

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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QANTAS AIRWAYS LIMITED & ANOR APPELLANTS

AND

TRANSPORT WORKERS UNION OF AUSTRALIA RESPONDENT

*Qantas Airways Limited v Transport Workers Union of Australia*

[2023] HCA 27

*Date of Hearing: 9 & 10 May 2023*

*Date of Judgment: 13 September 2023*

S153/2022

## ORDER

*Appeal dismissed.*

On appeal from the Federal Court of Australia

### Representation

J T Gleeson SC with T O Prince, N D Oreb and M F Caristo for the appellants  
(instructed by Herbert Smith Freehills)

N C Hutley SC with M Gibian SC, C J Tran and P A Boncardo for the  
respondent (instructed by Maurice Blackburn Lawyers)

T M Begbie KC with I M Sekler and N A Wootton for the Minister for  
Employment and Workplace Relations, intervening (instructed by Australian  
Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to  
formal revision prior to publication in the Commonwealth Law  
Reports.



## CATCHWORDS

### **Qantas Airways Limited v Transport Workers Union of Australia**

Industrial law (Cth) – Prohibition of taking adverse action against person to prevent exercise of workplace right – Workplace right – Where s 340(1)(b) of *Fair Work Act 2009* (Cth) provided that person must not take adverse action against another person to prevent exercise of workplace right – Where Qantas Airways Ltd made decision to outsource ground handling operations – Where outsourcing decision was adverse action in respect of affected employees – Where at time of outsourcing decision affected employees had no presently existing workplace right to organise and engage in protected industrial action and to participate in enterprise bargaining – Whether prohibition in s 340(1)(b) of *Fair Work Act* only prohibited adverse action taken to prevent exercise of presently existing workplace right.

Words and phrases – "adverse action", "contingent right", "enterprise bargaining", "presently existing right", "prevent", "protected industrial action", "rebuttable presumption", "substantial and operative reasons", "workplace law or workplace instrument", "workplace right".

*Fair Work Act 2009* (Cth), ss 340, 341, 361.



1 KIEFEL CJ, GAGELER, GLEESON AND JAGOT JJ. On 30 November 2020, while its operations were severely affected by the COVID-19 pandemic, Qantas Airways Ltd ("Qantas") announced a decision to outsource its ground handling operations at ten Australian airports ("the outsourcing decision"). The effect of the outsourcing decision was that ground handling services then being performed by employees of Qantas and employees of Qantas Ground Services Pty Ltd ("QGS"), many of whom were members of the Transport Workers Union of Australia ("TWU"), would instead be performed by staff of third-party suppliers contracted to provide those services.

2 The outsourcing decision was "adverse action" within the meaning of the *Fair Work Act 2009* (Cth) ("the Act") because it altered the position of the affected employees of Qantas<sup>1</sup> and QGS<sup>2</sup> to their prejudice.

3 Qantas had sound commercial reasons for the outsourcing decision. Qantas also had additional reasons which were "substantial and operative"<sup>3</sup>. Those additional reasons, as found by a judge of the Federal Court of Australia (Lee J), were to prevent the affected employees from exercising workplace rights to organise and engage in protected industrial action and to participate in bargaining. The affected employees could not exercise those workplace rights at the time of the outsourcing decision. Nevertheless, it was expected at the time of the outsourcing decision that, in the absence of the outsourcing decision, the affected employees would be able to exercise and would in fact exercise those workplace rights in 2021<sup>4</sup>.

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1 Section 342(1), item 1(c) of the Act.

2 Section 342(1), item 3(c) of the Act.

3 See *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 242; 12 ALR 605 at 619; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 535 [104], 540-541 [121]. See also *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232 at 275-276 [163]-[164], 287-288 [204], 289 [209]; Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 234 [1458].

4 *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 324-330 [282]-[302].

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4 The issue on this appeal is whether the primary judge and a Full Court of the Federal Court (Bromberg, Rangiah and Bromwich JJ) on appeal<sup>5</sup> were correct to conclude that, by making the outsourcing decision for reasons that included those additional reasons, Qantas contravened s 340(1)(b) of the Act, which provides that a person must not take adverse action against another person "to prevent the exercise of a workplace right by the other person".

5 To support its argument that the conclusion was wrong, Qantas advanced two contentions of statutory construction on the hearing of the appeal. The broader contention was that s 340(1)(b) bites only where a workplace right is presently in existence at the time adverse action is taken. The narrower contention, advanced in the alternative, was that an employer does not "prevent" the exercise of a workplace right by an employee within the meaning of s 340(1)(b) merely by taking advantage of a "window of opportunity" to take adverse action against the employee at a time when "architectural feature[s]" of the Act operate to prevent the employee from exercising a workplace right including by taking industrial action in response. Neither contention can be accepted.

6 For the reasons given below, the appeal must be dismissed. In short, a person who takes adverse action against another person for a substantial and operative reason of preventing the exercise of a workplace right by the other person contravenes s 340(1)(b), regardless of whether that other person has the relevant workplace right at the time the adverse action is taken. Qantas did not avoid the operation of s 340(1)(b) in relation to its adverse action by taking the action prior to the existence of the workplace rights the exercise of which Qantas sought to thwart.

### **Background to the outsourcing decision**

7 At the relevant times, Qantas' ground handling operations consisted of ramp, baggage and fleet presentation work, such as baggage handling and aircraft cleaning. At all but ten Australian airports, this work was performed for Qantas by third-party contractors. At the remaining ten airports, the work was performed in-house by Qantas and QGS employees.

8 The affected employees were covered by two enterprise agreements. The agreement covering the affected Qantas employees commenced operation on

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5 *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244; *Transport Workers' Union of Australia v Qantas Airways Ltd [No 2]* (2021) 308 IR 333; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2022) 292 FCR 34.

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27 December 2018 and had a nominal expiry date of 31 December 2020. The agreement covering the affected QGS employees commenced operation on 17 February 2017 and had a nominal expiry date of 1 September 2019.

9 From January 2020, the COVID-19 pandemic severely affected Qantas' operations and revenues. Qantas experienced an almost total reduction in travelling passengers and thus passenger flights on its international networks, and a very significant reduction on its domestic networks. From February 2020, Australian governments implemented progressive restrictions first on international travel, and then on domestic travel. By May 2020, Qantas' management identified the outsourcing of Qantas' remaining ground handling operations as one option to keep the airline financially viable.

10 In the period from 29 June to 11 August 2020, Qantas took steps in contemplation of a decision about outsourcing being made by the end of 2020. Those steps included a request for information process with potential third-party suppliers of ground handling services, including in relation to the potential industrial benefits of outsourcing when compared with existing arrangements.

11 On 20 August 2020, the Qantas Group released its results for the 2020 financial year. Those results included a 91 per cent profit reduction on the previous financial year and a \$2.7 billion statutory before-tax loss, as well as significant anticipated underlying losses for the 2021 financial year. As the primary judge noted, Qantas was facing a "business calamity"<sup>6</sup>. At the hearing in this Court, senior counsel for Qantas described the business as "bleeding cash".

12 On 24 or 25 August 2020, Mr Andrew David, the Chief Executive Officer of Qantas Domestic and International, commenced a review of ground handling operations. On 25 August, Qantas notified the affected employees of the review, including details of an in-house bid ("IHB") process and an external request for proposal ("RFP") process. The IHB process, which provided Qantas employees with an opportunity to bid competitively to continue to provide the ground handling services, was required by the relevant enterprise agreement. On the same day, Qantas made a public announcement about the review. The primary judge found that, by this time, Mr David and other senior officers of Qantas were of the view that a final outsourcing decision would be made, subject to the completion of the IHB and RFP processes.

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6 *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 295 [139].

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13 On 19 November 2020, the TWU presented an IHB which was less competitive than outsourcing: the bid only offered indicative savings of approximately \$100 million over five years with the possibility of additional savings. The primary judge found that there was never any real prospect that the IHB would deliver the perceived commercial benefits that were thought likely to be obtained by the proposed outsourcing (and that were confirmed following the RFP process). Even so, his Honour did not find that the IHB process was an artifice or conducted otherwise than in good faith. Rather, the process occurred because Qantas was properly advised that it was necessary under the relevant enterprise agreement.

14 The primary judge found that, although the outsourcing decision was highly likely to be made from at least August 2020, it was Mr David who was ultimately responsible for the decision, which was made on 27 November 2020. On 30 November 2020, Qantas announced the outsourcing decision, as well as the accompanying decision to reject the TWU's IHB.

15 At the time of the making and announcement of the outsourcing decision, the affected Qantas employees were prohibited by s 417 of the Act from organising or engaging in protected industrial action under s 415 of the Act because their enterprise agreement had not passed its nominal expiry date. The affected QGS employees were practically unable to take protected industrial action of any significance because the complex steps necessary to engage in protected industrial action under the Act had not been taken<sup>7</sup>.

16 In this Court, Qantas emphasised its sound lawful and commercial reasons for the outsourcing decision. The primary judge found that, by the time the review was instigated in August 2020, the rewards and benefits of outsourcing for Qantas were already "manifest"<sup>8</sup>.

17 In that context, Qantas highlighted three "commercial imperatives" that the primary judge found to be substantial and operative in making the outsourcing decision: (1) costs savings for the ground handling operations of around \$100 million per year when things "returned to normal"; (2) provision of ground handling operations on a "cost per turn" basis (such that Qantas would only pay when an aircraft needed to be "turned" at one of the affected airports), which would

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7 Including, relevantly, a protected action ballot: see Pt 3-3, Div 8 of the Act. See also ss 417 and 418.

8 *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 298 [156].

increase variability in Qantas' cost base; and (3) obviation of the need for capital expenditure of \$80 million over the following five years in updated equipment to perform the services in-house.

### **The proscribed reasons for the outsourcing decision**

18 Despite Qantas' sound reasons for the outsourcing decision, the primary judge was not satisfied that Mr David was "not subjectively conscious of other considerations"<sup>9</sup>, and concluded that Qantas had not discharged its onus under s 361 of the Act of disproving that substantial and operative reasons for the decision were to prevent the affected employees from organising and engaging in protected industrial action and from participating in enterprise bargaining the following year. Specifically, the primary judge was not positively satisfied that the additional reasons were not substantial and operative reasons for Mr David outsourcing the ground handling operations.

### **The legislative scheme for protection of workplace rights**

19 Chapter 3 of the Act, entitled "Rights and responsibilities of employees, employers, organisations etc", sets out rights and responsibilities of "national system employees, national system employers, organisations and others (such as independent contractors and industrial associations)"<sup>10</sup>. Chapter 3 is particularly directed to the Act's object of<sup>11</sup>:

"enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms".

20 Part 3-1 is entitled "General protections". It has three broad concerns: (1) protecting workplace rights; (2) protecting freedom of association and involvement in lawful industrial activities; and (3) providing other protections, including protection from discrimination<sup>12</sup>. There is a long and complex history of

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9 *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 307 [194], 322 [272(1)].

10 Section 6(1) of the Act.

11 Section 3(e) of the Act.

12 Section 6(2) of the Act.

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provisions in Commonwealth industrial legislation that protect workplace participants against unfair treatment<sup>13</sup>. At a high level of generality, the historical arc of the protections against adverse action has generally tended to expand the scope of workplace rights, the classes of persons who are covered by the general workplace protections, and the limits upon adverse action. For example, the current Act is not limited by an equivalent of s 792(4) and (8) of the former *Workplace Relations Act 1996* (Cth)<sup>14</sup> which required that, for conduct to contravene the predecessors to the adverse action provisions<sup>15</sup>, the entitlement to the benefit of an industrial instrument must have been the "sole or dominant reason" for the conduct. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) notes that the provisions in Pt 3-1 were "intended to rationalise, but not diminish, existing protections", and that, "[i]n some cases, providing general, more rationalised protections has expanded their scope"<sup>16</sup>. It went on to explain that "the new provisions protect persons against a broader range of adverse action"<sup>17</sup>. The complex legislative history does not support any narrower reading of s 340(1)(b) than is otherwise suggested by the text, context and purpose of the provision.

21 The objects of Pt 3-1 relevantly include the protection of workplace rights<sup>18</sup>, and the guide to Pt 3-1 states that Div 3 "protects workplace rights, and the exercise of those rights"<sup>19</sup>. The expression "workplace right" is used only in three provisions of Pt 3-1, being ss 340, 343 and 345, and was not used in earlier Commonwealth industrial legislation. Section 341 provides:

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13 See *Greater Dandenong City Council* (2001) 112 FCR 232 at 282-288 [192]-[204]; *Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421 at 431-432 [23]-[30].

14 Inserted by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), Sch 1, item 193 as s 253, which was then renumbered to s 792 by Sch 5 to that same Act.

15 See s 792(1) and (5) of the *Workplace Relations Act 1996* (Cth).

16 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 212 [1336].

17 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 221 [1386].

18 Section 336(1)(a) of the Act.

19 Section 334 of the Act.

**"341 Meaning of *workplace right***

*Meaning of workplace right*

- (1) A person has a ***workplace right*** if the person:
- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
  - (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
  - (c) is able to make a complaint or inquiry:
    - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
    - (ii) if the person is an employee – in relation to his or her employment.

*Meaning of process or proceedings under a workplace law or workplace instrument*

- (2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:
- ...
  - (c) protected industrial action;
  - (d) a protected action ballot;
  - ...
  - (k) any other process or proceedings under a workplace law or workplace instrument.

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*Prospective employees taken to have workplace rights*

- (3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

..."

Relevantly, "workplace law" is defined to include the Act<sup>20</sup>.

22 Division 3 of Pt 3-1, entitled "Workplace rights", contains prohibitions against adverse action<sup>21</sup>, coercion<sup>22</sup>, undue influence or pressure (although without reference to workplace rights)<sup>23</sup>, and misrepresentations<sup>24</sup>. The protections afforded in Pt 3-1 are provided to a person, whether an employee, an employer or otherwise<sup>25</sup>, in contrast with Pt 3-2 of the Act, which concerns unfair dismissal and explicitly establishes a framework that "balances" the needs of business and the needs of employees<sup>26</sup>. The protections in Pt 3-1 are secured through civil regulatory remedies enforceable by the Fair Work Ombudsman and affected parties.

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20 Section 12 of the Act, definition of "workplace law" (para (a)).

21 Section 340 of the Act.

22 Section 343 of the Act.

23 Section 344 of the Act.

24 Section 345 of the Act.

25 Section 336(2) of the Act.

26 Section 381(1)(a) of the Act.

9.

23 Section 340 establishes the prohibition against adverse action. It provides:

**"340 Protection**

- (1) A person must not take adverse action against another person:
  - (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.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) A person must not take adverse action against another person (the *second person*) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1)."

24 Section 343 provides:

**"343 Coercion**

- (1) 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, or a third person, to:
  - (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
  - (b) exercise, or propose to exercise, a workplace right in a particular way.

Note: This subsection is a civil remedy provision (see Part 4-1).

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*Jagot* J

10.

(2) Subsection (1) does not apply to protected industrial action."

25 Section 345 provides:

**"345 Misrepresentations**

(1) A person must not knowingly or recklessly make a false or misleading representation about:

- (a) the workplace rights of another person; or
- (b) the exercise, or the effect of the exercise, of a workplace right by another person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it."

26 The operation of Pt 3-1 is supported by ancillary rules in Div 7 of that Part. For the purposes of the Part, a person "takes action for a particular reason if the reasons for the action include that reason"<sup>27</sup>. Section 361 provides:

**"361 Reason for action to be presumed unless proved otherwise**

- (1) If:
  - (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
  - (b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction."

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27 Section 360 of the Act.

### **Qantas' case**

27 As has been noted, Qantas presented its argument on this appeal by  
reference to two contentions: one broader and the other narrower.

28 Qantas' broader contention was that s 340(1)(b) applies only where there is  
a workplace right "presently in existence", that is, where a person has a workplace  
right within the meaning of s 341(1) at the time of the adverse action. According  
to Qantas, where the "entire existence" of the right is "time-bound" in that it  
depends upon circumstances, such as the phase of the employment relationship or  
whether particular events occur, then the right is not protected by s 340(1)(b)  
before it comes into existence.

29 Qantas' narrower contention was that an employer does not contravene  
s 340(1)(b) merely because a reason for the timing of adverse action is "to take  
advantage of an architectural feature of the Act which positively denies to the  
TWU and employees the right to oppose the decision by industrial action, a denial  
which delay might reverse". According to Qantas, such a reason does not involve  
"prevention" of the exercise of a workplace right for the purposes of s 340(1)(b).

30 Amalgamating the two contentions, Qantas framed the issue on the appeal  
as whether s 340(1)(b) can apply to a decision to terminate an employee at a time  
when the employee does not have a workplace right as defined in s 341, but with  
an appreciation that to defer the decision may mean that, at a future time, the  
employee may have a workplace right which might be used to resist termination.

31 This framing is flawed in two ways. First, it mistakenly implies that a mere  
"appreciation" of the possible future exercise of a workplace right at the time of  
taking adverse action would amount to a substantial and operative reason for taking  
adverse action. Second, it denies the additional reasons for the outsourcing  
decision the subject of the appeal, which go beyond both an appreciation of a  
possible effect of the outsourcing decision and a belief as to the possible existence  
of workplace rights in the future. These flaws demonstrate the importance for the  
correct application of s 340 of a careful identification of the true reasons for  
adverse action that is alleged to contravene s 340<sup>28</sup>.

### **"Workplace rights"**

32 The concept of a workplace right is central to the operation of Div 3 of  
Pt 3-1 and, within Div 3, to the operation of s 340(1)(b). Section 341(1) is not a

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28 cf *Greater Dandenong City Council* (2001) 112 FCR 232 at 291 [215]-[216].

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Jagot J

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definition of "workplace right" in the sense that it cannot be said that s 341 merely "shortens, but is part of, the text of the substantive enactment to which it applies"<sup>29</sup>. Quite apart from the awkwardness of attempting to read s 341(1) into the text of s 340, ss 343 and 345 would both be deprived of meaningful operation were s 341(1) to be read in that way. Rather, s 341 identifies as a matter of substance that a person has a workplace right in specified circumstances.

33 Section 341(1) uses the present tense to describe when a person "has" a workplace right. Whether a person has a "workplace right" under s 341 is determined by their present entitlements or role or responsibilities (under s 341(1)(a)) or abilities (under s 341(1)(b) and (c)).

34 The reference in s 341(1)(a) to a person having a workplace right if the person is entitled to the benefit of a workplace law or workplace instrument is sufficiently broad to encompass a present entitlement under a workplace law or workplace instrument to receive a benefit at some future stage of the employment relationship on the occurrence of an expected event or on the occurrence of a contingency. In this way, s 341(1)(a) has a forward-looking dimension. For example, s 108 provides that an employee who engages in an eligible community service activity, such as jury service or volunteer bushfire fighting<sup>30</sup>, "is entitled to be absent from his or her employment" in certain circumstances. An employee "has" a workplace right in the nature of an entitlement to the benefit of s 108, although the circumstances for asserting that entitlement have not arisen and may never arise.

35 Thus, a person can have a workplace right, comprising an entitlement to the benefit of a workplace law or workplace instrument, within s 341(1)(a), even though the person's capacity to exercise the workplace right may depend on accrual over time or on the occurrence of a future event or contingency<sup>31</sup>. The broad scope

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29 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 574-575 [12]. See also *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635.

30 See s 109 of the Act.

31 See, eg, *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440 at 446 [30]. Other examples under the Act include the notice and/or evidentiary requirements for taking unpaid parental leave or flexible unpaid parental leave (ss 70, 72A and 74), paid personal/carer's leave (ss 96 and 107), unpaid pre-adoption leave (s 85), unpaid carer's leave (ss 102 and 107), compassionate leave

of s 341(1)(a) is confirmed by the Explanatory Memorandum, which states that "[a] benefit under a workplace law or workplace instrument is also intended to include benefits that are contingent or accruing (eg, long service leave)"<sup>32</sup>.

36 The words "is able to" in s 341(1)(b) and (c), while not words of limitation<sup>33</sup>, necessarily indicate that circumstances have come into existence in which the person has a present capacity to exercise a relevant power or freedom. These powers and freedoms are specifically identified in s 341(1)(b) (read with s 341(2)) and in s 341(1)(c).

37 There is no reason in principle why a workplace right that a person has under s 341(1)(a) cannot overlap with a workplace right that the person has or might have in the future under s 341(1)(b) or (c). In particular, there is no reason in principle why the benefit of the statutory immunity in relation to protected industrial action that a person contingently has under s 415 is not a workplace right that the person has under s 341(1)(a) even before circumstances have come into existence in which the person has a present power or freedom to engage in protected industrial action so as to give that person an additional right under s 341(1)(b).

38 This said, there is a difference between a case where the capacity of a person to exercise the workplace right depends on temporal and circumstantial contingencies and a case where the exercise of the purported workplace right is prohibited or would expose the person to legal process to prevent the exercise of that purported right. In the former case, it may be said that the person "has" the workplace right, albeit that the right is not presently exercisable. In the latter case, it cannot be said that the person "has" the workplace right at all. Notwithstanding that s 341(1)(a) covers benefits that are contingent or accruing, it would unduly strain the meaning of s 341(1)(a) to posit that a person "has" a workplace right comprising an entitlement to the benefit of the statutory immunity in relation to protected industrial action in s 415 of the Act in the face of the statutory prohibition

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(ss 104 and 107) and, most recently, paid family and domestic violence leave (ss 106A and 107) (though at the time of the outsourcing decision, those provisions established only an entitlement to unpaid family and domestic violence leave).

32 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 216 [1363]. See also Pt 2-1, Div 9 of the Act.

33 *Cummins South Pacific* (2020) 281 FCR 421 at 433 [34]; *Alam v National Australia Bank Ltd* (2021) 288 FCR 301 at 328 [85].

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14.

in s 417 against organising or engaging in industrial action when the nominal expiry date of a relevant enterprise agreement has not passed.

39 Accordingly, it is appropriate to proceed upon the basis that the affected employees did not have relevant workplace rights at the time of the outsourcing decision in respect of the actions that Qantas sought to prevent by that decision, because they were not "entitled to the benefit of ... a workplace law" within s 341(1)(a) and they did not have an ability to initiate or participate in protected industrial action or a protected action ballot for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement, or to initiate or participate in enterprise bargaining, within the meaning of s 341(1)(b).

### **Proscribed adverse action – s 340(1)**

40 Section 340(1) employs the sanctions of civil contravention and penalty for certain types of conduct taken for reasons that are antithetical to the full enjoyment of workplace rights. As a civil penalty provision, it should be "certain and its reach ascertainable by those who are subject to it"<sup>34</sup>.

41 The evident object of s 340(1) is to protect workplace rights by protecting persons from adverse action for specified reasons connected with their holding or exercise of workplace rights<sup>35</sup>. The provision affords scope for lawful adverse action to achieve any number of objectives, provided that the action is not substantively actuated by a purpose or reason inimical to a person holding or exercising workplace rights. Importantly, adverse action will not offend s 340(1) if taken with mere awareness of an effect on another person's workplace rights. Instead, adverse action will only offend the section if it is taken for a proscribed reason: "because" the person against whom it is taken has a workplace right or has (or has not) done something in relation to the exercise of a workplace right within the scope of s 340(1)(a), or "to prevent" the exercise of a workplace right by that person within the scope of s 340(1)(b). As already noted, the proscribed reason must be a substantial and operative reason for taking the adverse action against the other person.

42 Except for s 340(1)(a)(i), the text of s 340(1) does not require a workplace right to be held or to be capable of immediate exercise by an affected person at the

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34 *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 634-635 [48].

35 *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225 at 229 [10]; cf *Cummins South Pacific* (2020) 281 FCR 421 at 429 [14].

time of the adverse action. To the contrary, as Qantas accepted, the application of s 340(1)(a)(ii) or (iii) to prohibit adverse action because of conduct concerning workplace rights that a person previously had is not contingent upon the existence of the workplace right at the time of the adverse action.

43 For s 340(1)(a)(ii) to apply, it is clearly necessary that the affected person had a workplace right at the time of its exercise or non-exercise.

44 Section 340(1)(a)(iii) is more complex in that its focus is the nature of the affected person's current or past proposal: to exercise or not to exercise a workplace right. It does not specify a temporal relationship between the proposal and the proposed exercise of the workplace right, but applies where the person proposes to exercise a workplace right in the future that they have in the present and where the person proposes to exercise a workplace right in the future that they will only have in the future. In that way, s 340(1)(a)(iii) undoubtedly applies to adverse action taken before, during or after the proposed exercise of a workplace right.

45 The focus of s 340(1)(b), in prohibiting adverse action "to prevent the exercise of a workplace right", is the future exercise of a workplace right, not the present existence of a workplace right. The words "to prevent", as has been emphasised, are directed to a substantial and operative reason for the taking of the adverse action and mean, in this context, "in order to prevent" or "with a view to preventing". To "prevent" is to preclude the occurrence of an anticipated event or to render the event impractical or impossible by anticipatory action<sup>36</sup>. To "prevent the exercise of a workplace right" encompasses stopping or putting an obstacle in the way of the exercise of a presently held right. But equally, it encompasses putting an obstacle in the way of exercising a right that may arise at some future date.

46 Why should s 340(1)(b) be construed as applying to adverse action to prevent the future exercise of a presently held workplace right, but not to adverse action to prevent the future exercise of a future workplace right (including, for example, a workplace right which will be held perhaps as soon as the following day)? The answer, according to Qantas, is to be found in a legislative choice, discernible in the context of a plethora of statutory rights under the Act that arise at different times, to protect only rights that a person presently has, as exemplified by the definition in s 341(1) being in the present tense. On analysis of each of

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36 *The Oxford English Dictionary*, online, "prevent", sense II.9.a.

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Qantas' arguments as to the proper construction of s 340(1)(b), no such legislative choice is apparent.

*The text*

47 Qantas' primary argument involved treating s 341(1) as if it were a definition so as to confine the operation of s 340(1)(b) by adding to the content of the proscribed reason a temporal relationship between the relevant workplace right and the adverse action. However, when s 341(1) is read as a substantive statement identifying when a person has a workplace right (rather than as a definition of a "workplace right"), no such temporal confinement appears.

48 Qantas next argued that the workplace right referred to in s 340(1)(b) must be a right which a person presently has within s 341(1) because any other construction would give primacy to s 340(1)(b), which should be understood as complementary to s 340(1)(a). This argument must be rejected. There is no principle of statutory interpretation that requires s 340(1)(a) to be treated as the primary proscribed reason and s 340(1)(b) as merely complementary to it because it follows after s 340(1)(a). Any breach of s 340 is liable to attract the same penalty<sup>37</sup> and the same forms of relief<sup>38</sup>.

49 Qantas also submitted that construing s 340(1)(b) to apply to adverse action to prevent the exercise of future workplace rights would make it easier to prove a contravention of s 340(1)(b) than of s 340(1)(a) because, for s 340(1)(b), it would not be necessary to prove the existence of an affected workplace right. Again, this submission lacks a principled basis. In any event, the primary concern of s 340(1) is the substantial and operative reasons of the person who takes the adverse action. What is required to be proved is the state of mind of the alleged contravener. On this appeal, it was not in issue that Qantas contemplated or knew that the affected employees would have the workplace rights in 2021 and Qantas had not disproved that this was a substantial and operative reason for the outsourcing decision. Accordingly, it is not necessary to address Qantas' argument of suggested unfairness that s 361 might be invoked to cast the burden of disproof upon the alleged contravener by nothing more than an allegation of a proscribed reason without proof of objective facts that would make such a reason a plausible one<sup>39</sup>.

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37 Section 539(2), item 11 and s 546 of the Act.

38 Section 545 of the Act.

39 cf *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at 75-76 [119].

50 The inclusion of conditional or contingent rights as an element of a proscribed reason does not render s 340(1)(b) uncertain, as Qantas suggested, principally because the section requires the alleged contravener's reasons for the adverse action to be determined. If the alleged reasons involve remote or improbable circumstances, it may be expected that the alleged contravener will readily rebut the presumption in s 361.

51 Qantas' construction of s 340(1)(b) would leave it with little practical operation beyond s 340(1)(a). On Qantas' construction, s 340(1)(b) would be confined to a case where adverse action taken for a reason of preventing the exercise of a workplace right could not also be characterised as adverse action taken for a reason of having a workplace right. It is difficult to envisage such a case.

*Purpose and context of Pt 3-1*

52 Apart from a lack of textual justification for Qantas' construction of s 340(1)(b), its protective purpose, the breadth of the concepts of adverse action and workplace rights in Pt 3-1, and the apparently comprehensive scope of s 340 all point against limiting s 340(1)(b) to the prevention of the exercise of workplace rights in existence at the time of the adverse action.

53 Qantas argued that s 341(3), and the related provisions in s 341(4) and (5) concerning prospective employees, would be otiose if s 340(1)(b) were construed to include preventing the exercise of a future workplace right. Section 341(3) is a deeming provision applying to adverse action taken because of a workplace right a prospective employee would have if employed. Section 341(3) involves determining what workplace rights the prospective employee would have had if they had been employed<sup>40</sup>. It is not concerned with the case of an existing employee (or another person who is not an employee) who may acquire workplace rights over time.

*Broader context of the Act*

54 Qantas next argued that construing s 340(1)(b) as applying to future workplace rights would tend to defeat the legislative choices in other parts of the Act, namely the time limitations placed upon protected industrial action and unfair dismissal rights. In particular, Qantas referred to s 194(c) and (e), which respectively provide that terms of an enterprise agreement are unlawful if they confer any entitlement or remedy in relation to unfair dismissal before the

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40 *Maric v Ericsson Australia Pty Ltd* (2020) 293 IR 442 at 461-462 [58].

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employee has completed the minimum employment period under the Act or if they are inconsistent with a provision of Pt 3-3 (which deals with industrial action). Section 194 and the various protections conferred on employers by ss 417 and 418, subject to the other preconditions to protected industrial action<sup>41</sup>, operate independently of s 340 as exemplified by the facts in this appeal.

55 As to the unfair dismissal provisions, it is not self-evident that the balance struck in Pt 3-2 is independent of other parts of the Act. Parts 3-1 and 3-2 serve different purposes and are attended by different legal tests. By including dismissal of an employee within the scope of adverse action<sup>42</sup>, Parliament has made a policy choice that forms part of the balance struck by Pt 3-2.

56 The Act also plainly envisages that Pt 3-2 is not a code for dealing with conduct that falls within its terms. To the contrary, the potential for overlapping claims under the Act is explicitly recognised and addressed in Div 3 of Pt 6-1, which is entitled "Preventing multiple actions". The general rule is that a person who has been dismissed must not make an application or complaint of a kind referred to in any one of ss 726 to 732 in relation to the dismissal if any other of those sections applies. Section 728 addresses general protections court applications, that is, applications to a court for orders in relation to a contravention of Pt 3-1<sup>43</sup>, and s 729 addresses applications under s 394(1) for a remedy for unfair dismissal. This speaks against Qantas' argument of incoherence in the possibility of a contravention of s 340(1)(b) notwithstanding an absence of available relief under the unfair dismissal regime in Pt 3-2.

## **Conclusion**

57 Qantas' construction of s 340(1)(b) must be rejected. The readily ascertainable meaning of s 340(1)(b) is to proscribe the taking of adverse action against another person if a substantial and operative reason for the action is to prevent the other person exercising a presently held or future workplace right.

58 The appeal should be dismissed.

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41 See, eg, ss 409(2), 437 and 459 of the Act.

42 Section 342(1), item 1(a) of the Act.

43 Section 368(4) of the Act.

59 GORDON AND EDELMAN JJ. The facts and statutory framework are set out in the reasons of other members of the Court. We gratefully adopt them. We agree that the appeal should be dismissed and that it is unnecessary to consider the respondent's notice of contention or proposed cross-appeal. We would express our reasons for dismissing the appeal in the following way.

60 Section 340(1)(b) of the *Fair Work Act 2009* (Cth) provides that a person must not take "*adverse action* against another person ... to prevent the exercise of a *workplace right* by the other person" (emphasis added). "[A]dverse action" is defined in s 342 of the Act and includes an employer "alter[ing] the position of the employee to the employee's prejudice"<sup>44</sup>. The meaning of "workplace right" is set out in s 341 of the Act. A person has a workplace right "if the person ... is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument"<sup>45</sup>. A "process or proceedings" includes "protected industrial action"<sup>46</sup> and "a protected action ballot"<sup>47</sup>.

61 It is not in contention that Qantas took adverse action against the affected employees in deciding on 30 November 2020 to outsource ground handling operations work at ten Australian airports ("the outsourcing decision"). It is also not in contention that all affected employees were entitled to the benefit of a workplace instrument<sup>48</sup>, being an enterprise agreement made under the Act.

62 There were two groups of Qantas employees affected by the outsourcing decision. The nominal expiry date of the applicable enterprise agreement had passed for Qantas Ground Services Pty Ltd employees, but not for Qantas Airways Ltd employees. The Qantas Airways Ltd employees were therefore prohibited from taking industrial action given their enterprise agreement remained on foot<sup>49</sup>, and, although the nominal expiry date of the Qantas Ground Services Pty Ltd employees' enterprise agreement had passed, protected industrial action<sup>50</sup> by those employees could not be taken as the necessary procedural steps to enable that to

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44 *Fair Work Act*, s 342(1), item 1(c).

45 *Fair Work Act*, s 341(1)(b); see s 341(1)(a) and (c) for the other circumstances in which a person has a workplace right.

46 *Fair Work Act*, s 341(2)(c).

47 *Fair Work Act*, s 341(2)(d).

48 *Fair Work Act*, s 341(1)(a).

49 *Fair Work Act*, s 417.

50 *Fair Work Act*, ss 408 and 409.

occur<sup>51</sup> had not been completed at the time of the outsourcing decision. It was relevantly alleged, and found by the primary judge, that the reasons for the adverse action – the outsourcing decision – included to prevent the exercise by employees of their workplace rights in 2021, following the nominal expiry of their enterprise agreements, to: (i) organise and engage in protected industrial action<sup>52</sup> or a protected action ballot<sup>53</sup> for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement; and (ii) participate in enterprise bargaining<sup>54</sup> under the Act.

63 Section 361 of the Act establishes a rebuttable presumption that the adverse action was taken for the reason alleged, or with the intent alleged, if taking action for that reason or with that intent would constitute a contravention of Pt 3-1 of the Act (which includes s 340). A person takes action for a particular reason if the reasons for the action include that reason<sup>55</sup>. The presumption in s 361 recognises that the decision-maker is uniquely placed to know the reasons for their action and should thus be made to prove them<sup>56</sup>. An employer can discharge that onus by proving that none of its substantial and operative reasons for the adverse action was to prevent the exercise of workplace rights<sup>57</sup>.

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51 *Fair Work Act*, ss 437, 438, 443, 449, 459.

52 *Fair Work Act*, Div 2 of Pt 3-3.

53 *Fair Work Act*, Div 8 of Pt 3-3.

54 *Fair Work Act*, Pt 2-4.

55 *Fair Work Act*, s 360.

56 *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 517 [44]-[45], 519-520 [49]-[51], 535-536 [105]-[106]; *Rumble v The Partnership (t/as HWL Ebsworth Lawyers)* (2020) 275 FCR 423 at 430-431 [33]-[34].

57 *Bowling* (1976) 51 ALJR 235 at 238-239, 241-242; 12 ALR 605 at 611-612, 616-617, 619; *Barclay [No 1]* (2012) 248 CLR 500 at 522 [56], 523 [59], 523 [62], 535 [103]-[104], 542 [127]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 at 249 [7]-[9], 252-253 [22], 267 [85], 268-269 [88]-[90]; *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150 at 160 [30], 160-161 [32], 169 [75]-[77], 186-187 [166], 191 [190]-[191]; *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273 at 281-282 [36]-[37], 301 [130]-[131], 302 [133]-[135].

64 Qantas failed to rebut the presumption because its witness evidence on this point was not accepted. Accordingly, Qantas failed to prove that its outsourcing decision was made for reasons *not* including the substantial and operative reason of preventing the exercise of a workplace right within the meaning of s 341(1)(b) of the Act, which was relevantly the entitlement of the employees affected by the outsourcing decision to engage in enterprise bargaining following the expiry of the enterprise agreements and to organise and engage in protected industrial action and a protected action ballot (in short, "the entitlement to engage in protected industrial action"). On appeal to this Court, Qantas did not challenge the conclusion that it had failed to rebut the presumption that its outsourcing decision was made for reasons that included the prevention of its employees' exercise of an entitlement, in the future, to engage in protected industrial action.

65 This appeal turns on the proper construction of s 340(1), and, in particular, the term "workplace right". The central issue is the scope of the protection afforded by s 340(1)(b) of the Act against the taking of adverse action to prevent the future exercise of the entitlement to engage in protected industrial action, even where that entitlement is not presently existing. That issue is a question of construction – does s 340(1)(b) of the Act prohibit a person from taking adverse action against another person for the purpose of preventing the exercise of a workplace right when that "right" is not a presently existing right, but is one that might arise in the future? The answer is "yes".

66 Qantas argued that neither of the groups of affected employees had a relevant workplace right within the meaning of s 341 at the time of the outsourcing decision, and that prevention of the exercise of a workplace right in s 340(1)(b) is concerned only with existing workplace rights. Qantas' contentions, both of which were essential for its success, were that: (1) a workplace right in s 341(1) does not include entitlements and abilities (including contingent entitlements and abilities) to the benefit of things, or to initiate or participate in things, whilst those things are positively prohibited or unlawful; and (2) s 340(1)(b) is concerned only to prohibit adverse action against a person to prevent that person from exercising a presently existing workplace right. As will be explained, the first contention is correct; the second contention is rejected.

67 "Right" and "entitlement" are used loosely in the Act to include those legal relations that have elsewhere been described as claim rights, powers, privileges and immunities<sup>58</sup>. Nothing in this appeal turns upon the precise legal

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58 The word "right" is one of the most ill-used legal concepts: Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 28-30; Pound, "Legal Rights" (1915) 26 *The International Journal of Ethics* 92; Walker, *The Oxford Companion to Law* (1980) at 1070 (definition of "[r]ight").

characterisation of these concepts so it is convenient generally to use the language of the Act.

### **Qantas' first contention**

68 Section 341(1), headed "Meaning of *workplace right*", provides that:

"A person *has a workplace right* if the person:

- (a) *is entitled* to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- (b) *is able to* initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- (c) *is able to* make a complaint or inquiry ..." (emphasis added)

69 The chapeau refers to a person who "has a workplace right". Section 341(1)(a) to (c) then respectively refer in the present tense to a person who "is entitled to" a particular benefit, or who "is able to initiate, or participate in" a particular action or "is able to make a complaint or inquiry".

70 Qantas submitted that a workplace right in s 341(1) is concerned, in each of paras (a) to (c), with presently held workplace rights and does not include entitlements and abilities (including contingent entitlements and abilities) to the benefit of things, or to initiate or participate in things, whilst those things are positively prohibited or unlawful. Qantas argued that, at the time of the outsourcing decision, neither of the groups of affected employees had a presently existing relevant "workplace right" because they were unable to lawfully engage in protected industrial action. The respondent, the Transport Workers Union of Australia, and the Minister for Employment and Workplace Relations (intervening), submitted that the employees had contingent rights to initiate or participate in protected industrial action which were workplace rights within the meaning of s 341(1)(b) of the Act. Qantas' submission on this first contention should be accepted. The text of s 341(1), as well as its context and purpose, compels that conclusion.

71 It is important to draw a distinction between different forms of workplace rights that give rise to contingent benefits which accrue over time before they can be claimed, and those workplace rights that represent a thing, action or activity that is positively prohibited or unlawful until it can be claimed.

72 Two examples of the former type of workplace rights are an employee's entitlements to take annual leave<sup>59</sup> and paid personal/carer's leave<sup>60</sup>. These entitlements are contingent upon being accrued and being claimed. So, for example, s 87(2) of the Act provides that "[a]n employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year"<sup>61</sup>. Even before the entitlements to take annual leave and paid personal/carer's leave have accrued, it is not difficult to say that these entitlements which "accrue[] progressively during a year of service" are an immediate benefit to which an employee is entitled under a workplace law within s 341(1)(a). Indeed, that view is reinforced by the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) which states that "benefit" in s 341(1)(a) is intended to include benefits that are "contingent or accruing"<sup>62</sup>.

73 However, there is a distinct difference between, on the one hand, presently existing but contingent entitlements, and, on the other hand, a thing, action or activity which is unlawful or positively prohibited under pain of civil penalty. There is no power or entitlement to do something that is positively prohibited or unlawful. That is not a benefit to which a person is entitled under s 341(1)(a). Nor is it a process or proceeding that a person is able to initiate or participate in under s 341(1)(b).

74 By s 417, the Qantas Airways Ltd employees were prohibited from organising or engaging in industrial action because the nominal expiry date of their applicable enterprise agreement had not passed. As a matter of construction, it is not open to say that the prohibition in s 417 is a "benefit" to which a person is entitled within the meaning of s 341(1)(a) of the Act. The prohibition in s 417 does not in terms meet the description in s 341(1)(b) of a workplace right, being a process or proceedings under a workplace law or workplace instrument that a person "is able to initiate, or participate in" (emphasis added). Under the s 417 prohibition, a person is *not* "able to initiate" – they are prohibited from

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59 *Fair Work Act*, s 87.

60 *Fair Work Act*, s 96.

61 See also *Fair Work Act*, s 96(2).

62 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 216 [1363].

"initiating" – any process of the kind to which s 341(1)(b) of the Act is directed<sup>63</sup>. If the person contravenes that prohibition, the Federal Court or what is now called the Federal Circuit and Family Court of Australia may grant an injunction or make any other relevant orders that the court considers necessary to stop, or remedy the effects of, the contravention<sup>64</sup>.

75 As noted, at the time of the outsourcing decision, the Qantas Ground Services Pty Ltd employees were in a different position because the nominal expiry date of the applicable enterprise agreement had passed. Although any *industrial action* by those employees was no longer prohibited under s 417, it would not acquire the status of *protected industrial action* which has immunity under law<sup>65</sup> unless and until the necessary procedural steps had been taken<sup>66</sup>.

76 Put in different terms, it cannot be said that a person is able to initiate or participate in that which is prohibited<sup>67</sup> or that which they are unable to lawfully do – here, to engage in protected industrial action. The affected employees did not have a presently existing "workplace right" within the meaning of s 341(1) to engage in protected industrial action at the time that the outsourcing decision was made.

### **Qantas' second contention**

77 That conclusion, however, does not answer Qantas' second contention, which is that s 340(1)(b) is concerned only with prohibiting the taking of adverse action against a person to prevent that person from exercising a *presently existing* workplace right.

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63 cf *Fair Work Act*, s 438 dealing with an application for a protected action ballot order which must not be made earlier than 30 days before the nominal expiry date of the enterprise agreement.

64 *Fair Work Act*, s 417(3) read with s 545(1).

65 *Fair Work Act*, s 415.

66 Unless protected, industrial action can have a range of civil consequences. Those consequences include that, if it appears to the Fair Work Commission that industrial action by one or more employees that is not or would not be protected industrial action is happening, is threatened, impending or probable, or is being organised, the Commission must make an order that the industrial action stop, not occur or not be organised: *Fair Work Act*, s 418(1). A person must not contravene such an order: *Fair Work Act*, s 421(1).

67 *Fair Work Act*, s 417(1)(a).

78 Unlike s 341, which identifies what is a workplace right, s 340 is in a different form and has a different purpose. Section 340 is headed "Protection". Section 340(1) provides that:

"A person must not take adverse action against another person:

(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.*"  
(emphasis added)

79 The relationship between s 340 and s 341 is important. Section 341 enacts substantive law. It is not a mere drafting device that is designed to shorten the length of s 340. None of the sub-sections of s 341 is apt to be transplanted into s 340. There is substantive and independent content to each sub-section of s 341: the meaning of a "workplace right" in s 341(1); the examples of processes or proceedings under a workplace law or workplace instrument in s 341(2); the deeming provision in s 341(3) with respect to prospective employees; and the exceptions with respect to prospective employees in s 341(4) and (5).

80 In this respect, s 341 contrasts starkly with a definition section as that concept is properly understood. True definition sections are a drafting device. They "are not provisions with any operative effect; they simply provide an aid to the construction of the substantive provisions in an Act"<sup>68</sup>. The "function of a definition is not to enact substantive law" but to "shorten[] ... the text of the substantive enactment to which it applies"<sup>69</sup>. Hence, the only proper course with a definition section is to "read the words of the definition into the substantive enactment and then construe the substantive enactment"<sup>70</sup>. Section 341 is not a definition section. It is not to be read into the words of s 340.

81 Accordingly, in the structure and hierarchy of the provisions, s 341 identifies what is a workplace right, and then s 340, in setting out the

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68 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 72 [185].

69 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103].

70 *Kelly* (2004) 218 CLR 216 at 253 [103].

protections against the taking of adverse action, provides the bases upon which the protection of those workplace rights operates. And those bases are temporal in nature. That is, the fact that the paragraphs of s 341(1) are expressed in the present tense is of no moment in the application of the prohibition contained in s 340. The reference to the structure and hierarchy of the provisions is important. As we have said, s 341 does not control the bases on which s 340 operates.

82 This appeal is concerned with s 340(1)(b). The question is whether that provision extends to prevent the exercise of a workplace right if that right is one which might exist in the future. The answer is "yes". The text "to prevent the exercise of a workplace right" extends to the *prevention* of the future exercise of a workplace right by a person. It is necessarily concerned with obstruction of an exercise of a workplace right that might occur in the future. Section 340(1)(b) applies where the workplace right that would be exercised in the future presently exists. But, equally on a plain reading of the paragraph, it applies to workplace rights that might be exercised in the future after they come into existence and are therefore not presently existing.

83 Supporting that construction, as a matter of immediate context, s 340(1)(b) is to be contrasted with s 340(1)(a). Section 340(1)(a) applies where the adverse action is taken "because", among other things, the person has a workplace right, has exercised a workplace right, or proposes, or has at any time proposed, to exercise a workplace right. Section 340(1)(a)(i) is directed to the present. Section 340(1)(a)(ii) is directed to the past. Section 340(1)(a)(iii) is directed to the act of proposing to do or not to do something, whether in the past or in the present.

84 Section 340(1)(b), on the other hand, is directed to adverse action taken *to prevent* the exercise of a workplace right. It is directed to, and concerned with, different temporal aspects of the interaction between a person and another person, and between that other person and a workplace right. It concerns what might be described as a pre-emptive strike by one person against another person so as to deny the second person the ability or opportunity to exercise a workplace right in the future. Put in different terms, the person to whom the protection in s 340(1)(b) is addressed is a person who need not be doing, have done, or propose to do, anything at all.

85 Qantas contended that construing s 340(1)(b) as a provision that extends to workplace rights that might exist in the future would invert the natural reading of s 340(1) and give primacy to s 340(1)(b) over s 340(1)(a). That submission must be rejected. As is self-evident, s 340(1)(a) and (b) are complementary. Similarly, Qantas' contention that construing s 340(1)(b) in that way would make a contravention of that sub-section easier to prove than under s 340(1)(a) is also rejected. That contention fails to take account of the fact that the Act – s 361 read with s 340 – establishes a rebuttable presumption that adverse action is taken for

the reason alleged, or with the intent alleged, if taking that action for that reason or with that intent would constitute a contravention of s 340. As explained, this presumption recognises that the alleged contravener is uniquely placed to know the reasons for their action. That is, the Act is concerned with the alleged reason or intent and then whether the alleged contravener can prove that none of their substantial and operative reasons for the adverse action was of the kind alleged. The present case is instructive. The central issue was whether Qantas could prove that the outsourcing decision was made for reasons *not* including the substantial and operative reason of preventing the affected employees from exercising an entitlement to engage in protected industrial action. Qantas was uniquely placed to know the reasons for the outsourcing decision and to put on evidence to address the allegation that it was made to prevent the exercise by the affected employees of workplace rights. Qantas' evidence on that point was not accepted by the primary judge.

86 If Qantas' second contention were accepted there would be a considerable gap in the protection afforded by s 340. The gap would not be as big as the Full Court suggested because, as has been explained, benefits such as annual leave and paid personal/carer's leave can be interpreted, consistently with their express terms, as presently existing, but contingent, entitlements even if the benefit cannot yet be exercised. However, the gap in the protection afforded by s 340 that would exist should Qantas' second contention be accepted would include the inapplicability of s 340(1)(b) to, for example, adverse action taken against a person to prevent the future taking of annual leave in circumstances where an employment contract has been signed but work has not yet commenced so that the leave has not yet started to accrue and is, therefore, not yet an existing contingent entitlement. Section 340(1)(b) would also not apply to adverse action taken to prevent the future taking of annual leave where an employee has an annual leave deficit because there would be no presently existing accruing benefit, just a reduction of a deficit in annual leave. The future rights in those cases could, on Qantas' second contention, form the basis for permissible adverse action. That construction should not be accepted.

87 Moreover, there is nothing in the stated objects of the Act<sup>71</sup>, the stated objects of Pt 3-1 of Ch 3<sup>72</sup>, the other provisions of the Act<sup>73</sup>, or the legislative

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71 *Fair Work Act*, s 3.

72 *Fair Work Act*, s 336.

73 See, eg, *Fair Work Act*, Pt 3-2, concerned with the unfair dismissal of national system employees and the granting of remedies for unfair dismissal.

history of the Act<sup>74</sup> or the predecessor legislation<sup>75</sup> that supports Qantas' narrow construction of s 340(1)(b). Put simply, the provisions in Pt 3-1 of the Act were "intended to rationalise, but not diminish, existing protections" and the "new provisions" in Pt 3-1 (which included s 340(1)(b)) were intended to "protect persons against a broader range of adverse action"<sup>76</sup>.

88 Finally, nothing in these reasons should be understood as suggesting that employers are prevented from considering the existence and terms of enterprise agreements in making decisions about the future. In fact, to fail to do so might in some circumstances constitute a breach of duty<sup>77</sup>. There is no legal or practical difficulty in allowing such a matter to be considered by a decision-maker. However, what is not permissible, and what s 340(1)(b) protects against, is the taking of adverse action to prevent the exercise of a workplace right, whether presently existing or not. If Qantas had established, for example, that its reason for the outsourcing decision was to generate substantial savings in order to address imminent liquidity issues (with the inevitable consequence of that decision being termination of employment of staff), *and* that its reasons *did not include* a substantial and operative reason of preventing the employees affected by the outsourcing decision from organising and engaging in protected industrial action, then the outsourcing decision would not have been for a proscribed or prohibited purpose (and the termination would not have been unlawful under s 340). Qantas did not do so.

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74 See, eg, *Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421 at 431-432 [23]-[30].

75 See, eg, *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440; *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232 at 282-288 [192]-[204].

76 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 212 [1336], 221 [1386].

77 See, eg, *Fair Work Act*, s 550 read with s 539; *Corporations Act 2001* (Cth), ss 180 and 181.

89 STEWARD J. This appeal raises difficult issues about whether a business may undertake a commercial restructure, which involves the necessary taking of adverse action (say the dismissal of employees within a particular business division), without contravening the general protection provisions contained in Div 3 of Pt 3-1 of the *Fair Work Act 2009* (Cth) ("the FWA"). Here, in 2020, Qantas Airways Limited ("QAL") and its wholly-owned subsidiary Qantas Ground Services Pty Ltd ("QGS"), referred to collectively in these reasons as "Qantas", thought they had an opportunity during the COVID-19 pandemic to rid themselves of an expensive way of undertaking their ground handling operations. This service was to be outsourced, saving QAL around \$100 million per year "when things returned to normal" and \$80 million of capital costs over five years. Given that QAL's revenues had plummeted since the beginning of the pandemic (QAL had incurred a revenue loss of \$20 billion), the attractiveness of outsourcing a costly business division was manifest. But it would involve making the employees in the ground handling operations redundant; that is, it would require QAL to take "adverse action" as defined by s 342 of the FWA against its employees and QGS's employees.

### **The background to the Transport Workers Union's suit against Qantas**

90 Section 340(1)(b) of the FWA provides that a person must not take "adverse action against another person ... to prevent the exercise of a workplace right by the other person". The term "workplace right" is defined broadly in s 341. Relevantly, a person will have a "workplace right if the person ... is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument"<sup>78</sup>. Here, that "process" was said to be an ability to initiate or participate in "protected industrial action"<sup>79</sup>. The term "adverse action" is also defined broadly in s 342. It was not in dispute that QAL prejudicially altered "the position of" employees in the ground handling operations when it announced, on 30 November 2020, its decision to outsource those operations to third parties. This constituted "adverse action" for the purposes of item 1(c) of s 342(1) of the FWA. So too did the eventual dismissal of the ground handling employees.

91 Section 340(1) of the FWA should be set out in full. It provides:

"A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

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78 FWA, s 341(1)(b).

79 FWA, s 341(2)(c).

- (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."

92 The Transport Workers Union of Australia ("the TWU") commenced proceedings in the Federal Court of Australia relevantly alleging that QAL had contravened s 340(1)(b) of the FWA by taking adverse action against employees in the ground handling operations to prevent those employees from exercising a "right" to initiate or participate in "protected industrial action" for the purposes of s 341(2)(c). It was not in dispute that as at 30 November 2020 the ground handling employees did not have any such "ability" to initiate or participate in protected industrial action. The time for that ability to arise would only be in the future, and, even then, it would be conditional on certain events taking place.

93 In November 2020, ground handling employees of QAL were the subject of an enterprise agreement entitled "Qantas Airways Limited and QCatering Limited – Transport Workers Agreement 2018" ("the QAL Enterprise Agreement"), which had a nominal expiry date of 31 December 2020. Ground handling employees of QGS were the subject of another enterprise agreement entitled "Qantas Ground Services Pty Limited Ground Handling Agreement 2015" ("the QGS Enterprise Agreement"), which had a nominal expiry date of 1 September 2019. About 63 per cent of all ground handling workers were employed by QGS, and about 50 per cent of these were members of the TWU. Almost all of the ground handling workers employed by QAL were members of the TWU.

94 As at 30 November 2020, in the case of QAL employees, by reason of s 417 of the FWA, they were prevented from taking industrial action, including protected industrial action, as the QAL Enterprise Agreement remained on foot. No such limitation applied to the employees of QGS precisely because the QGS Enterprise Agreement had passed its nominal expiry date. But, as at 30 November 2020, for another reason those employees also held no ability to initiate or participate in protected industrial action. In order to secure that ability, the following steps, amongst other things, were required: an application needed to be made by a bargaining representative to the Fair Work Commission for an order that a protected action ballot take place<sup>80</sup>; the employees needed the Fair Work Commission to make such an order<sup>81</sup>; and when the protected action ballot occurred the employees needed at least 50 per cent of eligible voters to vote in the

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80 FWA, ss 437 and 438.

81 FWA, s 443.

ballot, and more than 50 per cent of those voters to approve the proposed industrial action<sup>82</sup>. In the case of the QGS ground handling employees, none of those steps had taken place before 30 November 2020.

95 It was in this context that the TWU relevantly made the following allegation in its amended statement of claim<sup>83</sup>:

"In the circumstances, Qantas contravened s 340(1)(b) of the FW Act by taking adverse action against the Affected Employees to prevent the Affected Employees exercising the workplace right, following the nominal expiry date of enterprise agreements which covered and applied to them, to participate in a process under the FW Act, being the ability to participate in a process under the FW Act by ... engaging in protected industrial action for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement under the FW Act."

96 By reason of s 361 of the FWA, it was common ground that it was to be presumed that QAL took adverse action against the ground handling employees for the reason alleged by the TWU in its pleading. Section 361(1) provides:

"If:

- (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
- (b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise."

97 Section 360 should also be noted. It provides that a person "takes action for a particular reason if the reasons for the action include that reason".

98 As explained below at [111]-[114], the primary judge found that QAL had failed to displace that presumption on the narrowest of grounds. Qantas did not seek to attack that conclusion on appeal to this Court. Instead, it relied upon what ultimately amounted to a single legal proposition<sup>84</sup>, namely that QAL could not

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82 FWA, s 459.

83 Paragraph 44A of the amended statement of claim dated 31 December 2020.

84 Kiefel CJ, Gageler, Gleeson and Jagot JJ rightly point out that Qantas had a second legal contention, but it was wholly subsumed within Qantas' primary argument.

have taken adverse action to prevent the exercise of the relevant workplace right because, as at 30 November 2020, no ground handling employee had the right or ability to initiate or participate in protected industrial action. This contention turns upon an interpretation of s 340(1)(b) that requires the "workplace right", the exercise of which is to be prevented, to exist at the time when adverse action is taken. For the reasons given below, that construction of s 340(1)(b) of the FWA is unsustainable.

### **The activating reasons for taking adverse action**

99 In a case where workers have been made redundant, the statutory context relevant to construing s 340 of the FWA includes Part 3-2 of that Act, which addresses the topic of unfair dismissal. Section 385 appears within Pt 3-2 of the FWA. It defines when a person has been "unfairly dismissed". Of course, the TWU did not contend that any of its members had been unfairly dismissed for the purposes of s 385 of the FWA. Had it done so, it might have been met with the defence of "genuine redundancy" as provided by s 385(d). Section 389(1) supplies a definition of this term. It states:

"A person's dismissal was a case of *genuine redundancy* if:

- (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy."

100 Industrial law has long recognised that genuine redundancy, defined over the years in various ways<sup>85</sup>, is a legitimate and acceptable reason for the termination of employment. As Ryan J famously observed in *Jones v Department*

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85 *R v The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd* (1977) 16 SASR 6 at 8 per Bray CJ, 26-27 per Bright J; *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 55-56 per Moore P, Maddern J and Brown C; *Ulan Coal Mines Ltd v Howarth* (2010) 196 IR 32 at 36-38 [15]-[20] per Boulton J, SDP, Drake SDP and McKenna C; *Mackay Taxi Holdings Ltd v Wilson* (2014) 240 IR 409 at 416-420 [29]-[47] per Richards SDP, Spencer and Simpson CC; *McRae v Greyhound Australia* (2020) 295 IR 126 at 145-149 [68]-[78] per Sams DP; cf *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 249 [12] per Gleeson CJ and McHugh J.

of *Energy and Minerals*<sup>86</sup>, it is an employer's "prerogative". In the full passage from which this expression emerges, his Honour said<sup>87</sup>:

"[I]t is within the employer's prerogative to rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions."

101 Of course, it is no technical legal answer to a contention that adverse action – in the form of dismissal or the like – has taken place in contravention of s 340, to submit that the defence of genuine redundancy is made out. That is a defence to a claim of unfair dismissal; it is not a defence for the purposes of Div 3 of Pt 3-1 of the FWA. But at a practical level, and very much generally speaking, an employer who can demonstrate that a dismissal took place "because of changes in the operational requirements of the employer's enterprise" which resulted in a relevant job being no longer required, to use the language of s 389, should thereby be capable of displacing the presumption arising under s 361 of the FWA in a case where a contravention of s 340 is alleged. The foregoing might not be applicable in a case where some employees are rendered redundant, and others not, and the process for selecting employees is unrelated to the circumstances of redundancy<sup>88</sup>. But where, as here, all employees of a division are rendered redundant, the general observation remains valid. Such a conclusion ensures that the FWA gives effect to "harmonious goals"<sup>89</sup>.

102 Consistently with the foregoing, a distinction has traditionally been drawn by courts between the operative or immediate reason for taking adverse action as against a merely contributing factor or factors for undertaking such conduct. Section 340 is concerned with the former reason for acting and not the latter. Thus,

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86 (1995) 60 IR 304 at 308.

87 (1995) 60 IR 304 at 308. See also *ICI Australia Operations Pty Ltd v Hutton* (1993) 47 IR 288 at 296-297 per Bauer, Hill and Peterson JJ; *Short v F W Hercus Pty Ltd* (1993) 40 FCR 511 at 520-521 per Burchett J; *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327 at 332-333 per Beazley J; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2001) 111 IR 241 at 269-275 [70]-[81] per Moore J; *Dibb v Commissioner of Taxation* (2004) 136 FCR 388 at 401-405 [33]-[44] per Spender, Dowsett and Allsop JJ.

88 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 247 [1553].

89 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70] per McHugh, Gummow, Kirby and Hayne JJ, citing *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.

in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*, albeit in the analogous context of s 346 of the FWA, French CJ and Kiefel J said<sup>90</sup>:

"The focus of the inquiry as to whether s 346(b) has been contravened is upon the reasons for [the decision-maker] taking the adverse action. This is evident from the word 'because' in s 346, and from the terms of s 361. The inquiry involves a search for the reasoning actually employed by [the decision-maker]. The determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences."

103 To similar effect, in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*, Heydon J said<sup>91</sup>:

"To search for the 'reason' for a voluntary action is to search for the reasoning actually employed by the person who acted. Nothing in the Act expressly suggests that the courts are to search for 'unconscious' elements in the impugned reasoning of persons ..."

104 Corporate decision-making is often the product of many motivations, causes, influences and processes of reasoning. Depending on their level of seniority or function, officers of a company may well emphasise different aspects or factors as to why something is to be done. For example, those in the area of human resources may well have a focus on employment outcomes. But the task is the identification of the actual, immediate or operative reason or reasons for taking adverse action. That is a question of fact. In a given case, it may well require one to reject as a reason for taking adverse action the musings or thoughts of employees that ultimately play no part in the ultimate decision-making process. It may also require one to differentiate between the actual reasons for taking adverse action, and factors or issues which may have contributed in only some causal way in the lead up to the occurrence of such conduct. Perram J explained this well in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd*<sup>92</sup>, when his Honour observed that factoring something into one's consideration or taking something into account does not necessarily make it a reason for taking adverse action. Perram J said<sup>93</sup>:

"[T]here is a factual distinction between factoring something into one's consideration of a matter and making a decision about the matter itself. To

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90 (2014) 253 CLR 243 at 249 [7] (footnotes omitted).

91 (2012) 248 CLR 500 at 546 [146].

92 (2015) 231 FCR 150.

93 (2015) 231 FCR 150 at 173 [91].

give an example: in reaching the conclusions I have reached on this appeal I have taken the CFMEU's submissions into account and they have formed an important element in my decision-making processes. However, as will be apparent, the fact that I have had regard to them does not entail that they may therefore be described as constituting a part of my subjective reasons for decision. Of course, if by reason one means 'cause' then one gets a different result. On that view of things, [the employee's] prior record was causally connected to the decision to transfer him to a different shift. That approach to the identification of the reason in question is prevented, however, by *CFMEU v BHP*. The inquiry thrown up by s 340 is not one concerned with causation but, rather, the subjective reasons for action of the decision-maker."

105 For similar reasons it is not enough that there may be a "connection" between the taking of adverse action, and, for example, protected industrial activity. As French CJ and Kiefel J said in *BHP Coal*<sup>94</sup>:

"Section 346 does not direct a court to inquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action."

106 The foregoing observation applies equally to s 340 of the FWA.

107 Identifying the actual or operative reason for taking adverse action will also require one to identify the decision-maker or decision-makers. That is again a question of fact. In this matter, it was accepted that the decision-maker was Mr Andrew David, Chief Executive Officer of Qantas Domestic and International. Where a company takes adverse action, the decision-makers will usually be those who represent its directing mind, and, ordinarily, that will be the company's board of directors<sup>95</sup> or, where applicable, the board's authorised delegate or delegates and agent or agents. In every case, if the presumption mandated by s 361 is to be displaced, what is required is a determination of the actual or authentic reason or reasons for taking adverse action by the real decision-maker or decision-makers.

108 The distinction between the actual or operative reason for taking adverse action and factors contributing to the causes for adverse action explains the principle that s 340 does not inhibit an employer from taking adverse action for a

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94 (2014) 253 CLR 243 at 252 [19].

95 *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 370 per Gibbs CJ. See also, by way of example, *Australian Workers' Union v John Holland Pty Ltd* (2001) 103 IR 205 and *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326.

legitimate commercial reason, even when the cost of employment has been a factor in the decision-making process. As Finkelstein J observed in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union*<sup>96</sup>:

"[T]o decide whether an employee has been unlawfully dismissed, it is necessary to ascertain the true motive for, or purpose of, the dismissal. If there is some legitimate reason for the dismissal, such as the desire to avoid bankruptcy or the need to maintain a profitable operation, the dismissal will be lawful. It matters not that the cause of the impending bankruptcy or the unprofitable trading is the high rate of wages payable under an award or certified agreement. That is to say, although the benefits produced by an award or certified agreement have caused the problem which the employer seeks to address, that does not necessarily make those benefits the 'reason' or motive for his act."

109 The foregoing followed from the distinction between an operative reason and a participating cause, described earlier. Finkelstein J usefully explained that distinction in the following way<sup>97</sup>:

"[T]here has been an unbroken line of State and federal authority in favour of the proposition that, for the purpose of deciding whether there has been an unlawful dismissal for the reason that an employee is entitled to the benefit of an award or certified agreement, it is necessary to draw a distinction between the 'reason' or motive behind the dismissal and what produced that motive."

110 The foregoing is also consistent with the "balance" struck by the FWA between the interests of employers and the interests of employees "of which Alfred Deakin spoke as being necessary for an effective conciliation and arbitration system"<sup>98</sup>. That same balance can be seen in the first listed "object" of the FWA, which (as presently framed) provides<sup>99</sup>:

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

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96 (2001) 112 FCR 232 at 286 [199].

97 (2001) 112 FCR 232 at 287 [204].

98 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 523 [61] per French CJ and Crennan J.

99 FWA, s 3(a).

- (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations".

111 There was evidence before the primary judge that the decision by QAL to outsource the ground handling operations was based upon three commercial imperatives: (a) the achievement of two-year cost targets by a reduction in operating costs; (b) a need to increase variability in the cost base; and (c) a concern to minimise capital expenditure, grow customer confidence and deliver ongoing business improvement. Stating commercial objectives in this way – using language of high generality – is unlikely to be of utility. Of greater concrete reality is the fact, as already mentioned, that it was estimated by QAL that outsourcing its ground handling operations would save it around \$100 million per year. Following the making of the outsourcing decision, Mr David sent a communication to employees, which set out more relevant detail about what had occurred. Amongst other things, Mr David wrote that because of the COVID-19 pandemic:

"We face a huge task to recover from this crisis and we need to make fundamental changes across the Group.

For ground operations, we need to solve for three challenges – lower our overall cost of ground handling operations (by outsourcing we anticipated saving around \$100 million annually based on pre-COVID flying), avoid large spending on equipment (calculated at \$80 million over 5 years) and match our ground handling services with fluctuating levels of demand."

112 In considering how to achieve its commercial objectives, QAL invited the TWU to make an in-house bid to continue ground handling operations internally. But it was rejected in favour of specialist third-party ground handlers; seemingly, the TWU never had much hope of being the winning bidder. As Mr David explained in his communication:

"The TWU national in-house bid was unsuccessful because it didn't outline a plan or any real detail for how costs savings would be practically achieved. The bid was also unable to solve the challenge to avoid large spending on equipment and matching our ground handling services with fluctuating levels of demand.

In contrast, teams at some airports presented a number of ideas to deliver our ground handling services more efficiently. Unfortunately, they were only able to identify \$18 million in savings compared to external suppliers who can solve all three challenges, including an overall reduction in annual ground handling costs of approximately \$103 million.

Specialist third-party ground handlers provide services to many airlines as their core business. This means they have much lower overheads and equipment costs, better access to technology and resources they can scale up and down more easily between airlines."

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The foregoing might have been accepted by the primary judge as the actual or operative reasons for the taking of adverse action by QAL. If that had been the case, QAL would not have been found to have contravened s 340 of the FWA. But without deciding whether the foregoing could have been the actual or operative reasons of QAL, the primary judge determined that the evidence before him was most unsatisfactory. That evidence included affidavits filed by current and former officers of QAL, and the answers those officers gave in cross-examination. Mr Jones was one such key witness. The primary judge described him as an "unimpressive witness" and observed that unless what Mr Jones said accorded with the "inherent probabilities" or other evidence accepted by his Honour, the primary judge did not "consider it ... safe to place any significant reliance upon [Mr Jones'] evidence"<sup>100</sup>. Mr Hughes was another witness. His evidence was found, in some respects, to be "less than compelling"<sup>101</sup>. The primary judge lacked confidence in accepting the affidavit sworn by Mr David<sup>102</sup>; he did not consider that Mr David's evidence was "entirely satisfactory", and he found that Mr David was unwilling "to make concessions from time to time"<sup>103</sup>. The upshot was that the primary judge found that QAL had simply failed to discharge its onus of demonstrating that the reason pleaded by the TWU for taking adverse action, presumed by s 361 to exist, was incorrect. As his Honour said<sup>104</sup>:

"If the question posed was whether I have reached a state of actual persuasion or reasonable satisfaction that a substantial and operative reason for Mr David outsourcing the ground operations was the Relevant Prohibited Reason, I would answer that question in the negative. If the same question was posed in relation to the reasons for the relevant endorsement

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**100** *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 266 [61], 273 [69], 292 [133] per Lee J.

**101** *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 274 [73] per Lee J.

**102** *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 325 [289] per Lee J.

**103** *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 279 [90]-[91] per Lee J.

**104** *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 325 [287]-[288] per Lee J.

of outsourcing by Mr Jones, I would answer in the positive. But neither of these questions is the issue I am presently addressing.

I am not satisfied that Qantas has proved on the balance of probabilities that Mr David did not decide to outsource the ground operations for reasons which included the Relevant Prohibited Reason. As will already be obvious, this conclusion reflects my unease as to the state of the evidence on this fact in issue and, in particular, Mr David's evidence when viewed in the light of all the other evidence to which I have made reference."

114 Thus, it was on the narrowest of grounds that QAL was unable to succeed in demonstrating that it did not take adverse action for the reasons alleged by the TWU.

### **Preventing the exercise of a workplace right**

115 This left Qantas with its point of construction concerning how to apply s 340(1). The submission turned upon the language of the definition of "workplace right" in s 341(1) of the FWA. That provision is in the following terms:

"A person has a *workplace right* if the person:

- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- (c) is able to make a complaint or inquiry:
  - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
  - (ii) if the person is an employee – in relation to his or her employment."

116 Ultimately, this case concerned only s 341(1)(b). The term "process or proceedings under a workplace law or workplace instrument" is defined in s 341(2) by reference to a list of activities or actions. As already mentioned, one of these is "protected industrial action"<sup>105</sup>. Qantas submitted that the language of s 341(1) is necessarily concerned with presently held workplace rights. Thus, the *chapeau* to

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105 FWA, s 341(2)(c).

the provision refers to a person who "has" a right, and thereafter: in para (a) the reference is to a person who "is entitled" to certain matters, or who "has" a certain role or responsibility; in para (b) the reference is to a person who "is able to initiate, or participate in, a process or proceedings", relevantly here protected industrial action; and in para (c) the reference is to a person who "is able to make" a certain type of complaint or inquiry. In the case of para (c) the significance of the phrase "is able to make" has led Dodds-Streeton J in *Shea v TRUenergy Services Pty Ltd [No 6]* to observe that the ability to make a complaint must be underpinned by some entitlement or right to do so<sup>106</sup>, which, inferentially, must be actually and presently held by the employee. Dodds-Streeton J's observation has since been upheld by the Full Court of the Federal Court in *Cigarette & Gift Warehouse Pty Ltd v Whelan*<sup>107</sup>. It is plainly correct.

117 Here, Qantas submitted, as at 30 November 2020 it could not be said that the ground handling employees had a presently held right to initiate or participate in protected industrial action, for the reasons set out above. The TWU, and the Minister for Employment and Workplace Relations intervening, sought to contend otherwise by submitting that the employees had contingent rights to initiate or participate in such action and that this was sufficient to satisfy s 341(1)(b) of the FWA. Reference was made to the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), which expressed the proposition that the word "benefit" in

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**106** (2014) 314 ALR 346 at 440 [625].

**107** (2019) 268 FCR 46 at 55-56 [28] per Greenwood, Logan and Derrington JJ. See also *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225 at 229-230 [11]-[14] per Rangiah and Charlesworth JJ, 257-258 [162]-[164] per Snaden J; *Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421 at 488 [285]-[286] per Anastassiou J; *Alam v National Australia Bank Ltd* (2021) 288 FCR 301 at 324-332 [68]-[97] per White, O'Callaghan and Colvin JJ. Dodds-Streeton J's observation has also been followed at first instance on many occasions: *The Environmental Group Ltd v Bowd* (2019) 288 IR 396 at 439-440 [128] per Steward J; *Morton v Commonwealth Scientific and Industrial Research Organisation [No 2]* [2019] FCA 1754 at [34]-[36] per Rangiah J; *Maric v Ericsson Australia Pty Ltd* (2020) 293 IR 442 at 453-454 [27], 460 [55] per Steward J; *Lamont v University of Queensland [No 2]* [2020] FCA 720 at [55]-[56], [110] per Rangiah J; *Flageul v WeDrive Pty Ltd* [2020] FCA 1666 at [273]-[274] per Steward J; *Salama v Sydney Trains* [2021] FCA 251 at [99]-[102] per Burley J; *SBP Employment Solutions Pty Ltd v Smith* [2021] FCA 601 at [128]-[143] per Rangiah J; *Wong v National Australia Bank Ltd* [2021] FCA 671 at [69]-[77] per Snaden J; *Crossing v Anglicare NSW South, NSW West & ACT* [2021] FCA 1112 at [290]-[294] per Abraham J; *Messenger v The Commonwealth* [2022] FCA 677 at [142]-[150] per Snaden J; *Pigozzo v Mineral Resources Ltd* [2022] FCA 1166 at [44]-[46] per Feutrill J.

s 341(1)(a) included "benefits that are contingent or accruing"<sup>108</sup>. However, no equivalent language may be found in the explanation for s 341(1)(b); that provision does not use the word "benefit". Moreover, to proclaim that one has a present right to take protected industrial action – which may only be exercisable, or which may only crystallise, upon the happening of future contingent events, which may or may not happen – is to assert no more than the retention of an expectancy, given content by mere hope<sup>109</sup>. With respect, that is most unlikely to be what Parliament intended to include when it relevantly referred in s 341(1)(b) to a person who is able to initiate or participate, here, in protected industrial action. The TWU's and the Minister's submission on this point is rejected.

118 Qantas sought to support its case by relying upon the decision of the Full Court of the Federal Court in *Burnie Port Corporation Pty Ltd v Maritime Union*<sup>110</sup>. That case concerned former ss 298K and 298L of the *Workplace Relations Act 1996* (Cth). Section 298K provided that an employer must not refuse to employ another person for a "prohibited reason". Pursuant to s 298L, conduct was for a prohibited reason if it was carried out because the employee "is entitled to the benefit of an industrial instrument". Qantas latched onto the phrase "is entitled" as part of its broader submission that there must be a present or existing, rather than prospective, entitlement. *Burnie Port Corporation Pty Ltd* had two vacancies it needed to fill, and made it clear to candidates in interviews that it would require the successful candidates to enter into an Australian Workplace Agreement ("AWA")<sup>111</sup>. One of the candidates said that he was "not happy"<sup>112</sup> with this; he wished to be governed by an enterprise bargaining agreement ("EBA") that the Port had entered into with the Maritime Union. He was overlooked for both positions in favour of two other candidates, both of whom agreed to enter into an AWA before commencing employment with the Port. The Union contended that he had been refused employment for a prohibited reason. The Full Court rejected the contention because at the time when employment was refused the candidate

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**108** Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 216 [1363].

**109** *cf Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9. The TWU submission had no more substance than an assertion that a person can presently hold a right because they may become a citizen of another country upon satisfying in the future that country's conditions for citizenship.

**110** (2000) 104 FCR 440.

**111** (2000) 104 FCR 440 at 441-442 [7]-[8] per Wilcox, Kiefel and Merkel JJ.

**112** (2000) 104 FCR 440 at 442 [8] per Wilcox, Kiefel and Merkel JJ.

was not yet "entitled" to the benefit of the EBA<sup>113</sup>. The Full Court agreed with the following submission made by the Port<sup>114</sup>:

"[Section] 298L(1)(h) required that the person who has been refused employment be, at the date of the refusal, entitled to the benefit of an industrial instrument or an order of an industrial body; it was said to be insufficient that the person might in the future be entitled to that benefit. It was common ground that at the date of the refusal, as [the candidate] was not yet an employee of the Corporation, he had no existing legal entitlement to any benefit under the EBA or under any other industrial instrument or order of an industrial body that was of relevance to his prospective employment with the Corporation."

119 Qantas submitted that this reasoning applied here. The ground handling employees simply had "no existing legal entitlement" to initiate or participate in protected industrial action when Qantas took adverse action.

120 Qantas' submission is misconceived once s 341(1) is read with s 340(1) of the FWA. That is so for a number of reasons.

121 *First*, the Full Court of the Federal Court was correct to conclude that the "temporal frame", or time, for considering a workplace right in connection with the taking of adverse action is governed by s 340(1), being the operative provision, rather than s 341, which is a definitional section. The language of s 340 bears that out: s 340(1)(a)(i) refers to action taken against a person because he or she "has" a workplace right; s 340(1)(a)(ii) refers to action taken against a person who "has, or has not, exercised" a workplace right; and s 340(1)(a)(iii) refers to action taken against a person who "proposes or proposes not to, or has at any time proposed or proposed not to, exercise" a workplace right. Sub-paragraph (i) necessarily deals with the present and would require an employee to hold or have a workplace right as defined by s 341(1). Sub-paragraph (ii) deals with the past; when it applies it will not matter whether the employee has continued to hold the workplace right, which either was or was not exercised in the past, when adverse action is taken. Sub-paragraph (iii) deals with the future as well as the past. Whilst it requires an actual "proposal" which either must exist when adverse action is taken or has existed in the past, it nonetheless contemplates that the exercise of the applicable workplace right has yet to take place. It follows that Qantas' reliance on the words and phrases "has", "is entitled" and "is able" in s 341(1) are of no moment; they cannot control the operation of s 340(1). If they did, they would undo much that s 340(1)(a) seeks to achieve.

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113 cf FWA, s 341(3).

114 (2000) 104 FCR 440 at 443 [17] per Wilcox, Kiefel and Merkel JJ.

122 *Secondly*, s 340(1)(b) also addresses the future. When introduced as part of the FWA, it was wholly new. Unlike s 340(1)(a), and previous statutory analogues of Div 3 of Pt 3-1<sup>115</sup>, it does not employ the word "because" to direct attention to the actuating reason for taking adverse action. Instead, it applies when adverse action is taken against a person "to prevent" the exercise of a workplace right. As the Full Court of the Federal Court in *Toyota Motor Corporation Australia Ltd v Marmara*<sup>116</sup> correctly observed (with which the Full Court below agreed), the phrase "to prevent" must be read as "in order to prevent". In that case, the Full Court said<sup>117</sup>:

"[T]he expression 'to prevent the exercise' must be read in the sense 'in order to prevent the exercise' or 'with a view to preventing the exercise'. It was not sufficient if action taken by the person referred to in the subsection had the incidental effect of preventing the exercise."

123 Plainly, like s 340(1)(a)(iii), s 340(1)(b) contemplates a situation where a workplace right has yet to be exercised, where the exercise of the right remains preventable. But unlike s 340(1)(a)(iii), it does not require the employee or employees to have done anything. In order to be engaged, it does not require the present existence of a proposed or threatened exercise of a workplace right. Its concern is thus with the pre-emptive strike.

124 *Thirdly*, given the foregoing, it would make little sense to confine s 340(1)(b) to pre-emptive strikes only against the exercise of workplace rights presently held by an employee or employees. Once it is accepted that the language of s 341(1) cannot relevantly control the operation of s 340(1) in the sense contended for by Qantas, there is nothing in the text of s 340(1)(b) that limits its operation to only those workplace rights which are in existence when adverse action has been taken. Such a restriction would require the presence of words of limitation which operate to exclude future workplace rights, yet no such words are to be found. Moreover, given that the concern of s 340(1)(b) is with the pre-emptive strike, it would make little sense for Parliament to have enacted a provision that would deny such a strike against presently held rights, but not against rights which may arise and then possibly be exercised in the future. There

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115 See, eg, *Industrial Relations Act 1988* (Cth), s 334(3); *Workplace Relations Act 1996* (Cth), ss 298K and 298L. See also *Commonwealth Conciliation and Arbitration Act 1904* (Cth), s 9(1), as amended by the *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cth), which adopted the expression "by reason of".

116 (2014) 222 FCR 152.

117 (2014) 222 FCR 152 at 190 [126] per Jessup, Tracey and Perram JJ; see also *Qantas Airways Ltd v Transport Workers' Union of Australia* (2022) 292 FCR 34 at 62 [86].

is nothing in the Explanatory Memorandum that would support the pursuit, as a matter of legislative policy, of such a distinction.

125 In that respect, the following reasons of the primary judge, which are essentially similar to the foregoing, are entirely correct and necessarily dispositive<sup>118</sup>:

"[T]he submission that the outsourcing decision 'did not prevent anything' and that the Union cannot point to any direct or immediate 'prevention' is misconceived. The Union makes the point, correctly, that the insertion of a requirement that the prevention of the exercise of the workplace right be 'direct or immediate' involves a gloss on the words of s 340(1)(b). The section directs attention to whether adverse action has been taken 'to prevent' the exercise of a workplace right. There is no basis for adding a requirement that the right be of a particular nature such that it can be characterised, by some sort of evaluative assessment, to be sufficiently immediate. In any event, the outsourcing decision prevented the members of the Union who were affected employees exercising their workplace right to do something that Qantas did not want to occur and wished to prevent, that is, participation in protected industrial action. Section 340(1)(b) contemplates acts to prevent employees exercising workplace rights by preventing circumstances arising whereby those rights could be exercised."

126 *Fourthly*, the reliance by Qantas on the decision in *Burnie Port Corporation* is flawed. The operative language in that case required the Full Court to focus on whether the putative employee was "entitled" to the benefit of an industrial instrument (relevantly a certain EBA) at a time when he was not employed by the Port. The language used in s 340(1)(b) is, for the reasons given above, very different from that considered in *Burnie Port Corporation*.

127 It is otherwise unnecessary to consider the TWU's notice of contention, or its proposed cross-appeal. The appeal must be dismissed.

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**118** *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at 323 [278] per Lee J.

