IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M185 of 2016

BETWEEN:

ESSO AUSTRALIA PTY LTD
(ABN 49 000 018 566)
Appellant

and

THE AUSTRALIAN WORKERS' UNION
Respondent

10 **APPELLANT'S REPLY**

Part I: Certification

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

Part II: Argument in reply

2. In paragraphs 18-21 of the Respondent's Submissions dated 17 February 2017 (**RS**), the respondent takes a narrow view of context. Whether one plays semantics with the concept of a "right" or not,[1] what is clear is that the concept of "protected industrial action" and civil immunity from suit was a significant departure from the existing state of the law and industrial relations in Australia, stretching back around 150 years. Developments in the United Kingdom and
20 elsewhere are interesting, but not particularly relevant to the domestic construction exercise.

3. Further, the asserted "right" which is "*hedged about with qualifications*" must be seen in its proper context: it takes away fundamental common law rights and

[1] Of the protected action provisions introduced in 1994, this Court said that they "*may conveniently, though perhaps not accurately, be referred to as the right to strike and to engage in industrial action*": *Victoria v The Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 542 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See also *National Workforce Pty Ltd v Australian Manufacturing Workers' Union (No 2)* [1997] VSC 51; [1998] 3 VR 265 at 275-6 (Phillips, Charles and Batt JJA).

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should be construed accordingly.[2] Comment has been made previously about this regarding the relevant predecessor provisions.[3]

4. Paragraph 22 of the RS avoids the observations made in paragraphs 71(b) and 72(b) of the AS and overstates the position. Protected action is no longer described as an *entitlement* (nor is the word "entitled" used), the objects provision (regarding international obligations and the so-called "right to strike") has been removed[4] and the qualifications and preconditions to accessing protected action have increased.

5. In paragraphs 31-33 of the RS, the respondent reasons not by reference to any exercise in construction of language, but rather solely from asserted premises and purposes extraneous to that language.

6. Further, paragraph 31 asserts that any bargaining representative "*would be precluded from organising or engaging in any protected industrial action*". The preclusion in the present matter operates where the bargaining representative has contravened the order, not the employees being represented. Such employees could change bargaining representatives and (subsequently) take protected industrial action through the new representative. Alternatively, the bargaining representative could withdraw the proposed enterprise agreement and seek to commence the bargaining process again. In either case, the preclusion in section 413(5) would cease to apply.

7. The reliance on *Cooper Brookes* and related cases to re-write section 413(5), hinges on two false premises: first, Parliament could not have intended these outcomes and second, the outcomes are "*incongruous, irrational or unjust*".

8. When regard is had to the orthodox statutory analysis undertaken in the AS (paragraphs 76-86), it cannot be said that these outcomes were not intended (the language used points directly to that intention), nor could they be described

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2 Paragraphs 71-72 of the Appellant's Submissions dated 27 January 2017 (**AS**).

3 *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at 357-8 [117]-[120] (McHugh J) and 398 [252] (Callinan J) (note contra, 328-30 [19]-[23] (Gleeson CJ)).

4 Section 3(a) of the FW Act (footnote 12 of the RS) is hardly a substitute or conveys any similar meaning or effect, as a matter of construction.

as incongruous or irrational.

9. As for the concept of injustice, the disentitling effect of section 413(5) cuts both ways (it applies to all bargaining representatives, including employers). Further, the hypotheticals also cut both ways. An experienced industrial protagonist who flouts (perhaps multiple times) an order of the Commission preventing industrial action, causing significant damage in the process, would be free to take further industrial action the following day (after it stops contravening the order or the order expires) and secure the FW Act's immunity from suit.

10. Further, the hypotheticals in paragraphs 32-33 of the RS could be easily dealt with by the Commission in its discretion in the way that it frames its bargaining orders (by allowing substantial compliance for instance).[5] An alternative, of course, is for industrial parties to be careful about obeying orders or seeking their variation if strict compliance is not possible for some reason.

11. Ultimately, section 413(5) seeks to provide a degree of balance between competing interests. Reasoning by reference to anomaly or incongruity derived from hypotheticals ignores that balance and that the Parliament has not seen fit to pursue one set of interests at the expense of all others.[6]

12. As to the matters addressed in paragraphs 36-38 of the RS, there are very few prerequisites or disentitling circumstances to obtaining a protected action ballot order. There are other examples of matters which would preclude a "common requirement" being satisfied and thereby preclude the taking of protected industrial action (any of the instruments in section 413(7) of the FW Act), which are not mentioned in sections 437 or 443 of the FW Act either. As a matter of statutory context, this provides no indication one way or another.

13. Further, as occurred here, there had been no contraventions of any orders at the time the relevant ballot order had been obtained. The appropriate time to consider the requirements in section 413 is when the industrial action comes to

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5 They are not solved by adopting a construction of section 413(5) which excludes bargaining orders from its sphere of operation entirely: paragraphs 38-43 of the AS.

6 *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at 142-3 [5]-[6] (Gleeson CJ). See also *ConnectEast Management Ltd v Federal Commissioner of Taxation* [2009] FCAFC 22; (2009) 175 FCR 110 at 119 [41] (Sundberg, Jessup and Middleton JJ).

be taken.

14. As for paragraph 39 of the RS, it is one thing to criticise the appellant's proposed construction, but no reasonable or persuasive argument is advanced as to what alternative interpretation should be adopted and why. As the AS demonstrates, the problems afflicting any other alternative construction are more significant and raise more policy/purpose questions, than exist for the appellant's construction. No answers are ventured with respect to these criticisms. And the appellant's construction is most consistent with the surest guide to statutory intention: the language.[7]

10 15. Paragraphs 40-41 of the RS involve some exaggeration and a narrow contextual focus. There are other mechanisms to encourage/compel an employer to bargain (and agree) in Division 8 of Part 2-4 or elsewhere, including termination of an enterprise agreement.[8] As to "*economic weapons*" and "*equilibriums*", an employer cannot lock-out employees unless they have first taken protected industrial action.[9] Further, the emphasis on there being "*no statutory obligation on an employer to concede claims made by employees or to reach agreement*" can just as easily be put the other way in respect of employees having no statutory obligation to concede their employer's claims (note also paragraph 6 above).

20 16. Further, the Parliament has obviously imposed a suite of limitations on the circumstances in which protected industrial action can be taken. The argument deployed here by the respondent would apply equally to these (*i.e.* why do/should these other limitations exist?)[10]

17. Paragraph 42 of the RS encounters similar difficulties. Why does section 413(5) exist at all, if penalties and restraining orders were seen as sufficient

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7 See for example regarding the respondent's significant departure from the text under the guise of construction, *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1 at 14 [28] (French CJ, Hayne, Kiefel and Bell JJ); *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 390 [26] (French CJ and Hayne J); *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at 548 [38] (French CJ, Crennan and Bell JJ).

8 Sections 225 and 226 of the FW Act.

9 Section 411 of the FW Act.

10 This "all or nothing" type of argument lacks force: see paragraph 11 above.

remedies for contraventions of orders? The argument does not assist in selecting between competing constructions.

18. Paragraphs 44-51 of the RS merely repeat the effect of the Full Court's reasoning, without engaging with or responding to the criticisms of it in the AS. This is exemplified by paragraphs 47-48 of the RS, which overlook and do not respond to paragraph 87 of the AS. A further answer to this particular contention is that section 413(5) extends beyond contraventions of bargaining orders (to section 418 orders, for example).[11]

19. Paragraphs 52-55 of the RS exhibit the same deficiency. They do not mention, let alone engage with, paragraphs 51-57 of the AS.

20. Paragraph 56 of the RS is an exemplar of the shortcomings in the totality of the respondent's argument. The respondent criticises the primary judge's reasoning process, which was based on the language and drafting technique employed by Parliament, in favour of undefined, unidentified and selective notions of "context", "purpose" and an inconclusive discussion in explanatory materials.

21. Paragraphs 59-62 of the RS are already dealt with in paragraphs 12, 14 and 18 above. Paragraphs 63-66 of the RS are already dealt with in the AS and nothing new (or by way of response) is contained in these paragraphs.

Dated: 3 March 2017

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[11] Serious breach declarations relate to "bargaining orders" only: section 235(2)(a) of the FW Act.