



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I INTERNET PUBLICATION

This outline of oral argument is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Text

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1. Section 340 protects workplace rights by prohibiting action taken for distinct reasons or purposes: because a person has a workplace right (s 340(1)(a)(i)); because of the past exercise (or non-exercise) of a workplace right (s 340(1)(a)(ii)); because of a current or past proposal to exercise (or not) a workplace right (s 340(1)(a)(iii)); or for the purpose of preventing the anticipated future exercise of a right (s 340(1)(b)). **RS [16]-[17].**

2. The text of s 340(1) contains a careful use of terms. It distinguishes between past, present and future events or states of affairs when intended. Section 340(1)(a)(ii), (iii) and (b) do not textually require a workplace right to exist, or be capable of immediate exercise, at the time of the adverse action. **RS [14]-[18].**

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3. The present tense in s 341 does not introduce a requirement that workplace rights are protected under ss 340, 343 and 345 only if they presently exist, or are capable of immediate exercise, at the time of the adverse action (s 340), coercion (s 343) or misrepresentation (s 345). **RS [19]-[23].** *Kelly v The Queen* (2004) 218 CLR 216 at [104]-[105].

4. The Full Court's construction does not render s 341(3) otiose. Section 341(3) ensures that the protection in s 340(1)(a)(i) extends to adverse action taken because of a workplace right a prospective employee would have if employed. **RS [27];** *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440 (**JBA Vol 6, Tab 37**).

Purpose

5. Qantas’s construction undermines rather than promotes the purpose of s 340. The purpose of s 340 is to protect workplace rights and their exercise in the calibrated manner set out in s 340. Section 340(1)(a) looks at both the wrongdoer and the victim: it protects having workplace rights, exercises (or non-exercises) of them and proposing (or not) to exercise them from adverse action. Section 340(1)(b) looks at the wrongdoer alone: it protects against that person taking adverse action to impede or stop others from exercising workplace rights whether or not they have them, have exercised them or propose to exercise them.
- 10 6. Qantas invokes a concept of “balance” that has no content and no merit. Qantas’ construction does not introduce “balance” but puts workplace rights at the mercy of persons who would seek to prevent their exercise. **RS [34]-[38]**. Sections 340, 343 and 345 extend to protect employers and independent contractors. Instances where the provisions have been contravened by unions or union officials include: *Patrick Stevedores Holdings Pty Ltd v CFMEU* (2019) 286 IR 52; *FWO v AWU* [2020] FCA 60; *ABCC v CFMMEU (The Adelaide Airport Case)* [2021] FCA 951; *ABCC v CFMMEU (No 7)* [2020] FCCA 351; *ABCC v CFMMEU (No 2)* [2019] FCCA 3623; *ABCC v CFMMEU (the Syme Library Case No 2)* [2019] FCA 1555; *ABCC v CFMMEU (The Laverton North and Cheltenham Premises Case) (No 2)* [2019] FCA 973; *ABCC v Ravbar (No 2)* [2019] FCA 522.
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History

7. To the extent legislative history is informative, it weighs against Qantas’s construction. **RS [39]-[41]**; *Workplace Relations Act 1996* (Cth) ss 298K, 298L (**JBA Vol 3, Tab 16**); *Workplace Relations Act 1996* (Cth) ss 792, 793 (**JBA Vol 3, Tab 17**); Explanatory Memorandum Fair Work Bill 2008 (Cth) at [1336] (**JBA Vol 8, Tab 59**); *Burnie Port* (2000) 104 FCR 440 (**JBA Vol 6, Tab 37**).

Context

8. Qantas’s construction introduces incoherence into ss 340, 343 and 345 as Qantas’s construction cannot be uniformly applied across those provisions and would produce an outcome starkly at variance with the purposes of the provisions. **RS [24]-[26], [29]-[33]**.
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9. The Full Court’s construction does not cut across unfair dismissal or the limits on protected industrial action. **RS [48]-[52]**.

Examples

10. The leave examples illustrate the difficulties with Qantas' construction and the extent to which the construction would undermine rights and entitlements conferred by the FW Act. **RS [43]-[47]**. These include: requests for flexible working arrangements: FW Act s 65; parental leave: FW Act, ss 67, 70-71, 74; community service leave: FW Act, ss 108-110; personal leave: FW Act, ss 97, 107. The right to take certain types of leave is an inchoate one: *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492 at 507-508 (**not in JBA**).

Contingent rights

- 10 11. If s 340(1)(b) protects against adverse action to prevent the exercise of a workplace right which depends on events occurring or circumstances coming into existence, it extends to action taken for the purpose of preventing the future exercise of the right to take protected industrial action (notice of contention). **RS [62]-[63]**; *Burnie Port* (2000) 104 FCR 440 at [30] (**JBA Vol 6, Tab 37**); Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [1363] (**JBA Vol 8, Tab 59**).

Relief

12. If the appeal succeeds and the notice of contention fails, the appropriate relief is to vary the declaration made. The primary judge found that Qantas' reasons included preventing the exercise of the workplace right to engaged in enterprise bargaining. **RS [57]-[61]**.
- 20 13. If Qantas is granted the relief it seeks, the matter should be remitted to the Full Court for determination of the respondent's appeal against the dismissal of its s 346(a) case.

Intervention

14. The respondent supports the Minister's position in respect to the construction of s 569(1) and the alternate application for leave to intervene.

Dated: 9 May 2023



Noel Hutley

Mark Gibian

Christopher Tran

Philip Boncardo