



HIGH COURT OF AUSTRALIA

6 December 2017

ESSO AUSTRALIA PTY LTD v THE AUSTRALIAN WORKERS' UNION;
THE AUSTRALIAN WORKERS' UNION v ESSO AUSTRALIA PTY LTD
[2017] HCA 54

Today, the High Court allowed one appeal by majority and unanimously dismissed a second appeal from a decision of the Full Court of the Federal Court of Australia regarding the application of certain provisions of the *Fair Work Act 2009* (Cth) to industrial action taken by The Australian Workers' Union ("the AWU") against Esso Australia Pty Ltd ("Esso").

Section 415 of the *Fair Work Act* confers a broad-ranging immunity from civil suit on persons engaging in or organising protected industrial action. Section 413 specifies the common requirements for industrial action to qualify as protected industrial action for a proposed enterprise agreement. Relevantly, s 413(5) provides that persons organising or engaging in the action "must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement".

In 2015, during negotiations for a new enterprise agreement, the AWU organised industrial action against Esso which it claimed was protected industrial action. Esso obtained an order from the Fair Work Commission ("the Commission") requiring the AWU to stop organising certain forms of action. In contravention of that order, the AWU continued to organise the proscribed action.

Esso instituted proceedings in the Federal Court of Australia seeking inter alia declarations that the AWU was a person who had contravened an order which applies to it, in the terms of s 413(5), with the consequence that action thereafter organised by the AWU in relation to the agreement was not protected industrial action. It was also alleged that, contrary to ss 343 and 348 of the *Fair Work Act*, the AWU had organised action with intent to coerce Esso to enter into an agreement on terms favourable to the AWU. The primary judge declined to make the declarations sought by Esso, but found that the AWU had contravened ss 343 and 348. On appeal, the Full Court held that the AWU's prior contravention of the Commission's order did not fall within the terms of s 413(5) and that there was no error in the primary judge's approach to or application of ss 343 and 348.

By grant of special leave, Esso and the AWU each appealed to the High Court against the Full Court's decision in relation to the construction of s 413(5) and the contraventions of ss 343 and 348 respectively. In relation to Esso's appeal, a majority of the High Court held that the requirement in s 413(5) for compliance with orders is not confined to orders that are in existence or may still be complied with at the time of the proposed protected industrial action, or which relate to that action. The majority held that s 413(5) applies to past contraventions of orders that applied to the relevant persons and that related to the relevant subject matter, and thus, by reason of its contravention of the Commission's order, the AWU failed to meet the requirement in s 413(5) for its subsequently organised action to qualify as protected industrial action. In relation to the AWU's appeal, the Court unanimously held that a contravention of s 343 or s 348 is constituted of organising, taking or threatening action against another person with intent to negate that person's choice and that knowledge or intent that the action be unlawful, illegitimate or unconscionable is not required. In the result, Esso's appeal was allowed and the AWU's appeal was dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*