes why it lost at trial. In case **AS[6]-[18]** gives the impression that Qantas' failure at trial and on appeal was the result of an extreme construction of s 340(1)(b) operating on an entirely ordinary set of facts, it needs to be made clear that that is not so. Qantas lost because the evidence of its key witness and other witnesses was not accepted at trial.

7. In this case, the primary judge did not accept the evidence of Qantas' decision-maker (Andrew David, CEO of Qantas Domestic and International) that none of the substantial and operative reasons for the adverse action were to prevent the exercise by employees

of their workplace rights to organise and engage in PIA and a protected action ballot, and to engage in enterprise bargaining. The primary judge had reservations about Mr David's denials on these critical matters and his evidence was found to be deficient: **J[90]-[91], [194], [290]-[296]; CAB49-50, 109-112**. Further, the circumstances presented a unique opportunity to outsource (**J[273]-[277]; CAB104-105**) and senior managers whom Mr David worked closely with and who recommended the outsourcing were motivated by the proscribed purposes: **J[66], [68]-[69], [73]-[76], [304]-[305]; DJ[16]-[18]; CAB40-43, 114, 126-127**.

8. **AS[18]** incorrectly describes the operation of the reverse onus found in s 361 of the FW Act. Section 361 establishes a (rebuttable) presumption that adverse action was taken against the person alleging it for a proscribed reason. This presumption recognises that the decision-maker is uniquely placed to know the reasons for his or her action and should thus be made to prove them.[1] This does not impose an "extremely high burden of proof" (**AS[20]**) that could never be negated in the circumstances of an outsourcing. The standard of proof is the balance of probabilities.[2] An employer can readily discharge its onus in an outsourcing case (or any other adverse action case) by proving that none of its substantial and operative reasons were to prevent the exercise of workplace rights.[3] Qantas failed to do so because its witness evidence was not accepted.

9. The primary judge and Full Court correctly understood that a proscribed reason needed to be a substantial and operative one for s 340(1)(b) to be contravened and that the onus imposed on Qantas was to prove that none of the substantial and operative reasons for the adverse action were the proscribed ones alleged: **FC[136], [144]-[145], [148], [217]; CAB198, 202-204, 226**. Mere identification of a risk to future operational continuity that might result from PIA would not have been sufficient: **J[281]; CAB106-107**. The appeal is not directed to the approach to the reverse onus and Qantas' complaints about its operation can be put to one side.

PART V ARGUMENT

A. THE COMPETING CASES

1 *General Motors Holden's Pty Ltd v* ***Bowling*** (1976) 12 ALR 605 at 615, 617 (Mason J); *Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* (2020) 275 FCR 423 at [33]-[34].

2 FW Act, s 551. See *CFMEU v BHP Coal Pty Ltd (No 2)* (2015) 230 FCR 298 at [63].

3 *CFMEU v BHP Coal* (2014) 253 CLR 243 at [7], [9], [22], [85], [88]-[90]; *CFMEU v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 at [30], [32], [75]-[77]; *CFMEU v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273 at [36]-[37], [133]-[135]; *Bowling* (1976) 12 ALR 605 at 612, 617.

10. Qantas begins by submitting that its "position can be stated simply" (**AS[19]**), yet its case is far from clear. At different points, Qantas submits that: (a) the right must be "presently in existence" (**AS[2]**) or "presently existing" (**AS[19]**); see also **AS[31], [76], [77]-[78], [82]**; (b) it must have been lawful to exercise the workplace right (the converse of **AS[3], [19],** see also **AS[21]**); (c) the person against whom adverse action is taken must "have" the workplace right (**AS[21]**; see also **AS[29], [69], [75]**); (d) the right must be "capable of being exercised" (**AS[26]**; see also **AS[29]**). These varied formulations appear not to have one meaning. That a person "has" a right or that it "exists" does not necessarily mean that it is capable of being exercised at a point of time or that it is "lawful" to do so. Quite what Qantas means when it asserts that its construction requires that a person be able "lawfully" to exercise the right is also obscure.

11. Further obscurity is added by Qantas' apparent acceptance at **AS[67]** that the protections under s 340(1)(b) extend to what it describes as "contingent rights".[4] What suffices for a right to be relevantly "contingent" is not explained. Most workplace rights conferred by the FW Act or created by industrial instruments like awards and enterprise agreements (which are often drafted as hinging on the happening of particular events or an employee having a particular status) and protected by s 340 can be described as "contingent" if by contingent one means dependent on the happening of particular circumstances and/or satisfaction of procedural or notice requirements.[5] Qantas does not explain which "contingent rights" would be encompassed on its case and in what circumstances. And Qantas makes no attempt to explain how its position in relation to "contingent" rights is aligned to the various formulations which are set out in [10] above. To put the case simply, the right to take PIA conferred by Part 3-3 is contingent upon the prior satisfaction of a number of preconditions. Prior to the satisfaction of those requirements, it could be described as a "contingent" right. Nowhere does Qantas explain why it would not be.

12. The respondent's case is simple. Section 340(1)(b) (as well as the other prohibitions in ss 340(1)-(2)) focuses upon the state of mind of the person taking the adverse action. It aims at stamping out action taken for a particular reason. That reason is to prevent another person from exercising his or her workplace rights in the future. If that is a substantial and operative reason for the action, there is a contravention. There is no need to

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4 See **AS[67]** and *Burnie Port Corporation Pty Ltd v MUA* (2000) 104 FCR 440 at [30]. See also *Moss v Fantil Pty Limited* (1994) 58 IR 118 at 124 (Hill J); Explanatory Memorandum to the Fair Work Bill 2008 (Cth) at [1363].

5 See, eg, the various categories of leave detailed in Part 2-1 of the FW Act.

investigate further whether or not the victim of the action could have immediately exercised the right at the time of the adverse action (or "lawfully" exercised it or "had" it or any other of Qantas' formulations). Nor is it necessary to investigate whether the action could (or did) succeed in preventing the exercise of the right, or whether the victim ever proposed to exercise the workplace right at all. The provision's central focus is on the reasons for action, not whether the victim has a "presently existing right" or a "right capable of being exercised" or a "contingent right".

13. One thing about Qantas' case is clear. If Qantas is correct, in this case it could have publicly announced on 30 November 2020, expressly and unabashedly, that: *Qantas has decided to terminate the employment of almost 2,000 ground handling staff because it wants to prevent them from exercising their workplace rights under the* Fair Work Act 2009 *(Cth) to engage in protected industrial action next year*. It could have done so, and have acted on the announcement by dismissing the employees, without contravening s 340(1)(b). That is an absurd outcome that is not supported by the statutory text and is irreconcilable with context and purpose.

B. TEXT

B.1 The language of s 340(1)(b)

14. Section 340(1)(b) provides that "A person must not take adverse action against another person… to prevent the exercise of a workplace right by the other person". It does not say that a person is protected from adverse action to prevent the exercise of a workplace right that he or she already "has" or can exercise at that time (or any other formulation of Qantas' case). Nothing in the text limits the protection to a presently existing right. For this basic reason, the Full Court's construction was correct, and Qantas' construction must be rejected as it is unavailable on the text of the provision.

15. The ordinary meaning of "prevent" includes "keep from occurring"[6] and "[s]top, hinder avoid. Forestall or thwart by previous or precautionary measures … Frustrate, defeat, make void (an expectation, plan, etc.). … Stop (something) from happening to oneself; escape or evade by timely action. … Cause to be unable to do or be something, stop (foll. by *from doing, from being*)".[7] A person can take action *to prevent* another person from

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6 See *Gittos v Surfers Paradise Rock & Roll Café Pty Ltd* [2009] QCA 306 at [3] (McMurdo P); *Peter Dixon & Sons Ltd v Henderson, Craig & Co Ltd* [1919] 2 KB 778 at 786 (Bankes LJ).

7 *ACCC v Baxter Healthcare Pty Ltd (No 2)* (2008) 170 FCR 16 at [317] (Dowsett J); *ACCC v Pfizer Australia Pty Ltd* (2018) 356 ALR 582 at [475] (Greenwood, Middleton and Foster JJ).

exercising a right in anticipation that it will be exercised in the future and act with the intent of stopping that happening. The word "prevent" is indifferent to whether the other person has an entitlement to exercise a workplace right at the time of the adverse action.

16. The prohibition in s 340(1)(b) depends on the *purpose* of the person taking the adverse action. This follows from the word "to" which means "in order to" or "with a view to preventing the exercise".[8] It is not sufficient if the action taken by the perpetrator has the incidental effect of preventing the exercise of the workplace right. Because the prohibition hinges on purpose, a contravention could take place regardless of whether the victim presently has a workplace right. Qantas' construction impermissibly reads words of limitation into s 340(1)(b) which are not there.

17. Indeed, because s 340(1)(b) is concerned with *purpose* rather than effect, if the person taking the adverse action fails to prevent the exercise of a workplace right or the subject of the action was never going to exercise the right, a contravention would still occur.[9] All that is necessary is that the contravener have, as a substantial and operative reason for taking the action, the prevention of the exercise of the right. Conversely, if the adverse action has the effect of preventing the exercise of a workplace right, it does not follow that a contravention has occurred: the provision is directed to prohibiting action taken with the proscribed purpose (an illicit state of mind). Having a present entitlement to exercise a workplace right is the type of requirement which one would expect to find in an effects-based prohibition rather than a purpose-based prohibition such as s 340(1)(b).

18. Another feature of the statutory text is that s 340(1)(b) is future-facing. It proscribes adverse action taken with the purpose of preventing the exercise of workplace rights in the future. The word "prevent" "carries with it the notion of acting in anticipation of a future event".[10] The Full Court was correct to regard the future-facing nature of the provision as a powerful indicator against Qantas' construction: **FC[99]-[100]; CAB184-185**. What s 340(1)(b) prohibits is adverse action motivated to thwart a future exercise of a workplace right. Parliament enacted s 340(1)(b) to protect and preserve future exercises of workplace rights. To look to the "present existence" of the workplace right at the time

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8 *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [126].

9 See and compare *Britten v Alpogut* [1987] VR 929; *Onuorah v The Queen* (2009) 76 NSWLR 1; *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 at [249].

10 *Michell Carbonised Wool Exports Pty Ltd v Export Development Grants Board* (1984) 2 FCR 93 at 99 (Toohey and Morling JJ) (appeal allowed: (1985) 59 ALJR 602).

of the adverse action is to adopt a focus disconnected from the concern of s 340(1)(b). What matters is the perpetrator's state of mind when they take the action.

B.2 Section 341

19. Qantas relies heavily on s 341: **AS[31]-[35]**. But Qantas misapprehends s 341, requires it to do more work than its words can tolerate and seeks ultimately to construe the substantive enactment (s 340(1)(b)) a-contextually and without due regard to its purpose.

20. Section 341(1) describes, in terms, when it is that "A person ***has*** a workplace right". It is not a conventional definitional provision that defines what a 'workplace right' is. The Dictionary to the FW Act in s 12 sets out that "In this Act… workplace right: see section 341(1)". The reference to workplace rights in s 12 does not (distinctly from a number of other expressions) provide that workplace right *means* what is detailed in s 341(1).[11] Further, the heading to s 341(1) being "Meaning of workplace right" is not a part of the FW Act.[12] Whilst the heading may assist in construing the FW Act as extrinsic material, this should not distract from, and cannot modify, the text of s 341(1) which describes when a person *has* a workplace right.

21. Section 341(1) gives content to the term "workplace right" indirectly by describing, using the present tense, when a person "*has*" a workplace right: **FC[103]; CAB186-187**. It is not intended that s 341(1) be read directly into every provision which utilises the phrase "workplace right". Where a provision does not use the full expression "has a workplace right" (as in ss 340(1)(a)(ii)-(iii) or 340(1)(b)), but instead only uses part of it ("workplace right"), on any view, s 341(1) cannot be simply read into the substantive provision. Reading s 341(1) directly into ss 340(1)(a)(ii)-(iii) or 340(1)(b) is productive of logical and grammatical infelicity.[13] Rather, the substantive provisions must be construed according to their terms and purposes, without being controlled by the use of the present tense in s 341(1).[14]

22. Further, s 341 does not determine when and in what circumstances workplace rights are protected by s 340(1). That work is done by s 340(1) itself. The prohibition in s 340(1)(a)(i) is on the taking of adverse action because a person *has* a workplace right.

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11 Compare, for instance "paid work", "registered employee association" and "workplace law".
12 FW Act, s 40A; *Acts Interpretation Act 1901* (Cth) s 13 as it applied at 25 June 2009.
13 See *Commissioner of Police v Kennedy* [2007] NSWCA 328 at [44]-[45] (Basten JA).
14 See *ACCC v Yazaki Corporation* (2018) 262 FCR 243 at [115]-[120]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 at [127] (Beech J).

Section 340(1)(a)(ii) captures action taken because a person has, or has not, *exercised* a workplace right. The focus in that case is on the occurrence of a past event, namely, an exercise or non-exercise of a right. Section 340(1)(a)(iii) is directed to a past or current proposal to exercise (or not exercise) a workplace right. Section 340(1)(b) captures an apprehended future exercise of rights. Other than s 340(1)(a)(i), none of these protections are drafted as depending on a "presently existing" entitlement (or "lawful capacity" or any of the other iterations of Qantas' construction) to exercise a workplace right.

23. Qantas assumes that, because s 341(1) is in the present tense ("has"), any substantive provision that does not use the word "has" (or otherwise operates on a basis that does not require the workplace right to be "presently existing" or "lawfully able to be exercised" or "capable of being exercised" at the moment adverse action is taken) must operate as if it had a verb in the present tense too. That is not right as a matter of logic and is incompatible with the text of the various subsections of s 340(1). This analysis does not deny that s 341(1) gives meaning to the concept of a "workplace right". Its object is to describe when a workplace right exists. It does not define workplace rights. Indeed, given the variety of workplace rights contemplated by the FW Act, it is difficult to apprehend how a comprehensive definition of "workplace right" could have been formulated.

C. CONTEXT

C.1 Section 340(1) and (3)

24. Section 340(1)(b) is only one limb of the protection provided by s 340(1). Qantas' construction of s 340(1)(b) leaves it with little practical work to do that is different from s 340(1)(a)(i). Most, if not all, cases where a person takes adverse action to prevent another from exercising a workplace right which he or she can "presently exercise" or can "lawfully exercise" or which is "capable of being exercised" will be a case where that person takes adverse action against another person because he or she "has" a workplace right. It is unlikely that the legislature intended it to have such a limited scope. Qantas' example at **AS[27]** (which does not appear to constitute a species of adverse action[15]) would likely also involve a contravention of s 340(1)(a)(i), given that it is difficult to contemplate that the employer would draw fine and nuanced distinctions between (a)

[15] Movement of employees from one shift to another would not, without more, fall within Item 1(b)-(c) of s 342(1), as such treatment would not be injurious or prejudicial (*Squires v Flight Stewards Association of Australia* (1982) 2 IR 155 at 164 (Ellicott J)) or involve an adverse affectation of, or deterioration in the advantages enjoyed by the employee prior to the action (*Patrick Stevedores Operations No 2 Pty Ltd v MUA* (1998) 195 CLR 1 at [4]).

taking action because employees had a right to take PIA; and (b) doing so in order to prevent them taking PIA. A further problem with the example is that the right to take PIA only arises after the effluxion of time under a notice given in accordance with s 414.

25. Further, it would also be incongruous to confine s 340(1)(b) to "presently existing" rights or rights which are at the moment the action is taken "capable of being exercised" or "lawfully able to be exercised" when s 340(1)(a)(iii) cannot sensibly be confined in the same manner. If adverse action is taken on Monday against a person because he or she proposes on Wednesday to exercise a workplace right, it is irrelevant whether that person was (or was not) able to exercise that right on Monday. Qantas' constructions confine s 340(1)(a)(iii) to proposals to exercise (or not exercise) a workplace right that the victim is immediately able to lawfully exercise at the time of the adverse action and therefore collapses sub-para (iii) into sub-para (i).

26. The arbitrary consequences of Qantas' construction for s 340(1)(a)(iii) can be demonstrated by a trade union taking action to prejudice the employment of an employee[16] prior to an enterprise agreement reaching its nominal expiry because the employee has indicated they propose to not participate in PIA which the union is planning to organise in upcoming bargaining. At the time the action is taken, the employee does not have a "presently existing" right to take PIA nor may they "lawfully exercise" a right to take PIA. On Qantas' construction, the union would be immune from liability under s 340(1)(a)(iii) and free to take any adverse action against the employee who proposed not to participate in the PIA.

27. Conversely, the Full Court's construction does not render s 341(3) otiose: **cf AS[36]**. The note to s 341(3) and the explanatory memorandum explaining the note identifies the type of situations where s 341(3) was intended to apply.[17] Section 340(1)(b) would not render s 341(3) otiose in Qantas' example because there would be no contravention of s 340(1)(b) on those bare facts. Section 341(3) requires an assessment of what workplace rights the person would have had if he or she had been employed.[18] This deeming provision ensures s 340(1)(a)(i) is able to apply with respect to prospective employees. For example, a contravention will occur if an employer refuses to employ or discriminates

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16 FW Act s 342(1), Item 7(b).
17 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [1372].
18 *Maric v Ericsson Australia Pty Ltd* (2020) 293 IR 442 at [58] (Steward J).

against a prospective employee[19] because the employee would, if employed, be entitled to a particular benefit under a workplace instrument. The employer in this example acts against the prospective employee not to prevent them exercising a workplace right but because, by virtue of the deeming provision under s 341(1), they are taken to have a right to the benefits of the workplace instrument.

28. Qantas' criticism of the Full Court's reasoning concerning s 340(1)(a)(ii) is misplaced and unfair: **AS[39]-[40]**. At **FC[120] (CAB193)**, the Full Court explained why the argument that s 340(1)(b) applies only if the person suffering adverse action had an entitlement to exercise the workplace right at the time of the adverse action cannot be reconciled with s 340(1)(a)(ii). Section 340(1)(a)(ii) protects against retaliatory action taken because a person has exercised (or not exercised) a workplace right in the past (as acknowledged at **AS[25]**). If Qantas' construction is consistently applied, retaliatory action could be taken with impunity so long as it is taken at a time when the right is not "presently existing" or no longer "lawfully capable of being exercised". The point made correctly by the Full Court was that if that were so, then a person would only be protected from retaliatory action if, at the time of that action, they had a "presently existing" right or a right "capable of being exercised".

C.2 Threats to take adverse action and organising action

29. Qantas ignores that adverse action extends, under s 342(2), to *threats* to take the forms of action in s 342(1) and the *organising* of such action. That the protections provided by s 340 extend to threats to take action and conduct preparatory to taking action demonstrates the incongruence of Qantas' construction which appears to depend on fine (and uncertain) distinctions and analyses about when a right "presently exists", is "capable of being exercised" or may "lawfully be exercised".

30. A *threat*, being the communication of an intention to take action described in s 342(1),[20] may be levelled at a person at a time they do not have a "presently existing" right (or who cannot "lawfully exercise" the workplace right) with a view to pressuring them not to exercise a right at the moment when it can be exercised. A threat may also be conditional:

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19 FW Act, s 342(1) item 2(a) and (b). As to 'discrimination' under s 342(1), see *CFMEU v Rio Tinto Coal Australia Pty Ltd* (2014) 232 FCR 560 at [56]-[58] (Flick J).

20 *National Union of Workers v* ***Qenos*** *Pty Ltd* (2001) 108 FCR 90 at [119] (Weinberg J); *CFMEU v Victoria* (2013) 302 ALR 1 at [221]-[222] (Bromberg J).

if you exercise (or do not exercise) your right to do X, you will suffer Y consequence.[21] On Qantas' construction, a person who threatens to take adverse action against another person if they exercise a workplace right in the future will avoid s 340(1) so long as the subject of the threat does not satisfy one of the formulations articulated by Qantas. A union would, for example, escape liability under s 340(1)(a)(iii) if it threatened to expel one of its members[22] from the union who had indicated that they proposed not to participate in PIA the union was proposing to organise, so long as the threat was made before the bargaining had commenced.

31. *Organising* action involves positive conduct intended to induce or procure particular action or marshalling or coordinating of activities to produce action.[23] Conduct preparatory to taking adverse action is, therefore, adverse action and could be engaged in without consequence or penalty at any time prior to a person having (or gaining) a "presently existing" workplace right.

C.3 Coercion and misrepresentations

32. Applying Qantas' construction throughout Division 3 of Part 3-1 produces further remarkable results. At **AS[56]**, Qantas accepts that, on its construction, s 343 is confined to rights which are "presently capable" of being exercised. On that view, it is open to a person to coerce another to exercise or not exercise a workplace right (by organising, taking or threatening action which is unlawful, illegitimate or unconscionable with the intent of negating the person's choice[24]) so long as the coercive action occurs prior to the right being "lawfully able" to be exercised or "presently existing". It would, for instance, be open to a union to coerce a non-member employee to exercise a right, such as to participate in a protected action ballot, so long as the coercive conduct occurred before that right was "presently exercisable" or "lawfully able to be exercised". Alternatively, an employer could seek to coerce a new employee who has indicated an intention to get pregnant to not exercise a right to take parental leave by telling her that if she decided to try and take parental leave, she would have no future with the employer (see [44] below).

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21 *Fair Work Ombudsman v AWU* (2017) 271 IR 139 at [54] (Bromberg J); *CFMEU v De Martin & Gasparini Pty Limited (No 2)* [2017] FCA 1046 at [23] (Wigney J).

22 FW Act s 342(1), item 7(d).

23 See *ABCC v Huddy* [2017] FCA 739 at [67] (White J). See also *Pirrie v McFarlane* (1925) 36 CLR 170 at 203 (Isaacs J).

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

33. Qantas' construction also leads to surprising results when applied to s 345, which prohibits false or misleading representations about workplace rights. There is no reason to think Parliament was content to permit misrepresentations about future workplace rights. If that were correct, an employer could brazenly lie to its employees about their right to participate in PIA or take forms of leave, so long as it did so the day before the employee had the ability to take PIA or the form of leave. The appellants seek to skirt around that capricious consequence by suggesting that a misrepresentation about the "effect of the exercise" of a workplace right will prohibit representations about the consequences of a future exercise of an existing right: **AS[59]**. What that means is unclear. In any event, it does not stay faithful to Qantas' own argument. Applying it to s 345 would, in truth, confine "the effect of the exercise, of a workplace right" in s 345(1)(b) to the effect of the exercise of a "presently existing" right or one a person is then "capable of exercising" (as opposed to the future exercise of a workplace right).

D. PURPOSE

34. Section 336 states the objects of Part 3-1. Relevantly, s 336(1)(a) provides that an object of the Part is "to protect workplace rights". Section 334 is a guide to Part 3-1 and sets out that Division 3 "protects workplace rights and the exercise of those rights". Qantas' construction does not promote these objects and is not to be preferred.[25] It creates uncertainty as to when workplace rights are protected, as it turns on fine analyses about when a right is "presently existing" or "lawfully able to be exercised" or "capable of being exercised" or is a species of "contingent" right Qantas says is captured by s 340(1)(b). All these different formulations lead to incoherence which the legislature cannot have intended when its purpose was to protect workplace rights.

35. Moreover, Qantas' construction leaves workplace rights at the mercy of those who would engage in adverse action at any point in time prior to the workplace right being "capable of being exercised" or "presently existing" or "lawfully able to be exercised" or a type of "contingent" right. On that construction, s 340(1)(b) permits employers, unions or employees to take action to ensure that workplace rights *never* arise. Ensuring that something bothersome does not come into existence at all will often be the best way to parry its threat. Where the future event is the exercise of a workplace right, to act in

[25] *Acts Interpretation Act 1901* (Cth) s 15AA as applicable to the FW Act: see s FW Act, s 40A.

anticipation of that occurring by cutting it off at the pass is to defeat, not protect, that right by ensuring that it never comes into being at all.

36. The obviously protective operation of s 340 specifically and Part 3-1 generally[26] attracts well-known principles of construction that present a powerful bulwark against Qantas' construction. Beneficial and protective provisions "should be construed so as to give the most complete remedy which is consistent 'with the actual language employed' and to which its words 'are fairly open'".[27] This is "a manifestation of the more general principle that all legislation is to be construed purposively".[28] The Full Court's construction does not give a strained meaning to the statutory text so as to be incapable of finding support in these principles.[29] The construction is, in fact, consistent with the ordinary meaning of "prevent" and congruent with the purpose of s 340(1)(b) being to protect the future exercise of workplace rights.

37. Qantas invokes the well-known caution about the limits of statutory purpose in *CFMEU v Mammoet Australia Pty Ltd*: **AS[41]**.[30] But caution does not require the Court to put the statutory purpose of protecting workplace rights to one side altogether, which is effectively what Qantas does. That is inappropriate where the statutory purpose of s 340(1)(b) is clear, where Qantas' construction is not compelled by the statutory text (indeed, it is contrary to the text) and where there is no rational countervailing purpose. That is, there is no rational reason to permit a person to take adverse action to prevent the exercise of a workplace right one minute before another person is "lawfully able" to exercise the right or the right becomes "presently existing" or the person becomes "capable" of exercising the right or the right is "contingent", while prohibiting the very same conduct one minute later.

38. Nor is it the case that the Full Court's construction will tip the balance in favour of employees. One reason for that is that the provisions of Part 3-1 apply equally to

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26 See *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225 at [22] (Rangiah and Charlesworth JJ); *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at [19]-[22] (Gray and Bromberg JJ); *CFMEU v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [35] (Katzmann J); *ABCC v CoreStaff WA Pty Ltd* (2020) 296 IR 459 at [92] (Banks-Smith J); *Qenos* (2001) 108 FCR 90 at [48] (Weinberg J); *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* (2000) 101 IR 143 at [75] (Madgwick J); *Kelly v CFMEU (No 3)* (1995) 63 IR 119 at 130 (Moore J).

27 ***Khoury*** *v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638.

28 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [92] (Gageler J).

29 Cf *Khoury* (1984) 165 CLR 622 at 638 (Mason, Brennan, Deane and Dawson JJ).

30 (2013) 248 CLR 619 at [40]-[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

employers, employees and unions. The protection applies against action by employees against their employer (s 342(1) item 5), independent contractors against persons they have contracted with (s 342(1) item 6) and unions and their officers and members against a variety of persons (s 342(1) item 7). Another reason is that a contravention of s 340(1)(b) depends on establishing (with the benefit of the reverse onus under s 361) that preventing the exercise of a workplace right was a "substantial and operative" reason for the adverse action: **J[218]; CAB90**.[31] That is a very significant hurdle to relying on s 340(1)(b) successfully, contrary to the misplaced assertions in **AS[20]**.

E. HISTORY

39. The legislative history is not especially useful because s 340(1)(b) is a new provision, and this appears to be common ground: **AS[60]**. Qantas is wrong to suggest that, if anything, the history assists them: **cf AS[60], [71]**. Qantas' submissions give the impression that predecessor provisions clearly did not extend to future rights that did not exist at the time the adverse action was taken, as the foundation for its ultimate submission that the Parliament would have used clearer words had it intended to do so under the FW Act. But Qantas' submission on the history is unpersuasive.

40. Take, for example, s 793(2) of the *Workplace Relations Act 1996* (Cth) (**WR Act**). Section 792 prohibited adverse action for a prohibited reason, s 793(1) listed prohibited reasons, and s 793(2) made it a prohibited reason to threaten a person to prevent him or her from doing the things listed in s 793(1). Section 793(1)(g) and (h) dealt with applications for and participation in secret ballots, which could only occur at particular times and in specified circumstances.[32] A threat to dissuade or prevent an employee from seeking support to apply for a ballot prior to bargaining commencing or to dissuade employees from voting prior to an order being made would fall foul of s 793(2) even though an employee would not, at that time, have a presently existing right or capacity to apply for or participate in a ballot. A contravention of those provisions did not depend on the victim of the action holding or possessing an extant right.

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31 See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [104] (Gummow and Hayne JJ); *Bowling* (1976) 12 ALR 605 at 612, 616.

32 An employee could only apply for a ballot order "during a bargaining period" (s 451(1)), not before the nominal expiry date of any existing collective agreement (s 451(2)), and if supported by at least the prescribed number of relevant employees (s 451(4)).

41. ***Burnie Port*** *Corporation Pty Ltd v MUA*[33] does not establish that predecessor legislation was confined to present rights: **cf AS[67]**. That case concerned the meaning of s 298L(1)(h) of the WR Act (the equivalent of post-Work Choices s 793(1)(i)), which prohibited conduct if carried out because the employee "*is entitled* to the benefit of an industrial instrument or an order of an industrial body". The Full Court explained that ss 298K(1) and 298L(1)(h) required, at the time of the proscribed conduct, that the person concerned had a present or existing right[34] because the specific statutory language used was "is entitled" and that its analysis was confined to the predecessor of s 340(1)(a)(i).[35]

F. CONSEQUENCES

F.1 Useful examples

42. It is useful to illustrate the parties' competing positions with some examples.

43. Take parental leave. Employees are not entitled to parental leave under s 70 of the FW Act unless they have, or will have, completed at least 12 months of continuous service with the employer immediately before the actual or expected date of the birth of the child.[36] In the case of a female employee who is pregnant, parental leave cannot be taken prior to 6 weeks before the child's expected date of birth (unless an earlier period is agreed).[37] Section 74 imposes notification requirements on an employee who intends to take parental leave. Generally, notice must be given 10 weeks before the leave commences and must specify the intended start and end dates of the leave.[38] An employer may require evidence to be produced.[39] Section 74(7) provides that, if an employee does not satisfy the notice requirements, the employee is not entitled to take parental leave.

44. Take the example of a woman who announces that she and her partner have decided to have a child and she intends to fall pregnant. At this moment, she does not have a "presently existing" right to take parental leave. She cannot lawfully take and is not "capable" of taking parental leave. If the employer decides to terminate her employment for the sole reason of preventing her in the future from exercising a workplace right to

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33 (2000) 104 FCR 440.
34 (2000) 104 FCR 440 at [23]-[24].
35 (2000) 104 FCR 440 at [32].
36 FW Act, ss 67(1), (3).
37 FW Act, s 71(3).
38 FW Act, s 74(2).
39 FW Act, s 74(5).

take parental leave upon becoming aware of the woman's intentions, on Qantas' construction of s 340(1)(b) the employer will escape liability.

45. Take instead the example of a woman who has been employed for four months who the employer discovers has fallen pregnant. Presuming the expected birth date is nine months hence, she may have a workplace right by operation of s 67(1) to parental leave because she will have completed at least 12 months service at the expected date of birth. She cannot, however, at that point exercise the right to take parental leave. The right may be "presently existing" but is not able to be "lawfully exercised" or "capable of being exercised". It will only be so on the happening of a number of contingencies which may or may not be fulfilled, including compliance with notice and evidence requirements. She must carry the child up to 6 weeks before the expected date of birth and, obviously, remain employed. If the employer dismisses her at this point for the sole reason of preventing her exercising a workplace right to take parental leave, it appears that the employer will escape liability under s 340(1)(b) on Qantas' construction. If the right, at this point, is a "contingent" one, there is no principled difference from the right to participate in a protected action ballot or organise and take PIA.

46. Take community service leave. Section 108 of the FW Act provides that an employee who engages in a "community service activity" is entitled to be absent from their employment for a period *if* the period consists of time when the person engages in an eligible community service activity and the employee's absence is "reasonable in all the circumstances". One requirement of an eligible activity is that the employee was requested by or on behalf of an emergency management body to engage in the activity or it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made: s 109(2)(d). Section 110 imposes notification requirements on an employee who intends to take community service leave. Section 110(4) provides that any absence will not be "covered" by the right conferred unless those notification requirements are complied with.

47. Take the example of an employee known to be a volunteer firefighter. Before the summer season, on Qantas' construction the employer could dismiss the employee for the sole purpose of preventing the exercise of the right to take community service leave. Questions would arise as to whether it was necessary to work through s 108 (and an assessment of the reasonableness of any absence in the future, which may be unknown) and s 109(2) to determine whether the employee has a presently existing right. Alternatively, it may be

that this is a "contingent" right. If it is, the contingencies are not relevantly different to those applicable to engaging in a protected action ballot and organising and taking PIA. Properly understood, s 340(1)(b) operates simply upon proof of the prohibited reason to the requisite standard without entering into such tortured prognostications about the kind of workplace right the employee has at the time of the action.

F.2 Qantas' examples

48. Qantas contends that the Full Court's construction leads to internal incoherence with the statutory unfair dismissal regime, which only operates after the employee has served a minimum employment period (of 6 or 12 months as applicable): see ss 194(c), 382(a), 383; **AS[48]-[50]**. Qantas suggests it is inconsistent with this regime for an employee who has not completed this minimum employment period to be able to establish a contravention of s 340(1)(b) where an employer terminates his or her employment for the substantial and operative reason of preventing the employee exercising the right to make an unfair dismissal claim in the future. There is no incongruity in that employer being found to contravene s 340(1)(b) in such circumstances, and they should be so found: cf **AS[49]**. The statutory protections serve different purposes.

49. The submission wrongly assumes (also at **AS[20]**) that an employer who is merely "subjectively aware" (that is, mindful) that a termination will have the effect of preventing a future unfair dismissal claim will contravene s 340(1)(b). That is not so. Simply being aware of, or even giving consideration to, a particular circumstance or attribute is not the same as it being a substantial and operative reason for the action.[40] There is ample room for an employer to terminate for poor performance within the first 6 months of employment (or 12 months for a small business), while being aware that this is at a time when unfair dismissal remedies cannot be sought, without contravening s 340(1)(b). If an employer terminates an employee for poor performance or because he or she is not a good fit for the business, and is conscious that he or she will not be able to make an unfair dismissal application, no contravention of s 340(1)(b) occurs. Qantas conflates effect with purpose. Termination of employment extinguishes many existing workplace rights. Mere awareness of that fact does not lead to a contravention of s 340(1)(b).

50. The Full Court's construction does not, on any view, circumvent the limitation on unfair dismissal rights for employees who have not completed the minimum employment

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[40] See *Greater Dandenong City Council v ASU* (2001) 112 FCR 232 at [163]-[167] (Merkel J), [199], [204], [209], [216] (Finkelstein J); *MUA v CSL Australia Pty Ltd* (2002) 113 IR 326 at [54]-[55].

period: **cf AS[50]**. A claim that a contravention of s 340(1)(b) has occurred turns upon whether the adverse action was taken for the proscribed reason of preventing the exercise of workplace rights. In contrast, an unfair dismissal claim involves a broad consideration of whether the dismissal was harsh, unjust or unreasonable.[41] Nor is it inconsistent with the statutory scheme for provisions to address conduct aimed at avoiding statutory obligations. Various parts of the FW Act are alert to, and seek to defeat, conduct designed to avoid statutory remedies. For instance, s 386(3) provides that restrictions on the concept of "dismissal" do not apply if the substantial purpose of a person being employed under a particular contractual arrangement was to avoid unfair dismissal protection.

51. Qantas also contends that it is perverse for an employer not to be able to take action to stymie PIA in the future when, at the time of the employer's actions, industrial action was prohibited by s 417 because an existing enterprise agreement had not yet passed its nominal expiry date: **AS[16], [51], [79]-[80]**. The submission raises an irrelevancy. It was not alleged, and the primary judge did not find, that Qantas outsourced its ground handling operations to prevent the employees taking industrial action generally. Indeed, that purpose would not have given rise to a contravention. One of the two reasons Qantas was found to have contravened s 340(1)(b) was because it failed to prove that a substantial and operative reason for its outsourcing decision was not to prevent the exercise of the workplace right conferred by Part 3-3 of the FW Act to participate in a protected action ballot and organise and engage in PIA. Further, s 417 is irrelevant to the participation of an employee in a protected action ballot, which can be applied for 30 days prior to the nominal expiry date of an existing enterprise agreement.[42]

52. The assertion at **AS[54]** that on the Full Court's construction an employer who terminates employees *in the knowledge* that industrial action might in the future be PIA repeats the error described in [8] above as to the operation of the reverse onus. Mere knowledge that industrial action may be protected in the future will not sound in a contravention of s 340(1)(b). What will contravene s 340(1)(b) is that the conduct is motivated *to prevent* the future exercise by employees of the right to take PIA in its character as a workplace right. When that is the naked purpose of the employer's adverse conduct, prohibiting that conduct serves to protect workplace rights by ensuring that they are not deliberately

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41 FW Act, ss 385(b), 387.

42 FW Act, s 438(1). Applying for a ballot order does not constitute industrial action: s 438(2). Ballot orders are required to be dealt with so far as reasonably possible within 2 days (s 441) and it is possible that a ballot may be undertaken before an agreement reaches its nominal expiry date.

circumvented. No purpose is served by Qantas' construction: see **FC[130]-[133]; CAB196-197**.

F.3 The Full Court's examples

53. The Full Court gave three examples of the consequences of Qantas' construction. The first example given by the Full Court was this (**FC[133]; CAB197**):

> … an employee on leave is within the protective reach of the provision when her employment is terminated by reason of the employer's desire to be relieved of the burden of the future exercise of that entitlement, whereas the employee without a presently existing right or capacity to take leave who gives prior notice that he or she will take leave once the right to do so has accrued, and whose employment is terminated for the same reason, falls outside the protection of the provision.

54. Qantas' response is that accruing benefits are "existing workplace rights" (**AS[75]**). Why this is so is not explained. If it is sufficient to have a contingent right that has not yet crystallised or accrued for the right to be "presently existing" or "lawfully able to be exercised", then there is no difference between a right to take leave and take PIA or participate in a protected action ballot. In each case, the prerequisites to be met before the right can be lawfully exercised are of either a temporal or procedural kind. If, on the other hand, Qantas' position is that the workplace right must be capable of exercise at the time of the adverse action, their construction fails to protect rights that are merely contingent at the time of the adverse action.

55. The second example was the victimisation of a person for appearing as a witness (see s 341(1)(b) and (2)(b)): **FC[133]; CAB197**. Qantas' response that "[a] potential witness can always be a witness in proceedings" (**AS[65], [76]**) is inaccurate. There is no workplace right to appear as a witness in any proceeding: people cannot simply turn up and speak in a courtroom. How that could be regarded as a present entitlement is even more baffling when the proceeding into which he or she would wish to insert himself or herself (apparently by entitlement) may not even have been commenced.

56. The third example given by the Full Court was sacking a person to prevent that person from taking up a role as a Health and Safety Representative because prior to being elected into the role and at the time the preventive action was taken, the person had no presently existing workplace right to hold that role: **FC[133]; CAB197**. Qantas' response is that "the ability to stand for election is an existing entitlement to the benefit of a workplace law" (**AS[77]**), but this overlooks that a contravention of s 340(1)(b) turns on purpose. The action taken in this example was *to prevent* the worker taking up the role of a health

and safety representative. The action was not taken *because* the person had a right to participate in an election. At the time the worker stands for election they are not a health and safety representative and have no workplace right to hold that role.

G. DISPOSITION

57. The appeal should be dismissed. But if Qantas' construction is upheld and ground one of the notice of contention is dismissed, then Qantas is only entitled to relief varying the primary judge's declaration that a proscribed reason for the adverse action was to prevent the exercise of the workplace rights to "organise and engage in protected industrial action or a protected action ballot for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement". Qantas incorrectly argues that the primary judge found a contravention of s 340(1)(b) based only on preventing the taking of PIA.

58. The primary judge expressly found that another substantial and operative reason for the action was to prevent the exercise of the workplace right to engage in enterprise bargaining: **J[282], [288], [304]; DJ[4](5)-(6), [6]-[9], [18]-[21]; CAB107, 108, 114, 122-124, 127-128**). The primary judge explained that the two workplace rights he had found Qantas had been motivated to prevent were "closely related but distinct": **DJ[6]; CAB124**. At **DJ[7]** (**CAB124**), the primary judge said that those rights included the ability to participate in bargaining, which is a "workplace right" as it is a process under a workplace law: s 341(1)(b). At **DJ[8]** (**CAB124**), the primary judge explained that he had found that Qantas had not proved that Mr David's reasons for deciding to take the action did not include preventing the exercise of the right to organise and engage in PIA and the right to *participate in bargaining.*

59. The primary judge carefully framed the declaratory relief to reflect these conclusions: **CAB133-134** and made clear at **DJ[19]-[20]** that the declaration was intended to capture his findings in relation to the prevention of the workplace right to engage in enterprise bargaining. This was why his Honour determined not to dismiss prayer 1.8 of the respondent's amended originating application which sought a declaration that Qantas had taken the adverse action to prevent the exercise of the workplace right to engage in enterprise bargaining: **RFM8, DJ[20]** and Order 2 at **CAB134**.

60. The primary judge's findings are significant in determining relief in this appeal. Section 360 of the FW Act determines that so long as *a reason* for adverse action is a prohibited one, it is presumed that the action was taken for that reason. Prevention of the

workplace right to engage in enterprise bargaining was *a reason* for the action and sufficient to establish a contravention of s 340(1)(b).

61. If Qantas' construction is upheld, the notice of contention dismissed and [59]-[62] above not accepted, the proceeding should be remitted to the Full Court for determination of the respondent's cross-appeal which the Full Court did not deal with (**FC[431]; CAB300**).

PART VI NOTICE OF CONTENTION

62. The respondent seeks an extension of time to file a notice of contention.[43] Only the first matter in it is pressed by way of notice of contention, for the second matter arises on the question of relief if Qantas' appeal is upheld and is dealt with above on that basis.

10 63. Section s 341(1)(b) is not dependent on the existence of a present entitlement to exercise a workplace right.[44] Being *able to initiate a process* under a workplace law is not dependent on a present capacity to initiate such a process. Qantas appears to acknowledge at **AS[67]** that a person will have a workplace right if they have the ability to exercise the right and that ability is contingent. The affected employees *were able to participate in* a process under the FW Act, being PIA and a protected action ballot, subject to a number of contingencies happening. Even if Qantas' construction of s 340(1)(b) were correct, the same result will ensue as s 341(1)(b) captures contingent rights: **FC[138]; CAB198-199**.

PART VII ESTIMATE OF TIME FOR ORAL ARGUMENT

64. The respondent will require a total of 2 hours to present its argument.

Dated: 17 February 2023

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[43] The respondent sought to file the notice of contention on 21 December 2022 rather than by 8 December 2022 as required: **CAB322,** Stephanie **Murphy Affidavit** at [6].

[44] *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [107] and [111] (Jessup J).

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901

First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692

Second Appellant

and

TRANSPORT WORKERS UNION OF AUSTRALIA

Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the respondent sets out below a list of the particular statutes and Conventions referred to in these submissions.

No	Description	Version	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Dated 4 December 2008	ss 13, 15AA-15AB
2.	*Fair Work Act 2009 (Cth)*	Compilation No. 41, dated 27 November 2020	ss 3, 6, 12, 40A, 61, 67 – 116, 194, 334 – 378, 382-387, 390-394, 406 – 477, 551
3.	*Workplace Relations Act 1996* (Cth)	Act No. 86 of 1988, dated 16 December 2005	ss 298K, 298L
4.	*Workplace Relations Act 1996* (Cth)	Act No. 86 of 1988, dated 26 March 2006	ss 792, 793