HIGH COURT OF AUSTRALIA

CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

CONSTRUCTION FORESTRY MINING &
ENERGY UNION APPELLANT

AND

MAMMOET AUSTRALIA PTY LTD RESPONDENT

Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd
[2013] HCA 36
14 August 2013
P26/2013

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Federal Court of Australia made on 14 August 2012 and, in their place, order that:*

   (a) *the appeal from the Federal Magistrates Court of Australia to the Federal Court be allowed;*

   (b) *the order of the Federal Magistrates Court made on 20 October 2011 be set aside; and*

   (c) *the application be remitted to the Federal Circuit Court of Australia to be heard and determined according to law.*

On appeal from the Federal Court of Australia

Representation

J K Kirk SC with T J Dixon for the appellant (instructed by Construction Forestry Mining & Energy Union)

S J Wood SC with C O H Parkinson for the respondent (instructed by Lander & Rogers Lawyers)

CATCHWORDS

Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd

Industrial law (Cth) – Payments relating to periods of industrial action – Where employer provided employees with accommodation under enterprise agreement – Where employees took "protected industrial action" within meaning of s 408 of *Fair Work Act* 2009 (Cth) ("Act") – Where employer ceased to provide accommodation to employees for duration of "protected industrial action" – Whether provision of accommodation a "payment to an employee in relation to the total duration of the industrial action" under s 470(1) of Act.

Industrial law (Cth) – Enterprise agreement – Whether employees entitled to accommodation under terms of enterprise agreement when not ready, willing and available to work.

Words and phrases – "adverse action", "enterprise agreement", "in relation to", "payment", "protected industrial action", "ready, willing and available to work".

Fair Work Act 2009 (Cth), ss 323, 332, 340, 342, 408, 470.

1 CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ. The appellant, an organisation of employees registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth), represents the industrial interests of a number of employees of the respondent who worked on construction at the Woodside Pluto Liquefied Natural Gas Project ("the Project") located on the Burrup Peninsula in the remote north-west of Western Australia. The Project principal was Woodside Burrup Pty Ltd ("Woodside").

2 The employees worked pursuant to "fly in/fly out" arrangements, under which the respondent provided their accommodation while on location.

3 The respondent was notified of the intention of some of its employees, including the four employees who are the subject of these proceedings ("the relevant employees"), to engage in industrial action as part of the process of negotiating an enterprise agreement with the respondent under the *Fair Work Act* 2009 (Cth) ("the Act"). It is common ground that this action was "protected industrial action" within the meaning of s 408 of the Act. It is also common ground that the respondent did not seek to terminate the employment of the relevant employees as a result of their action.

4 The respondent notified the relevant employees that it intended to cease providing accommodation to them, contending it was obliged to do so during the period of industrial action by s 470(1) of the Act, which provides:

> "If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day."

5 The respondent's contention was accepted in the Federal Magistrates Court of Australia and on appeal in the Federal Court of Australia.

6 For the reasons which follow, the appeal to this Court should be allowed.

Background

7 The employment of the relevant employees was regulated by an enterprise agreement entitled the Mammoet Australia Pty Ltd Pluto Project Greenfields Agreement 2008 ("the Agreement"). The Agreement was an employer greenfields agreement made under s 330 of the *Workplace Relations Act* 1996 (Cth) ("the WR Act"). The operation of the Agreement was continued as a collective agreement-based transitional instrument by Item 2 of Sched 3 of the

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) ("the Transitional Act").

8 The Agreement passed its nominal expiry date on 19 September 2009 and had not been terminated or replaced by April 2010. The case proceeded on the footing that the terms of the Agreement continued to regulate the employment relationship.

9 Clause 38 of the Agreement was headed "Contract of Service". It contained the following relevant sub-clauses:

"STAND DOWNS

(6) The Company is entitled to deduct payment for any day or part of a day an Employee cannot be usefully employed because of any strike or any breakdown in machinery or any stoppage of work by any cause for which the Company cannot be reasonably held responsible, as long as the Company has no useful alternative work available.

…

GENERAL CONDITIONS

…

(13) Employees shall have no right to be paid for any time that they are not ready, willing and available to follow all lawful directions of the Company or to carry out all duties that they are capable of performing.

…

ABANDONMENT OF EMPLOYMENT

(16) Should an Employee have three (3) consecutive days of unauthorised absence from work, the Employee shall be deemed to have abandoned their employment, unless, through exceptional circumstances they have been unable to communicate their absence to the Company."

10 Clause 42 of the Agreement provided that "Employees classified as Distant Workers as defined … shall be entitled to the conditions contained at Appendix 7".

11 "Distant Worker" was defined as:

> "An Employee who is engaged or selected or advised by the Company to proceed from their Usual Place of Residence within Australia to construction work on the Burrup Peninsula and the Employee does so and that work is at such a distance that the Employee cannot return to their Usual Place of Residence each night."

12 "Usual Place of Residence" was defined as:

> "The Employee's place of residence at which they would usually reside and to which they cannot return to [sic] each night because they have proceeded to work on the Project at the direction of the Company."

13 Appendix 7 contained the following relevant clauses:

> "(6) The Company shall have the choice of providing each Distant Worker with either suitable board and lodging or paying the Living Away from Home Allowance set out in this Appendix.
>
> …
>
> (16) A Distant Worker shall, for the return journey to the location of their initial engagement, receive the same time, fares and meal payments … provided that no return payments shall be made if the Distant Worker:
>
> (a) terminates or discontinues their employment before completing four hundred and eighty (480) Project Working Hours of service on the Site (or prior to the job completion if the work is for less than two months); or
>
> (b) is dismissed for incompetence within eight (8) ordinary weeks of commencing on the job; or
>
> (c) is dismissed for misconduct."

14 The relevant employees met the definition of "Distant Workers" and the respondent was accordingly obliged by cl 6 of Appendix 7 either to provide them

with suitable accommodation or to pay a living away from home allowance ("LAHA"). The respondent chose to provide their accommodation. Woodside owned the accommodation and the respondent paid Woodside to allow the relevant employees to reside in its premises.

15 On 21 April 2010, the appellant notified the respondent of an intended 28 day stoppage of work on 28 April 2010.

16 On 27 April 2010, the respondent informed the relevant employees that, for the duration of any protected industrial action, the respondent would cease to pay for the relevant employees' accommodation. The respondent required the relevant employees to vacate their accommodation by 6.30 am on 28 April unless they made their own arrangements directly with the management of the accommodation.

Legislative context

17 The object of the Act, stated in s 3, is "to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians" by means which include those stated in s 3(f): "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".

18 Section 19(1) provides:

"***Industrial action*** means action of any of the following kinds:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

(d) the lockout of employees from their employment by the employer of the employees."

19 Part 3-3 of the Act deals with industrial action. Within Pt 3-3, Div 2 specifically deals with "protected industrial action", by which employers and employees who are engaged in collective bargaining negotiations for a proposed enterprise agreement are able to advance their competing claims. Its central provision is s 415, which provides, subject to specified exceptions, that no action lies in relation to any protected industrial action under any law in force in a State or Territory. Protected industrial action for a proposed enterprise agreement is defined by s 408 to comprise "employee claim action" (defined in s 409), "employee response action" (defined in s 410) and "employer response action" (defined in s 411). Section 416 provides that an employer engaging in employer response action against employees "may refuse to make payments to the employees in relation to the period of the action."

20 Also within Pt 3-3 of the Act, Div 9 restricts payments to employees relating to periods of industrial action. Section 470(1), the terms of which have already been set out, prohibits an employer making a payment to an employee in relation to the total duration of protected industrial action which an employee engaged or engages in on a day. Section 473 prohibits an employee from accepting, and an employee or employee organisation from asking for, a payment from an employer which would contravene s 470(1). Section 474(1) correspondingly prohibits an employer making a payment to an employee who engaged or engages on a day in any industrial action that is not protected industrial action (the prohibition is on payment to the employee "in relation to … the total duration of the industrial action" if that duration was at least four hours, and otherwise "in relation to … 4 hours of that day") and s 475 correspondingly prohibits an employee from accepting, and an employee or employee organisation from asking for, a payment from an employer which would contravene s 474(1). Sections 470(1), 473, 474(1) and 475 are all civil remedy provisions, contravention of which gives rise to liability to penalty under s 539 of the Act.

21 Section 470(1), by s 470(2), does not apply to a partial work ban. Protected industrial action that amounts to a partial work ban in which an employee engaged or engages against an employer on a day is dealt with in s 471. That section allows the employer, by written notice to the employee, proportionately to reduce the employee's payments in relation to the period starting at the start of the first day on which the employee implemented the partial work ban (or the start of the next day on which the employee performs

work after the day on which the notice was given if that is later) and ending at the end of the day on which the ban ceases.

22 Argued to be relevant to the construction of s 470(1) are several provisions within Pt 2-9 of the Act concerning certain terms and conditions of employment. Section 323 provides:

> "(1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
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> (a) in full (except as provided by section 324); and
>
> (b) in money by one, or a combination, of the methods referred to in subsection (2); and
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> (c) at least monthly.
>
> (2) The methods are as follows:
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> (a) cash;
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> (b) cheque, money order, postal order or similar order, payable to the employee;
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> (c) the use of an electronic funds transfer system to credit an account held by the employee;
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> (d) a method authorised under a modern award or an enterprise agreement.
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> (3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method."

23 Section 324 allows an employer to deduct an amount from an amount payable to an employee in accordance with s 323(1), amongst other circumstances, if the deduction is authorised: in writing by the employee and is principally for the employee's benefit; or by the employee in accordance with an enterprise agreement. Section 332(1) makes clear that an employee's earnings may in some circumstances include "non-monetary benefits", defined in s 332(3) to include "benefits other than an entitlement to a payment of money" to which an employee "is entitled in return for the performance of work" and "for which a reasonable money value has been agreed by the employee and the employer".

24 The ability to initiate or participate in protected industrial action is, by virtue of sub-ss (1)(b) and (2)(c) of s 341, a "workplace right", in respect of which s 340(1) of the Act relevantly provides:

> "A person must not take adverse action against another person:
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> (a) because the other person:
>
> (i) has a workplace right; or
>
> (ii) has, or has not, exercised a workplace right; or
>
> (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
>
> (b) to prevent the exercise of a workplace right by the other person."

25 By virtue of s 342(1), an employer takes "adverse action" against an employee if the employer "alters the position of the employee to the employee's prejudice" save, relevantly, that by virtue of s 342(3) adverse action does not include action authorised under the Act.

The application to the Federal Magistrates Court

26 The appellant applied to the Federal Magistrates Court, seeking relief on the basis that the respondent's refusal to provide accommodation contravened cl 6 of Appendix 7 of the Agreement and constituted adverse action against the relevant employees within the meaning of s 342(1), in contravention of s 340(1) of the Act.

27 Dismissing the application, Lucev FM upheld a submission by the respondent, made at the end of the appellant's case, that the respondent had no case to answer on the basis that the provision of accommodation was the making of a payment prohibited by s 470(1) of the Act. By virtue of s 342(3), the withholding of accommodation therefore could not be adverse action[1] and,

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1 *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2011) 254 FLR 59 at 84 [114].

because "[w]hat the [Act] prohibits a collective agreement cannot permit", "[t]he claim for breach of the … Agreement must also therefore fail"[2].

28 It was unnecessary for Lucev FM to deal with the respondent's alternative submission that the non-provision of accommodation during the period of protected industrial action did not contravene s 340(1) of the Act or cl 6 of Appendix 7 of the Agreement because the Agreement did not require the respondent to provide accommodation to a Distant Worker if the Distant Worker was not ready, willing and available to work.

29 The reasoning which supported the proposition that the provision of accommodation was the making of a payment prohibited by s 470(1) of the Act was summarised by Lucev FM in the following passage[3]:

> "The legislative purpose of s 470 of the [Act], as with its immediate predecessors under the WR Act (variously ss 187AA and 507) is, as it applies to employees taking industrial action, 'that employees are to bear the economic loss of their industrial action'.[4]
>
> In the circumstances of this case, the Affected Employees would not, contrary to the legislative purpose of s 470 of the [Act], bear the financial consequences of the Protected Industrial Action if Mammoet continued to provide them with the Accommodation (at a cost to Mammoet of $90 per person per day) for the 28-day duration of the Protected Industrial Action.
>
> The provision of the Accommodation enables the Affected Employees to live away from home to perform the work so as to earn the other remuneration set out in the … Agreement. The provision of the Accommodation is therefore:

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2 (2011) 254 FLR 59 at 84 [115].

3 (2011) 254 FLR 59 at 83-84 [111]-[113].

4 *O'Shea v Heinemann Electric Pty Ltd* (2008) 172 FCR 475 at 487 [32]. See also *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49 at 73-74; *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 557-558 [83]-[84].

a) directly related to the work performed by the Affected Employees and to their capacity to earn remuneration for that work; and

b) for reasons set out above, a payment in relation to the work performed by the employee.

There is therefore a direct, or at the very least a sufficient and material, connection between the provision of the Accommodation and the work performed by the employees under the terms of the … Agreement. Were the Accommodation to be provided during the period of Protected Industrial Action it would therefore be a 'payment in relation to the total duration of the industrial action on the day of the action'. It would therefore be a payment which must not be made under s 470(1) of the [Act]." (one footnote omitted)

30 This passage highlights the controlling influence of his Honour's view of the perceived legislative purpose that employees should bear, not only the loss of remuneration for the period of protected industrial action, but also the burden of all financial consequences of that action. It also reflects the submission advanced in this Court on behalf of the respondent as to why the provision of accommodation to employees was "in relation to" the total duration of the protected industrial action taken by the relevant employees on the days it took place.

31 The passage invites two observations to which it will be necessary to return in due course. First, on his Honour's view of the legislative purpose, which controls the interpretation of s 470(1) of the Act, an employer must not, on pain of the penalty prescribed by the Act, comply with any contractual or award obligation to employees while they take protected industrial action where the obligation has financial consequences for either party. Secondly, his Honour's conclusion that the relationship required by s 470(1) of the Act, between the "payment to an employee" and "the total duration of the industrial action" on the day or days on which it took place, was satisfied by the "connection between the provision of the Accommodation and the work performed by the employees under the terms of the … Agreement" does not reflect the terms of s 470(1), which is concerned to prohibit a payment where work has *not* been performed by employees under the terms of the Agreement.

The appeal to the Federal Court of Australia

32 The appellant appealed to the Federal Court, where the principal focus of its submissions was that the provision of accommodation under the Agreement

was not a "payment" made "to an employee". In particular, the appellant argued that, in light of s 323(1) of the Act, when s 470(1) of the Act speaks of a "payment to an employee", it necessarily speaks of a payment in money to the employee.

33 Dismissing the appeal, Gilmour J interpreted s 323(1) to mean no more than that an employer must pay an employee "amounts payable to the employee in relation to the performance of work … in money."[5] His Honour held that the provision of accommodation by the respondent to each of the relevant employees was a "payment to an employee", but not an amount payable in relation to the performance of work within the meaning of the provision[6]:

> "I do not consider that the expression 'payment to an employee' in s 470 should be construed narrowly. The words 'payment' or 'pay' are used variously in the [Act] in combination with other words which have a qualifying or confining effect: 'payment of *fees* (s 30A(1))'; 'the employer must pay the employee at the employee's *base rate of pay* for the employee's ordinary hours of work … (s 81(6))'; 'the employer must pay the employee at the employee's *base rate of pay* for the employee's ordinary hours of work … (s 90(1))' and 'payment of *wages* and other *monetary entitlements* (s 139(1)(f)(ii))'. If Parliament had intended that in s 470 the prohibition be solely to the payment of 'wages' or an amount 'payable to the employee in relation to the performance of work' as is found, for example, in s 323(1) then it could have employed that language or language to that effect. It did not do so. Moreover, s 323(1) does not provide, contrary to the appellant's submission that 'employees must be paid "in money"'. Rather, it provides relevantly, that an employer must pay an employee 'amounts payable to the employee in relation to the performance of work … in money'. The relevant payment is thus qualified, which as I have observed is not the case with s 470(1)." (emphasis in original)

34 His Honour considered that the purpose of s 470(1) was to encourage employers and employees to negotiate and resolve disputes by ensuring that each bears the costs of their industrial action, so that the employer bears the cost of

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5 *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2012) 206 FCR 135 at 142 [43].

6 (2012) 206 FCR 135 at 142 [43].

lost production and the employee receives no payment[7]. In his Honour's view, this purpose would be undermined if the respondent was permitted to bear the cost of the accommodation[8]. He explained[9]:

> "The appellant's submission, if accepted, would mean, where the provision of accommodation to an employee formed part of his or her wages, that payment of wages by that means was prohibited by s 470. However, where the provision of accommodation did not form part of an employee's wages, but was merely an entitlement, the payment for accommodation, whether to a third party or by way of reimbursement to the employee would not be prohibited. I find that a very unattractive result."

35 His Honour considered that the concept of "payment" in s 470(1) was satisfied here, either as a payment in kind by the respondent by way of the provision of accommodation or as a payment by the respondent to Woodside on behalf of the relevant employees. As to the latter, he saw it as significant that the respondent "provided" the accommodation by paying Woodside for the cost of the accommodation used by the employees[10], and saw no relevant difference between the cessation of payment to Woodside for the accommodation and the cessation of payment to employees of LAHA[11]. He explained[12]:

> "It would be an extraordinary result if, by virtue of s 470(1) of the [Act], an employer was prohibited from making payment to its employees of amounts described in the notes to s 323(1) of the [Act], namely, incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments but such prohibition did not extend to payments made for accommodation for those employees during the period of protected industrial action."

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7 (2012) 206 FCR 135 at 141 [35], [37].

8 (2012) 206 FCR 135 at 142 [44].

9 (2012) 206 FCR 135 at 142-143 [45].

10 (2012) 206 FCR 135 at 143 [46].

11 (2012) 206 FCR 135 at 143 [47].

12 (2012) 206 FCR 135 at 143-144 [48].

36 His Honour concluded that "payment" in s 470(1) of the Act extends to payments in kind[13] and includes the benefit of accommodation provided "to enable the employees to be in a position to perform their employment and earn their pay"[14]. His view was that a contrary conclusion would have the effect that "it would be the respondent and not the employees who carried that cost of the industrial action", and that such a result "would serve only to undermine the policy of the provision."[15]

The appeal to this Court

37 In this Court, the appellant again submitted that "payment" in s 470(1) refers to payments in money in conformity with s 323 of the Act. In the alternative, the appellant submitted that, if "payment" in s 470(1) includes the provision of non-monetary benefits such as accommodation, it is nevertheless confined to benefits by way of a *quid pro quo* for work. The appellant accepted that the purpose of s 470(1) is to deter the taking of protected industrial action, but argued that the provision pursues that purpose by outlawing the payment of "strike pay", that is to say, payment by the employer of the employee's remuneration for a period during which the employee's services were not available to the employer because of the industrial action taken by the employee.

38 The respondent for its part submitted that Gilmour J correctly identified the legislative purpose of s 470(1) of the Act as being to encourage employers and employees to negotiate and resolve disputes by ensuring each bears the cost of industrial action by requiring that the employer bears the cost of lost production and the employee is not paid. To confine the operation of s 470(1) by confining the prohibited payments to those in the nature of a *quid pro quo* would allow the prohibition to be evaded by the making of a gift. The respondent submitted that Gilmour J was therefore correct to hold that, for the purposes of s 470(1) of the Act, "payment": has a meaning different from "wages" or "earnings"; includes both payment of money and payment in kind; and includes accommodation provided to enable the employees to be in a position to perform their employment and earn their pay. It advanced the proposition (expressly accepted by Lucev FM) that the relationship between the payment to an employee and the "total duration of the industrial action" contemplated by

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13 (2012) 206 FCR 135 at 142 [44].

14 (2012) 206 FCR 135 at 144 [48].

15 (2012) 206 FCR 135 at 144 [48].

s 470(1) was satisfied in this case because the provision of accommodation was for the purpose of enabling the relevant employees to work at the location of the Project.

39 The respondent, by notice of contention, also contended that the Agreement on its proper construction did not require the respondent to provide a Distant Worker with accommodation when he or she was not ready, willing and available to work. The respondent submitted that, if its construction of the terms of the Agreement is accepted, its non-provision of accommodation could not constitute "adverse action" under s 342 of the Act. The employees could not have been prejudiced in their employment because they suffered no adverse effect to their existing legal rights. It was said that their rights under the Agreement were unchanged by the respondent's conduct; rather, it was the action of the employees themselves that caused any deterioration in their conditions by reason of their not being ready, willing and available to work and thereby not satisfying cl 6 of Appendix 7 of the Agreement.

Application of s 470(1)

40 In *Carr v Western Australia*[16] Gleeson CJ said:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. … That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. …
>
> Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.
>
> … [T]he general purpose of legislation of the kind here in issue is reasonably clear; but it reflects a political compromise. The competing interests and forces at work in achieving that compromise are well known.

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16 (2007) 232 CLR 138 at 142-143 [5]-[7]; [2007] HCA 47.

> The question then is not: what was the purpose or object underlying the legislation? The question is: how far does the legislation go in pursuit of that purpose or object?"

41 The idea contained in the last paragraph of this passage was pithily expressed by the Supreme Court of the United States in *Rodriguez v United States*[17]: "[N]o legislation pursues its purposes at all costs."

42 One may accept that the purpose of s 470(1) is to allocate the economic loss attributable to industrial action as between employers and employees by requiring employees to bear the burden of the loss of earnings occasioned by the industrial action and the employer to bear the burden of the loss of production. But it is quite plain that the provision does not comprehensively address the allocation of all the costs of industrial action. Nor does it prohibit performance of the entirety of the obligations of an employer to its employees for the duration of the industrial action.

43 Section 470(1) is, rather, directed at a particular kind of transaction: a "payment to an employee" which is "in relation to the total duration of the industrial action" on a day. It is a provision which limits voluntary conduct and sanctions that limitation by the imposition of a penalty. Its text must be read in light of the statutory object expressed in s 3(f) of providing "clear rules governing industrial action".

44 While the full terms of the provision must be borne in mind, it is convenient to organise discussion of its operation into two parts, the first concerned with the transaction of payment to an employee, and the second with the relationship between that transaction and the duration of industrial action.

"Payment to an employee"

45 The appellant's argument based on s 323 is not persuasive. The terms of s 323(3) acknowledge that an enterprise agreement may specify a method for the payment of "the money" by a "particular method" other than "in money". The reference in s 323(3) to "the money" is a reference back to the prescription in s 323(1) of "amounts payable to the employee in relation to the performance of work". It is tolerably clear from the terms of s 323(3), and is confirmed by the Explanatory Memorandum which accompanied the Bill for the *Fair Work*

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17 480 US 522 at 525-526 (1987).

Act 2009[18], that s 323(1) addresses the same mischief addressed by "Truck Acts" as they had by then come to exist in each State[19], that is, that an employee's entitlement to payment for work might be compromised by an employer requiring the employee to accept some form of payment in kind of less value than the payment of money forgone. Section 323(3) expressly acknowledges that this mischief is not a concern where the provision is contained in an enterprise agreement.

46 The provision of accommodation by an employer to an employee may involve the transfer from the employer to the employee of an economic benefit. The benefit may even be capable of being measured and expressed in terms of monetary value, by reference to the cost to the employer paid or payable for the accommodation. But that circumstance itself does not mean that there has been a payment by the employer to the employee of that sum.

47 While the signification of "payment" in various sections of the Act may be affected by the particular context in which it appears, none of the other provisions of the Act to which the respondent referred in its argument actually speaks of "payment" of non-monetary benefits. It is true, as Gilmour J noted[20], that in other provisions within the Act where the terms "payment" and "pay" are to be found[21], the terms are used variously with other words that qualify or confine them, for example "payment of *wages* and *other monetary entitlements*" and "pay ... the employee's *base rate of pay*". It is also true that the term "payment" in s 470(1) is not qualified by the text in which it appears. Nevertheless, the usage of these other provisions is consistently to the effect that when the Act speaks of payment it is speaking of a payment in money.

48 The true construction of "payment" within the meaning of s 470(1) as a payment of money is also suggested by the character of s 470(1) as a civil

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18 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 205 [1278].

19 *Industrial Relations Act* 1996 (NSW), ss 117-118; *Victorian Workers' Wages Protection Act* 2007 (Vic), ss 6-7; *Fair Work Act* 1994 (SA), s 68; *Industrial Relations Act* 1999 (Q), ss 391-393; *Minimum Conditions of Employment Act* 1993 (WA), ss 17B-17D; *Industrial Relations Act* 1984 (Tas), s 51.

20 (2012) 206 FCR 135 at 142 [43].

21 *Fair Work Act* 2009 (Cth), ss 30A(1), 81(6), 90(1), 139(1)(f)(ii), 323(1).

remedy provision. It is only a transaction which answers the description of "a payment to an employee" which attracts the penalty imposed[22]. Like the imposition of criminal liability, the imposition of a civil penalty should be "certain and its reach ascertainable by those who are subject to it."[23] That general principle of statutory construction is reinforced in this case by the expressly articulated object of the Act to provide "clear rules governing industrial action"[24].

49 These considerations lead us to conclude that liability to the penalty imposed upon a contravention of s 470(1) is not attracted by the transfer of just any economic benefit by an employer to an employee during a period of protected industrial action. Not only would such an imposition be insufficiently clear and of insufficiently ascertainable reach, it would also have the consequence that employers and employees could become liable to a penalty, not only by taking some positive action, but also by doing no more than maintaining the status quo. It is not to be supposed that the legislature intended such a result.

"In relation to the total duration of the industrial action"

50 Section 470(1) prohibits the making of "a payment to an employee in relation to the total duration of the industrial action on that day." That is a prohibition upon the making of a payment to recoup, in whole or in part, what would have been payable in relation to the time during which the employee engaged in industrial action had the employee worked during that period.

51 An employee who engages in industrial action does not, for the duration of the industrial action, render the services on which the entitlement to remuneration commonly depends. But to say that is distinctly not to say that entitlements of an employee which are dependent on the subsistence of the contract of employment, rather than the actual performance of services, even if sensibly described as "payments", are "payment[s] … in relation to the total duration of the industrial action". To speak of "a payment to an employee in relation to the total duration of the industrial action" is to speak of a period of

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22 *Potts' Executors v Inland Revenue Commissioners* [1951] AC 443 at 453-455; *In re HPC Productions Ltd* [1962] Ch 466 at 485.

23 *Director of Public Prosecutions (Cth) v Keating* (2013) 87 ALJR 657 at 665 [48]; 297 ALR 394 at 404; [2013] HCA 20. See also *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 at 47-48.

24 *Fair Work Act* 2009 (Cth), s 3(f).

employment in respect of which no remuneration is earned by the employee. The concern addressed by s 470(1) of the Act is that the taking of industrial action must not be the occasion of a payment by the employer. The obligation to provide accommodation was not the occasion of the industrial action taken by the relevant employees.

52 The legislative history confirms that the relationship between payment and industrial action contemplated by s 470(1) is that the non-performance of work by the employee is the occasion of the proscribed payment. These indications support the view that the purpose of the provision is to prohibit "strike pay", that is, payments by an employer to "make up", in whole or in part, wages not earned by the employee during the period of industrial action.

53 From 1979 to 1996, there was no prohibition on the making of a payment by an employer to an employee in relation to loss suffered by the employee during a period of industrial action by the employee. The position under s 25A of the *Conciliation and Arbitration Act* 1904 (Cth), which applied from 25 October 1979 until 28 February 1989, was that an industrial award or agreement, by way of conciliation or arbitration respectively, could not be made "in respect of a claim for the making of a payment to employees in respect of a period during which those employees were engaged in industrial action." Similarly, a dispute over strike pay was excluded from the range of disputes susceptible to resolution under s 124 of the *Industrial Relations Act* 1988 (Cth), which was in force from 1 March 1989 until 30 December 1996.

54 That state of the law was altered by the enactment of s 187AA(1) of the WR Act, which began operation on 31 December 1996. Until 26 March 2006, s 187AA(1) of the WR Act provided that "[a]n employer must not make a payment to an employee in relation to a period during which the employee engaged, or engages, in industrial action".

55 From 27 March 2006 to 30 June 2009, the WR Act as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) provided by s 507(1) that:

> "This section applies if an employee engaged, or engages, in industrial action (whether or not protected action) in relation to an employer on a day."

56 Section 507(2) provided that:

> "The employer must not make a payment to an employee in relation to:

(a) if the total duration of the industrial action on that day is less than 4 hours—4 hours of that day; or

(b) otherwise—the total duration of the industrial action on that day."

57 It is pertinent to note that in the Second Reading Speech which accompanied the Bill introducing s 187AA of the WR Act it was said that[25]:

> "It will be unlawful: for an employer to pay strike pay; a union, or its representatives, to take industrial action to pursue strike pay; or for an employee to accept strike pay."

58 In *Independent Education Union of Australia v Canonical Administrators*, Ryan J said[26]:

> "I consider that s 187AA in the context of Pt VIIIA of the WR Act evinces a policy that collective bargaining should occur in an environment where employer and employee are to appreciate and accept the detrimental consequences for themselves of industrial action used as part of the negotiating armoury. For the employee those consequences are normally loss of remuneration in respect of the period of the industrial action and for the employer they are the loss of production attendant on a lockout. Consistently with that policy, s 187AA is framed to ensure that the loss of remuneration is not recouped after the bargaining is over".

59 The legislative history, the Second Reading Speech, and the observations of Ryan J point strongly to the conclusion that the mischief at which s 470(1) is directed is the payment of strike pay, that is, the making of payments whose relationship to industrial action is to be found in the recoupment of wages lost during the period of the action. There is no suggestion that the purpose of s 470(1) is to suspend the entirety of the employer's obligations under the relationship of employment. Indeed, the Act contemplates the continued subsistence of the employment relationship during and after the industrial action.

60 Whether the prohibition is apt to capture any given payment may depend on the circumstances of the case. For example, a payment by way of a gift might

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25 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 May 1996 at 1304.

26 (1998) 87 FCR 49 at 73-74.

be caught if the circumstances were such as to show that it was made by way of recompense for wages not earned. It is not necessary or desirable to attempt an exhaustive statement of those circumstances.

61 It is sufficient for the purposes of this case to say that the entitlement of the relevant employees to accommodation was established under cl 6 of Appendix 7 of the Agreement. The provision of that accommodation was a benefit to which the relevant employees were entitled upon attending at the work site unless and until they were directed to return to their usual place of residence. It was neither a payment of money, nor provided in relation to the non-performance of work during the period of industrial action.

Notice of contention

62 The view of the courts below that s 470(1) afforded an answer to the appellant's claims of adverse action and breach of contract meant that the appellant's claim was dismissed. Neither of the courts below addressed the respondent's further contention that the appellant's claim should fail for the reason advanced that the relevant employees were not ready, willing and available to work, and accordingly were not entitled to the provision of accommodation. The respondent seeks to rely on this contention to maintain the decision of the Federal Court.

63 The appellant's primary submission was that this Court should not deal with the notice of contention as it was not addressed below, and because it also involves questions of fact relating to the reasons for which the respondent took the action it did, so that the matter cannot finally be resolved in this Court whatever view is taken of the issues raised by the appeal and the notice of contention. That having been said, it does not appear that the respondent's contention turns on any disputed matters of fact. The respondent submits that, because this contention would justify upholding the decisions below, this Court should deal with it.

64 The decisive consideration favouring dealing with the notice of contention is the circumstance that the resolution of the argument as to the application of s 470(1) of the Act has necessitated some consideration of the terms of the Agreement; and it is undesirable that the ramifications of that consideration upon the respondent's associated arguments relating to the operation of the Agreement should be left in limbo.

65 By virtue of cl 42 of the Agreement, the relevant employees were entitled, as Distant Workers, "to the conditions contained at Appendix 7". Clause 6 of

Appendix 7 of the Agreement entitled the respondent to choose whether to provide each Distant Worker with "suitable board and lodging" or pay LAHA.

66 The Agreement operated upon the employment relationship of the respondent and the relevant employees to effect "an alteration in the rights and obligations of the parties to the contract [of employment], but it did so by force of"[27] the WR Act and latterly the Transitional Act. To the extent of any inconsistency between the terms of the employment contract between the parties and the Agreement, the terms of the Agreement prevail[28].

67 In this case, the respondent had chosen to provide suitable board and lodging for the relevant employees by virtue of their status as Distant Workers, that is, as employees "advised … to proceed from their Usual Place of Residence within Australia to construction work on the Burrup Peninsula and the Employee does so and that work is at such a distance that the Employee cannot return to their Usual Place of Residence each night."

68 Under the Agreement, the relevant employees' entitlement to suitable board and lodging arose in consequence of their having acted upon the respondent's advice to proceed to the location of the Project. The Agreement does not contain any express provision for the defeasance of an entitlement to accommodation which arose in this way.

69 The respondent argued that the entitlement to accommodation is dependent upon an implied condition that the relevant workers should be ready, willing and available to work during working hours. Absent an implied term of the kind for which the respondent contends, an employee's entitlement to accommodation would depend simply on the continuance of the employer-employee relationship, pursuant to which the entitlement accrued[29].

70 It is instructive that the express terms of the Agreement in relation to both travel and accommodation contain no suggestion that the exercise of rights of either party to negotiate in accordance with the provisions of the Act may affect travel or accommodation entitlements. Indeed, the circumstance that sub-cll 6

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27 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 419; [1995] HCA 24. See also *Visscher v Giudice* (2009) 239 CLR 361 at 385-386 [71]; [2009] HCA 34.

28 *Gapes v Commercial Bank of Australia Ltd* (1980) 37 ALR 20 at 21-22, 25.

29 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477; [1933] HCA 25.

and 13 of cl 38 of the Agreement make express provision for the consequence of a failure by an employee to be available for work suggests that no further implication should be made[30].

71 Similarly, cl 16 of Appendix 7 expressly provides for the non-payment of travel costs. The express provisions of the Agreement in relation to the loss of travel entitlements exclude the implication of the condition for which the respondent contends so far as travel entitlements are concerned.

72 The effect of the Agreement is that, while the employment relationship subsists, accommodation is to be provided by the respondent to its employees who have acted upon its instruction to travel to the location of the Project. It is the continuation of the employment relationship and the employee's entitlements under it which is the condition on which the provision of accommodation depends.

73 Finally, even if it were correct to say that the relevant employees ceased to be legally entitled to insist upon the provision of accommodation because they were not ready, willing and available to work, the respondent's denial of accommodation would be an alteration of the position of the relevant employees to their prejudice so as to constitute adverse action within the meaning of s 342 of the Act. Even though the refusal of accommodation would, on this assumption, not be a denial of a legally enforceable entitlement, it would effect a deterioration in the advantage enjoyed by the relevant employees had the refusal of accommodation not occurred.

74 The refusal of the accommodation was not an automatic consequence of the operation of the law upon the conduct of the relevant employees. The denial of the use of accommodation resulted from the respondent's action by way of response to the protected industrial action of the relevant employees. Even if that action put them in breach of the Agreement, the respondent's action in response was a matter of choice by it, a choice which s 340(1) of the Act denied to it.

Conclusion

75 The appeal should be allowed. The orders below should be set aside. The application should be remitted to the Federal Circuit Court to be heard and determined according to law.

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30 *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153 at 158; [1983] HCA 46.