HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, NETTLE, GORDON AND EDELMAN JJ

REGIONAL EXPRESS HOLDINGS LIMITED APPELLANT

AND

AUSTRALIAN FEDERATION OF AIR PILOTS RESPONDENT

Regional Express Holdings Limited v Australian Federation of Air Pilots
[2017] HCA 55
13 December 2017
M71/2017

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

M J Follett with L R Howard for the appellant (instructed by Clayton Utz Lawyers)

J M Firkin with J F Swanwick for the respondent (instructed by Australian Federation of Air Pilots)

CATCHWORDS

Regional Express Holdings Limited v Australian Federation of Air Pilots

Industrial relations – *Fair Work Act* 2009 (Cth) – Entitlement of industrial association to represent industrial interests of persons – Where industrial association registered organisation of employees under *Fair Work (Registered Organisations) Act* 2009 (Cth) – Where industrial association applied for orders in relation to alleged contraventions of civil remedy provisions in relation to persons – Where persons not members of industrial association but eligible for membership in accordance with eligibility rules of industrial association – Whether industrial association had standing to apply for orders on basis it was entitled to represent industrial interests of persons within meaning of s 540(6)(b)(ii) of *Fair Work Act* – Whether eligibility of persons for membership of industrial association sufficient to make industrial association entitled to represent industrial interests of persons within meaning of s 540(6)(b)(ii) of *Fair Work Act*.

Words and phrases – "*Dunlop Rubber* principle", "eligibility rules", "eligible for membership", "entitled to represent the industrial interests of", "industrial association", "registered organisation of employees".

Fair Work Act 2009 (Cth), ss 539(2), 540(6)(b)(ii), 546.

1 KIEFEL CJ, KEANE, NETTLE, GORDON AND EDELMAN JJ. The question for determination in this appeal is whether the fact that a person is eligible for membership of an industrial association in accordance with its eligibility rules is sufficient to make the industrial association "entitled to represent the industrial interests of" that person within the meaning of s 540(6)(b)(ii) of the *Fair Work Act* 2009 (Cth). For the reasons which follow, the question should be answered that, in the case of an industrial association which is registered as an organisation under the *Fair Work (Registered Organisations) Act* 2009 (Cth) ("the FWRO Act"), it is sufficient.

Relevant statutory provisions

2 An "industrial association" is defined by s 12 of the *Fair Work Act* as an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; an association of employees or independent contractors, or both, a purpose of which is the protection and promotion of their interests in matters concerning their employment or their interests as independent contractors; or an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors.

3 An "industrial law" is defined by s 12 of the *Fair Work Act* as the Act itself, the FWRO Act, a law of the Commonwealth that regulates the relationships between employers and employees, or a State or Territory industrial law. The FWRO Act enables an industrial association that meets the standards set out in that Act to register as an organisation under that Act ("registered organisation").

4 Chapter 3 of the *Fair Work Act* is concerned with rights and responsibilities of employees, employers and organisations. Section 336 provides that the objects of Pt 3-1 of Ch 3 include protecting workplace rights; protecting freedom of association by ensuring that persons are, among other things, free to be represented, or not represented, by industrial associations; and providing effective relief for persons who have been adversely affected as a result of contraventions of Pt 3-1.

5 Section 340(1) provides, relevantly, that a person must not take adverse action against another person because the other person has a workplace right or has exercised or proposes to exercise a workplace right, or in order to prevent the exercise of a workplace right. A "workplace right" is defined by s 341 as including an entitlement to the benefit of a workplace law, workplace instrument

or order made by an industrial body. Section 12 defines an "industrial body" as the Fair Work Commission, or a court or commission performing or exercising functions and powers under an industrial law corresponding to the functions and powers conferred on the Fair Work Commission.

6 Section 343(1) provides that a person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to do or not do so in a particular way.

7 Section 345(1) provides that a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person or the exercise, or effect of the exercise, of a workplace right by another person.

8 Chapter 4 of the *Fair Work Act* provides for compliance and enforcement. Section 539, which is within Ch 4, stipulates the civil remedy provisions of the Act and provides separately for each civil remedy provision the persons who may apply to specified courts for orders in relation to a contravention or proposed contravention of that civil remedy provision. As is set out in item 11 of the table in s 539(2), ss 340(1), 343(1) and 345(1) are civil remedy provisions and the persons who may apply to the Federal Court or the Federal Circuit Court for orders in relation to a contravention or proposed contravention of any of those provisions are a person affected by the contravention, an industrial association and an inspector.

9 Section 546 relevantly provides that the Federal Court or the Federal Circuit Court may, on application, order a person to pay a pecuniary penalty if the Court is satisfied that the person has contravened a civil remedy provision.

10 Section 540 limits the persons who may apply for orders in relation to contraventions or proposed contraventions of civil remedy provisions. Relevantly, sub-ss (5) and (6) provide that:

> "*Employer organisations*
>
> (5) An employer organisation may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation has a member who is affected by the contravention, or who will be affected by the proposed contravention.

Industrial associations

(6) An industrial association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if:

(a) the industrial association is affected by the contravention, or will be affected by the proposed contravention; or

(b) if the contravention is in relation to a person:

(i) the person is affected by the contravention, or will be affected by the proposed contravention; and

(ii) the industrial association is entitled to represent the industrial interests of the person."

The facts

11 The appellant ("Rex") is in the business of providing commercial aviation services. On 5 September 2014, it sent a letter to a number of persons to the effect that any Rex cadet who insisted on his or her workplace right to appropriate accommodation during layovers under cl 58.1 of the Regional Express Pilots' Enterprise Agreement 2011 would not be given a position of command[1].

12 The respondent ("the Federation") is an industrial association which is a registered organisation of employees under the FWRO Act. The Federation alleges that the letter contravened various civil remedy provisions of the *Fair Work Act* (being ss 340(1), 343(1) and 345(1)) in relation to two separate groups of persons.

13 It is not in issue that, if the sending of the letters contravened s 340(1), s 343(1) or s 345(1), the contraventions were in relation to the persons to whom Rex sent the letters. The question is whether the Federation is entitled to represent the industrial interests of those persons. It has not been alleged that any of those persons is a member of the Federation. It is common ground that they are entitled to be members of the Federation pursuant to its eligibility rules.

---

1 *Australian Federation of Air Pilots v Regional Express Holdings* [2016] FCCA 316 at [2]-[4].

Proceedings at first instance

14 On 15 April 2015, the Federation applied to the Federal Circuit Court of Australia for, inter alia, the imposition of pecuniary penalty orders for the alleged contraventions, pursuant to item 11 of the table in s 539(2) of the *Fair Work Act*.

15 Rex applied to have the claim summarily dismissed on the ground that the Federation lacked standing. The primary judge (Judge Riethmuller) rejected[2] Rex's application on the basis that, because the persons to whom the letter had been sent – and who were therefore affected by the alleged contraventions – were eligible for membership of the Federation, the Federation was entitled to represent their industrial interests within the meaning of s 540(6)(b)(ii) of the *Fair Work Act*.

The appeal to the Full Court of the Federal Court

16 Rex's appeal to the Full Court of the Federal Court of Australia (Jessup J, with whom North and White JJ agreed) was dismissed[3]. The Full Court based their decision on an historical survey of legislative development of the expression "entitled to represent the industrial interests of". As Jessup J observed[4], the expression owes its origins to the line of cases, culminating in *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia*[5], which established the entitlement of a trade union to represent the industrial interests of employees eligible for membership of the union ("the *Dunlop Rubber* principle"). From there, it may be traced through provisions of the *Conciliation and Arbitration Act* 1904 (Cth), the *Industrial Relations Act* 1988 (Cth) and the *Workplace Relations Act* 1996 (Cth) to the current legislative framework of the *Fair Work Act*. Over the years, it has been legislatively deployed, and understood, as meaning that an industrial organisation is entitled to represent the industrial interests of employees who are eligible for membership

---

2 See *Federation v Rex* [2016] FCCA 316 at [29]-[30], [43].

3 *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2016) 244 FCR 344.

4 *Rex v Federation* (2016) 244 FCR 344 at 350 [16] (North J and White J agreeing at 345 [1], 365 [65]).

5 (1957) 97 CLR 71; [1957] HCA 19.

of the organisation[6]. Jessup J concluded[7] that it is used in s 540(6)(b)(ii) in the same sense.

The parties' contentions

17 Rex contended that the Full Court erred by allowing themselves to be diverted from the text of the legislation by judicial and legislative history. In Rex's submission, it is also apparent that the Full Court misstated or misunderstood the *Dunlop Rubber* principle as establishing that a registered trade union in an industrial dispute represented the industrial interests of non-members. According to Rex, this Court's decision in *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd*[8] established that, when a trade union made demands on an employer in relation to the terms and conditions of non-member employees, the union was not representing the interests of the non-members but rather only the interests of the union's members. Alternatively, Rex contended, the Full Court erred by basing their analysis on a meaning of the expression "entitled to represent the industrial interests of the person" which, even if it were applicable to a registered trade union, was incapable of application to some forms of industrial association that do not have eligibility rules. In Rex's submission, although the expression "entitled to represent the industrial interests of the person" may present a constructional choice, it is a choice that should be made in favour of a narrow conception of entitlement equating to a "title, right or claim" such as would arise from membership. To do otherwise, it was contended, would be opposed to the limitations on the rights of representation stipulated in s 540(6) and (7) of the *Fair Work Act* and the legislative policy of freedom of association disclosed within the attendant objects of Pt 3-1 of the Act.

18 The Federation contended that the Full Court's construction should be upheld, essentially for the reasons given by the Full Court.

---

6 *Rex v Federation* (2016) 244 FCR 344 at 363 [56] (North J and White J agreeing at 345 [1], 365 [65]).

7 *Rex v Federation* (2016) 244 FCR 344 at 364 [60] (North J and White J agreeing at 345 [1], 365 [65]).

8 (1993) 178 CLR 352; [1993] HCA 34.

The text of the legislation

19 The Full Court were not diverted from the text of the legislation. The expression "entitled to represent the industrial interests of the person" does not have a plain and ordinary meaning which in and of itself reveals the criterion of entitlement. Accordingly, in order to discern the statutory purpose of the expression, and thence the criterion of entitlement, the Full Court adopted an entirely conventional approach to statutory construction of looking to the context of the provision both within the *Fair Work Act*[9] and against the background of its legislative history[10].

(i) Context within the Fair Work Act

20 Looking first to the context of the provision within the *Fair Work Act*, it may be observed that the expression "entitled to represent the industrial interests of" appears in multiple provisions throughout the Act. For example, under s 176(1) it is provided that an employee organisation may act as the bargaining representative of an employee for a proposed enterprise agreement that is not a "greenfields agreement" if the employee is a member of the organisation[11] or the employee appoints the organisation in writing as his or her bargaining representative[12] and the organisation "is entitled to represent the industrial interests of the employee in relation to work that will be performed under the

---

9 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24], 391-392 [30]-[31] per French CJ and Hayne J, 411-412 [88]-[89] per Kiefel J; [2012] HCA 56.

10 See *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55; *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247 at 265-266 [42] per Crennan, Bell and Gageler JJ; [2014] HCA 42. See also *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 379 [8], 389 [77], 390 [86]-[87]; 328 ALR 375 at 378, 391, 393; [2016] HCA 4.

11 *Fair Work Act* 2009 (Cth), s 176(1)(b)(i).

12 *Fair Work Act*, s 176(1)(c).

agreement"[13]. Under s 481, a permit holder may enter premises for the purpose of investigating a suspected contravention of the Act or a term of a fair work instrument that relates to or affects a member of the permit holder's organisation if the member is one "whose industrial interests the organisation is entitled to represent"[14] and the member performs work on the premises[15]. Under s 483A(1), a permit holder may enter premises for the purpose of investigating a suspected contravention of the Act or a term of a fair work instrument that relates to a TCF award worker "whose industrial interests the permit holder's organisation is entitled to represent"[16] and who performs work on the premises[17]. Under s 484, a permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers who perform work on the premises[18] whose "industrial interests the permit holder's organisation is entitled to represent"[19] if the employee or TCF award worker wishes to participate in the discussions[20]. Significantly, s 480(a) provides that a purpose of the power to enter premises is to enable the industrial organisation to hold discussions with "potential members". Under s 533, the Fair Work Commission may make an order in relation to an employer's failure to notify or consult registered employee associations in relation to the dismissal of 15 or more employees for reasons of an economic, technological, structural or similar nature in breach of s 531(1), inter alia, upon the application of a "registered employee association that is entitled to represent the industrial interests of one of the employees"[21].

---

13 *Fair Work Act*, s 176(3).

14 *Fair Work Act*, s 481(1)(a).

15 *Fair Work Act*, s 481(1)(b).

16 *Fair Work Act*, s 483A(1)(a)(i).

17 *Fair Work Act*, s 483A(1)(a)(ii).

18 *Fair Work Act*, s 484(a).

19 *Fair Work Act*, s 484(b).

20 *Fair Work Act*, s 484(c).

21 *Fair Work Act*, s 533(c).

21 Subject to contrary indication, it is to be presumed that the expression "entitled to represent the industrial interests of" has the same meaning wherever it appears in the *Fair Work Act*[22]; and, given that in each case where the expression appears it is directed to the capacity or standing of an industrial association to take some action or to intervene in relation to persons whose industrial interests the organisation represents, it logically presents as intended to have the same meaning wherever it so appears. Contrary to Rex's submissions, that is so notwithstanding that the expression sometimes appears in the Act in contexts that do not involve the exercise of judicial power or the assertion of accrued rights.

22 Next, it is to be observed that the majority of provisions in which the expression appears prescribe the standing of an industrial association to take action in relation to a person who is a member of the organisation. In each such case, the presence of the expression "entitled to represent the industrial interests of" adds to the requirement that the person be a member of the organisation a second or further condition that the organisation be entitled to represent the industrial interests of the person. Consequently, in each such case, the condition "entitled to represent the industrial interests of" is logically to be understood as something which may arise otherwise than from a person's membership of the organisation.

23 Thirdly, as will be recalled, s 540(5) provides that an employer organisation may apply for an order in relation to a contravention or proposed contravention of a civil remedy provision:

> "*only if the organisation has a member* who is affected by the contravention, or who will be affected by the proposed contravention." (emphasis added)

---

22 See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J (Barwick CJ and Jacobs J agreeing at 616, 621); [1975] HCA 41; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643 per Gibbs J; [1979] HCA 19; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32] per French CJ, Crennan, Kiefel and Bell JJ; [2013] HCA 52; *Tabcorp Holdings* (2016) 90 ALJR 376 at 387 [65]; 328 ALR 375 at 388-389. See generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 150-151 [4.6]. Cf *Thirteenth Beach Coast Watch Inc v Environment Protection Authority* (2009) 29 VR 1 at 6 [10].

24 By contrast, s 540(6)(b) provides that an industrial association may apply for an order in relation to a contravention or proposed contravention of a civil remedy provision in relation to a person if:

> "(i) the person is affected by the contravention, or will be affected by the proposed contravention; and
>
> (ii) *the industrial association is entitled to represent the industrial interests of the person.*" (emphasis added)

25 Thus it can be seen, even within s 540 itself in the contrast between s 540(5), which is expressly conditioned on membership, and s 540(6), which is not, that an organisation's entitlement to represent the industrial interests of a person may arise otherwise than from the person's membership of the organisation. And to repeat, given the absence of any identified signification that "entitled to represent the industrial interests of" is used otherwise than consistently throughout the *Fair Work Act*, it is to be concluded that it has the same meaning where it appears in provisions like ss 484, 533 and 540(6), which are not conditioned on membership, as it does in provisions like ss 176(1) and 481, which are.

26 Of course, as counsel for Rex contended, the fact that a person is a member of an organisation may have the result that, by reason of the terms of membership, the organisation is entitled to represent the industrial interests of the person. But, contrary to Rex's submissions, given the way that the *Fair Work Act* draws a distinction between a person's membership of an organisation and the organisation's entitlement to represent the industrial interests of the person, it cannot be that membership is the only entitlement to represent the industrial interests of a person recognised by the Act. The Act's conception of entitlement to represent the industrial interests of a person is necessarily broader than that; and, as will be explained, reflects the *Dunlop Rubber* principle sense of an entitlement to represent the industrial interests of a person who satisfies an organisation's eligibility rules.

27 Contrary also to Rex's submissions, the fact that, in some sections of the *Fair Work Act*, there are requirements both that a person be a member of an organisation and that the organisation be entitled to represent the industrial interests of the person does not suggest that the latter must mean something other than an entitlement to represent the industrial interests of the person arising by reason of the organisation's eligibility rules. The Act recognises that some

members of organisations may not meet the organisation's eligibility rules[23]. The requirement that the organisation be entitled to represent the industrial interests of the person is used, consistently with the *Dunlop Rubber* principle, to ensure that the organisation has industrial coverage in relation to the matter in issue.

28 Counsel for Rex contended in the alternative that the concept of entitlement should be seen as limited to an entitlement which arises either by reason of membership or because of specific authorisation or, perhaps, consent. But the form of the *Fair Work Act* excludes that possibility. As has been explained, if the Act's conception of an organisation's entitlement to represent the industrial interests of a person were one of entitlement that arises by reason of the person's membership of the organisation, there would be no point in the provisions of the Act which provide that it is a condition of an industrial association's entitlement to take action in relation to a person who is a member of the organisation that the organisation be entitled to represent the industrial interests of the person. And if the Act's conception of an organisation's entitlement to represent the industrial interests of a person were one of entitlement that arises by reason of a specific authorisation or consent, it is to be expected that the requirement for authorisation or consent would be expressed, as it is in s 176(1)(c), in terms of the person appointing the organisation in writing to take that action. As it is, the fact that s 176(1)(c) coupled with s 176(3) draws a clear distinction between providing for a person appointing an organisation in writing to be that person's bargaining representative, and the necessity for such a bargaining representative to be entitled to represent the industrial interests of the person, operates as a further, powerful indication that the latter is not limited to entitlement which arises by reason of authorisation or consent.

(ii) Historical context

29 The Full Court were correct in their understanding and estimation of the significance of the *Dunlop Rubber* principle cases. As Jessup J in effect observed[24], they were the starting point of the concept of an organisation's entitlement to represent the industrial interests of persons eligible for

---

23 See for example *Fair Work (Registered Organisations) Act* 2009 (Cth), s 166(3).

24 *Rex v Federation* (2016) 244 FCR 344 at 350 [18] (North J and White J agreeing at 345 [1], 365 [65]).

membership of the organisation. And as his Honour concluded[25], the history of legislative application of that concept, culminating in its appearance in the *Fair Work Act*, logically implies that the entitlement of an organisation to represent the industrial interests of a person that is referred to in s 540(6)(b)(ii) equates with that concept.

30 The *Dunlop Rubber* principle cases began with *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association*[26]. Until then, it was considered that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make an award against employers in respect of employees who had abandoned or withdrawn from a dispute[27]. At that stage of the law's development, the organisation was viewed as the contractual agent of its members and its participation in the dispute was conceived of as participation as agent on behalf of its members. *Burwood Cinema* represented a fundamental change in approach. It established that an organisation's role in relation to an industrial dispute was as a principal standing in the place of its members as representative of the class associated together in the organisation. Thus, as was held in *Burwood Cinema*[28], where a registered organisation of employees in a particular industry made a demand regarding wages and conditions upon a number of employers in that industry, neither the fact that some of the employers did not employ members of the organisation, nor the fact that all of the employees were satisfied with their wages and conditions, prevented the dispute arising from the employers' non-compliance with the demand from constituting an "industrial dispute" within the meaning of s 51(xxxv) of the Constitution. Starke J expressed the point succinctly[29]:

> "An industrial relationship, and not a contractual relationship, is all that is necessary to constitute an industrial dispute. The nexus is to be found in

---

25 *Rex v Federation* (2016) 244 FCR 344 at 363-364 [56]-[57] (North J and White J agreeing at 345 [1], 365 [65]).

26 (1925) 35 CLR 528; [1925] HCA 7.

27 See *Holyman's Case* (1914) 18 CLR 273; [1914] HCA 36.

28 (1925) 35 CLR 528 at 538-539, 541 per Isaacs J, 543-545 per Powers J, 547-548 per Rich J, 548-549, 551 per Starke J.

29 *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528 at 549.

the industry or in the calling or avocation in which the participators are engaged."

31 The next step was the decision in *Metal Trades Employers Association v Amalgamated Engineering Union*[30]. It established[31] that, where a union of employees in an industry served a log of demands as to terms and conditions of employment of all employees in the industry, whether members of the union or not, there was an industrial dispute for the settlement of which an award could be made binding on all employers as to the terms and conditions of all employees, including non-union member employees.

32 *Dunlop Rubber*[32] then added to what had been established in *Burwood Cinema* and *Metal Trades* the critical insight that an association acts in an industrial dispute in an independent capacity because the association represents "not definite or then ascertainable individuals but a group or class the actual membership of which is subject to constant change". Thus, as it was held[33], a trade union had the capacity "to formulate industrial claims *in the interests of that group or class* ascertainable by reference to the 'conditions of eligibility' prescribed by its rules" (emphasis added). It was no obstacle to the existence of an industrial dispute initiated by the trade union serving a log of claims on an employer that none of the employer's employees was a union member. It was sufficient if the employer's employees were eligible for membership of the union[34].

---

30 (1935) 54 CLR 387; [1935] HCA 79.

31 *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 404, 410-411 per Latham CJ, 419-421 per Rich and Evatt JJ, 442-443 per McTiernan J.

32 (1957) 97 CLR 71 at 81.

33 *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 71 at 87.

34 *Dunlop Rubber* (1957) 97 CLR 71 at 87. See also *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 584-585 per Mason J (Stephen J and Aickin J agreeing at 582, 592); [1979] HCA 46.

33 Next, as Jessup J noticed[35], although the expression "entitled to represent the industrial interests of" was not used as such in *Dunlop Rubber*, or for that matter for some time in any of the subsequent authorities, as a result of *Dunlop Rubber* it came to be understood that an organisation or a union was entitled to protect the industrial interests of those groups of employees who were within its conditions of eligibility. That understanding, later reflected in recommendations in the *Report of the Committee of Inquiry on Co-ordinated Industrial Organisations*[36], informed the terms of s 142A of the *Conciliation and Arbitration Act*. It empowered the Conciliation and Arbitration Commission to make demarcation orders giving one organisation of employees the right to the exclusion of others to represent, in respect of all or some industrial interests under the Act, a "class or group of employees who are eligible for membership of the organization, either generally or subject to such limitations as it may specify".

34 Counsel for Rex contended that the subsequent decision of the majority in *Re Finance Sector Union of Australia* threw doubt on, or limited, the *Dunlop Rubber* principle, by holding that an industrial dispute as to the superannuation scheme to which employers should contribute on behalf of employees will not normally arise at the instance of some employees or an organisation of employees with respect to the contributions to be made on behalf of employees who are not members of the organisation concerned.

35 That contention should be rejected. It misconceives the rationale of the decision. So far from casting doubt on the *Dunlop Rubber* principle, the majority in *Re Finance Sector Union of Australia*[37] expressly recognised that a union may make a claim in respect of the employment of non-members with respect to their position as employees relative to the position of those employees who are members of the union. Their Honours also recognised that such a union has an industrial interest in ensuring that non-members receive the same level of employment benefits as employees who are members, and therefore has legitimate, wide-ranging interests with respect to superannuation. Certainly, it was held that its interests did not extend to specifying the identity of the

---

35 *Rex v Federation* (2016) 244 FCR 344 at 350 [18] (North J and White J agreeing at 345 [1], 365 [65]).

36 See generally Sweeney, *Report of the Committee of Inquiry on Co-ordinated Industrial Organisations*, Parliamentary Paper No 220/1974.

37 *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 at 364 per Mason CJ, Deane, Toohey and Gaudron JJ.

superannuation fund to which contributions would be paid in respect of employees who were not and never became members "where the specification emanates from nothing more than a desire to bring about a situation in which there is a single industry superannuation scheme". But that was so, it was said, not because the union could not make a claim in respect of the employment of non-members with respect to their position as employees relative to the position of those employees who are members of the union, but because the identity of the fund to which superannuation contributions were to be made on behalf of non-members, standing alone, was not a matter that bore in any way on their employment position relative to the employment position of union members.

36 There is nothing in that which casts any doubt on the idea that a union's entitlement to represent the industrial interests of non-members in relation to matters which could potentially bear upon the conditions of employment and remuneration of members rests upon the non-members being eligible for membership under the union's eligibility rules.

37 Section 142A of the *Conciliation and Arbitration Act* was several times amended and expanded, for some time appearing as s 118(3) of the *Industrial Relations Act*. In that form, it conferred power on the Industrial Relations Commission, inter alia, to make:

> "an order that an organisation of employees shall have the right, to the exclusion of another organisation or organisations, to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation".

Later, it was repealed and replaced by s 118A(1), which then became s 118A(1) of the *Workplace Relations Act*, and then ultimately by s 133(1) of the FWRO Act in relevantly similar terms.

38 As Jessup J observed[38], the first appearance in legislation of the exact expression "entitled to represent the industrial interests of" was in the *Industrial Relations Act* in provisions which allowed an organisation to adopt rules enabling it to enter into an agreement with a State registered union, to the effect that members of the State registered union who were ineligible State members were

---

38 *Rex v Federation* (2016) 244 FCR 344 at 351-352 [22] (North J and White J agreeing at 345 [1], 365 [65]).

eligible to become members of the organisation. Relevantly, s 202(3) and (4) of the *Industrial Relations Act* provided that:

> "(3) An organisation is not entitled to represent the industrial interests of persons who are only eligible for membership of the organisation under an agreement entered into under rules made under subsection (1).
>
> (4) ... the organisation is not entitled to represent the industrial interests of the person until a record of the person's eligibility is entered in the register kept under paragraph 268(1)(a)."

The Explanatory Memorandum recorded[39] that the purpose of s 202 was to enable members of certain State registered unions to become members for limited purposes of the counterpart organisation registered under the *Industrial Relations Act*, and, consistently with the *Dunlop Rubber* principle, that:

> "Such persons will not be able to have their industrial interests represented by the organisation unless and until they become eligible to be members under the organisation's eligibility rules."

39 A grammatical variant of the expression "entitled to represent the industrial interests of" appeared in provisions of Pts VIA and VIB of the *Industrial Relations Act*[40] and later the *Workplace Relations Act*, some provisions of which were enacted in reliance upon the corporations power[41]. Section 170FB of the *Workplace Relations Act* provided that the Industrial Relations Commission must not make an order under s 170FA unless the Commission had first received an application for the making of the order from an employee "or a trade union whose rules entitle it to represent the industrial interests of employees, to be covered by the order". Section 170GA(1)(a) provided for an employer informing "each trade union of which any of the employees was a member, and which represented the industrial interests of such of those

---

39 Australia, House of Representatives, Industrial Relations Bill 1988, Explanatory Memorandum at 70.

40 See *Industrial Relations Reform Act* 1993 (Cth).

41 See *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 539 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56.

employees as were members". Section 170LJ(1) provided for an employer making an agreement with an employee organisation which has at least one member whose employment will be subject to the agreement, if the organisation "is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement". A form of words similar to that quoted appeared in ss 170LK(4)(b) and 170M(3)(d)(ii); and, in Pt VIII of that Act, which, like ss 539 and 540 of the *Fair Work Act*, was directed to compliance, s 178(5A) provided that:

> "A penalty for a breach of a term of a certified agreement may be sued for and recovered by:
>
> ...
>
> (d) an organisation:
>
> (i) that has at least one member whose employment is subject to the agreement; and
>
> (ii) that is entitled to represent the industrial interests of the member in relation to work carried on by the member that is subject to the agreement ..."

40 Consistently with the *Dunlop Rubber* principle, those provisions were understood as operating on the basis that an organisation's entitlement to represent the industrial interests of a member in relation to work covered by the agreement derived from eligibility rules giving the organisation coverage in relation to the work of the member covered by the agreement.

41 Section 405(3) of the *Workplace Relations Act* provided for an employee organisation to apply on behalf of an employee for a remedy for contravention of a civil remedy provision if:

> "(a) the employee has requested the organisation to apply on the employee's behalf; and
>
> (b) a member of the organisation is employed by the employee's employer; and
>
> (c) the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee."

42 In that context, too, the organisation's entitlement to represent the industrial interests of the employee was considered to be the *Dunlop Rubber* principle sense of eligibility rules giving the organisation coverage in relation to the work of the member covered by the agreement. The same was also true of s 495(7)(b)(iii), which provided for application by an employee organisation on behalf of an employee if the organisation was entitled under its eligibility rules to represent the industrial interests of that employee in relation to work carried on by that employee for the employer; s 605(4)(b), relating to civil penalties sought by an organisation on behalf of a transferring employee; and s 616(4)(c)(iii) in relation to applications by an organisation for a pecuniary penalty on behalf of an employee.

43 There remains to be considered the *Fair Work Act* and its introduction of the concept of enterprise agreements and bargaining representatives for proposed enterprise agreements. Section 176(1) provides that, among other "bargaining representatives" for a proposed agreement that is not a "greenfields agreement":

> "(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:
>
> (i) the employee is a member of the organisation; and
>
> (ii) in the case where the agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation – the organisation applied for the authorisation;
>
> unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2) ..."

44 Section 176(3) adds that:

> "Despite subsections (1) and (2):
>
> (a) an employee organisation; or
>
> (b) an official of an employee organisation (whether acting in that capacity or otherwise);

> cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement."

45 Standing alone, there might be some doubt about the meaning of that provision. Read, however, against the background of s 178(5A) of the *Workplace Relations Act*, and its legislative antecedents outlined above, there really is no room for any doubt that the entitlement to represent the industrial interests of an employee referred to in s 176(3) of the *Fair Work Act* is the same *Dunlop Rubber* principle sense of an organisation's entitlement to represent the industrial interests of persons eligible for membership of the organisation.

46 It is the same with s 484 of the *Fair Work Act*, read with s 480 (which it will be recalled provides the objects of Pt 3-4), which provides for a permit holder to enter premises to hold discussions with potential members of the permit holder in the following terms:

> "A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:
>
> (a) who perform work on the premises; and
>
> (b) whose industrial interests the permit holder's organisation is entitled to represent; and
>
> (c) who wish to participate in those discussions."

Despite the absence from s 484 of any requirement of the kind imposed by s 176(1)(b)(i) that the employee be a member of the permit holder, there is no reason to doubt that the entitlement to represent the employee that is referred to in s 484(b) is the *Dunlop Rubber* principle sense of entitlement to represent the industrial interests of an employee who, though not a member, is eligible for membership of the permit holder.

47 And logically the same also applies to s 540(6), which, as will be recalled, provides for an industrial association to apply for an order in relation to a contravention or proposed contravention of a civil remedy provision in relation to a person if:

> "(i) the person is affected by the contravention, or will be affected by the proposed contravention; and

(ii) the industrial association is entitled to represent the industrial interests of the person."

48 Admittedly, as Jessup J observed[42], that conclusion means that there is a significant difference between the conditions of the previous entitlement of an organisation to take action for breach of a certified agreement under s 178(5A) of the *Workplace Relations Act* and the conditions of the present entitlement of an industrial association to take action under s 540(6) of the *Fair Work Act* for contravention of a civil remedy provision: the former was conditioned on there being at least one member of the organisation whose employment was subject to the agreement whose interests the organisation was entitled under its rules to represent; under the latter, the entitlement applies regardless of whether any of the employees affected is a member of the industrial association. There is also the difference that the words "under its eligibility rules", which appeared in s 405(3) of the *Workplace Relations Act*, do not appear in s 540(6) of the *Fair Work Act*. And it is notable, as Jessup J said[43], that those changes went unremarked in the Explanatory Memorandum and Second Reading Speech. But, as his Honour reasoned, the effect of s 539 of the *Fair Work Act* was to consolidate in one provision a miscellany of standing provisions, and thus to employ the expression "entitled to represent the industrial interests of" in s 540(6) in a novel setting. Given the prior well-established meaning of the expression, the indications remain that it is used in its established sense in its new setting.

49 Rex criticised that idea as in effect ignoring the possibility that not all industrial associations referred to in s 540(6) would necessarily have rules of eligibility for membership. But Jessup J was alive to that possibility. As the Full Court in effect concluded[44], the fact that the *Dunlop Rubber* principle sense of entitlement to represent the industrial interests of a person may not fit precisely with industrial associations that do not have eligibility rules is not a sufficient reason to doubt that the established sense of the expression is applicable to an industrial association which, like the Federation, is a registered organisation and

---

42 *Rex v Federation* (2016) 244 FCR 344 at 364 [59] (North J and White J agreeing at 345 [1], 365 [65]).

43 *Rex v Federation* (2016) 244 FCR 344 at 364 [59] (North J and White J agreeing at 345 [1], 365 [65]).

44 *Rex v Federation* (2016) 244 FCR 344 at 364-365 [61]-[62] (North J and White J agreeing at 345 [1], 365 [65]).

therefore does have eligibility rules. It makes sense that the *Dunlop Rubber* principle conception of entitlement to represent should apply to registered organisations in the same way that it applied to registered trade unions, and, contrary to Rex's submission, s 540(7), by emphasising the requirement in s 540(6) that an organisation be entitled to apply for an order, reinforces that conclusion.

50 That is not to say that s 540(6) is necessarily limited to registered organisations. It may be that the *Dunlop Rubber* principle sense of entitlement to represent the industrial interests of persons applies, mutatis mutandis, to other forms of industrial organisation having a real interest in ensuring compliance with civil remedy provisions in relation to a particular class of persons. Contrary to Rex's submission, so to conclude would not be inconsistent with the objects of freedom of choice for which Pt 3-1 of the *Fair Work Act* provides. They are directed to the rights of an employee to choose his or her representative in relation to a matter affecting the employee. By contrast, as was emphasised in the Explanatory Memorandum[45], s 540(6) is concerned with the standing of an organisation to bring in its own right civil remedy proceedings for contraventions of the Act affecting a designated class of persons in relation to whom the organisation has industrial coverage.

51 In the end, however, it is enough for the disposition of this matter that s 540(6) applies to registered organisations. As the Full Court concluded, whether it otherwise applies is a question better left until it arises.

Conclusion

52 The appeal should be dismissed.

---

45 See Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 325-326 [2132]-[2133].