

Before the High Court

Esso Australia Pty Ltd v The Australian Workers' Union: Breaches of Orders, Coercion and Protected Industrial Action under the Fair Work Act 2009 (Cth)

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Abstract

In *Esso v AWU*, the High Court of Australia will consider two important issues concerning the capacity of employees and their representatives (unions) to take protected industrial action when negotiating for enterprise agreements. First, whether a union, subject to orders by a court or tribunal in the context of negotiations, should be barred from taking protected industrial action for the remainder of those negotiations although the circumstances giving rise to the making of the order have since been remedied. The Full Court of the Federal Court of Australia determined that they should not be subject to any such ban. That decision is soundly based, and should be upheld. The second issue is whether action that is unprotected should necessarily be regarded as ‘coercion’ for purposes of s 343 of the *Fair Work Act 2009* (Cth). The majority of the Full Federal Court determined that it should be so regarded in all but rare cases. We argue that that is too narrow a view, and that the notion of intent to coerce should be qualified by a requirement that the impugned actions had a meaningful capacity to coerce.

I Context

A *The National and International Context*

In *Esso Australia Pty Ltd v The Australian Workers' Union*,¹ the High Court of Australia is called upon to determine two important questions relating to the capacity of employees and their representatives lawfully to take industrial action to promote and to defend their interests in the context of enterprise bargaining under the *Fair Work Act 2009* (Cth) (*FW Act*). The first question is whether employees and/or their representatives who have been made subject to an order of a court or tribunal at an earlier stage in negotiations for an agreement are then barred from lawfully taking further action in pursuance of that agreement, even though they have

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¹ High Court of Australia, Case Nos M185/2016 and M187/2016 (on appeal from (2016) 258 IR 396) (*Esso v AWU*).

subsequently observed the terms of the order(s) or the orders are otherwise spent. The second question is whether action by employees that is not protected under the *FW Act* will necessarily, or normally, constitute ‘coercion’ for purposes of s 343 of the *FW Act*.

Part 2-4 of the *FW Act* provides a framework for the regulation of terms and conditions of employment through a process of enterprise-level negotiation between employers, employees and their representatives. As part of this process, employees and employers can, subject to satisfying rigorous procedural and substantive requirements, take ‘protected industrial action’ in support of their bargaining positions.

The concept of protected industrial action was first introduced at federal level by the *Industrial Relations Reform Act 1993* (Cth). Before then, effectively all industrial action was unlawful at common law (both as a tort and as a breach of contract) and (frequently) under statute.²

The introduction of statutory protection was partly driven by the logic of enterprise bargaining as an alternative to the regulation of work relations through centralised conciliation and arbitration. It was also driven by an increased awareness of Australia’s international obligations concerning the right to strike: notably under art 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights*,³ and the International Labour Organization’s Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87).⁴ This is reflected in s 3(a) of the *FW Act*, which states that the object of providing ‘a balanced framework of cooperative and productive workplace relations’ is to be achieved, *inter alia*, by laws that ‘take into account Australia’s international labour obligations’.

In that context, the statutory protections can be seen either as a formal recognition of workers’ rights to take industrial action to protect and to promote their interests in the enterprise bargaining context, or as according workers a ‘privilege’ to engage in conduct that would otherwise be unlawful. Viewed through the prism of privilege, the *FW Act* can be seen as setting the parameters within which that privilege may be exercised, and should be accorded a strict interpretation to minimise the extent of interference with established common law and statutory rights.

The distinction between the two approaches is not just an academic one, as evidenced by the competing interpretations at issue in *Eso v AWU*:

- Does s 413(5) of the *FW Act* have the effect that a party that breaches an order of the Fair Work Commission or a court in relation to negotiations for an enterprise agreement cannot take protected industrial action for the life of those negotiations, irrespective of whether the orders are spent or the breach has been remedied?

² See Breen Creighton, ‘Enforcement in the Federal Industrial Relations System: An Australian Paradox’ (1991) 4(3) *Australian Journal of Labour Law* 197; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) ch 4.

³ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴ Opened for signature 9 July 1948, CO 87 (entered into force 4 July 1950). This Convention was ratified by Australia on 28 February 1973. For discussion on its implications for Australian law, see McCrystal, above n 2, chs 2, 10.

- If a bargaining representative and relevant employees intend to take protected industrial action but inadvertently fail to comply with the statutory requirements, should they be exposed to liability for coercion under s 343 of the *FW Act*?

B *The Dispute*

In the context of negotiations for a new enterprise agreement to cover Esso's oil and gas operations in Bass Strait, the AWU complied with the formalities for taking protected industrial action, and issued notices to Esso of its intention to do so. These notices provided that the industrial action would include a ban on 'de-isolation' of equipment. This is a technical term referring to the return of certain equipment to operation after a period where it had been disconnected ('isolated') for servicing. A dispute arose between Esso and the AWU about exactly what 'de-isolation' entailed. Esso claimed that it was limited to the final steps before the machinery was turned back on, while the AWU claimed that it included steps preliminary to those final steps. If the proposed actions of the employees did not relate to 'de-isolation', then they were not covered by the notice of protected industrial action and were not protected, thereby exposing the workers and the AWU to the making of orders under s 418 of the *FW Act* and/or remedies in respect of coercion under s 343.

Esso sought and obtained a s 418 order from the Fair Work Commission directing that the alleged 'unprotected' action cease. As discussed below, the AWU challenged the making of this order in the Federal Court. Esso also sought a declaration that the Union's actions subsequent to the making of the s 418 order constituted coercion under s 343.

C *The Legislative Context*

The concept of 'industrial action' is defined in s 19 of the *FW Act*, while protected industrial action is regulated by pt 3-3. Subject to limited exceptions relating to personal injury, destruction etc of property and defamation,⁵ s 415 of the *FW Act* provides immunity against common law or statutory liability for all industrial action that is 'protected' within the meaning of pt 3-3 of the Act. To achieve protection, the action must satisfy a number of preconditions, including: observance of restrictions on the content of agreements; obtaining approval for taking protected industrial action through an elaborate balloting process; and giving notice of proposed action in the proper form. According to s 413(5), the preconditions also include that those proposing to take the protected industrial action 'must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement'.

Unprotected industrial action is not expressly made unlawful by the *FW Act*, except where the participants are bound by an enterprise agreement that has not yet reached its nominal expiry date.⁶ However, all participants in unprotected industrial

⁵ *FW Act* s 415.

⁶ *Ibid* s 417.

action may be subject to the making and enforcement of orders under ss 418–20 of the *FW Act*, and to the issue of injunctions, award of damages etc at common law and under statute.⁷

The provisions of pt 3-3 are intimately bound up with those of pt 2-4. The latter provisions contemplate a scheme of agreement making that includes good faith bargaining between bargaining representatives in negotiations for an agreement. Failure to observe the good faith bargaining requirements can give rise to the making of ‘bargaining orders’ under s 230, breach of which can lead to the imposition of civil penalties (ss 233 and 546) and, in principle, to the making of a ‘serious breach declaration’ (s 235) that can then trigger an arbitration process culminating in a ‘bargaining related workplace determination’ (s 269). No such declaration or (by definition) determination has been made since the enactment of the *FW Act*. Section 418 orders are, however, commonplace, and Federal Court of Australia proceedings to enforce such orders, while not the norm, are not unusual.

Participation in unprotected industrial action can also run foul of s 343(1) of the *FW Act*. This provision makes it unlawful for a ‘person’ to ‘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’⁸ in connection with the exercise or non-exercise of a ‘workplace right’.⁹ It is, however, clear from s 343(2) that this proscription does not extend to protected industrial action.

There are three important points to note about the substance of s 343(1):

- First, the ‘action’ does not need to be ‘industrial action’ within the meaning of s 19 of the *FW Act*. This means that the proscription would extend both to action that was capable of being protected, but that was not in fact protected (for example, because, as in *Eso v AWU*, a bargaining representative notified a form of industrial action that did not fall within the scope of the action approved by ballot), and to any other form of coercive behaviour — such as picketing — that did not constitute ‘industrial action’ in terms of s 19.¹⁰
- Second, for liability to arise under s 343(1), it must be shown that the action was intended to coerce the party against whom it was directed in the sense of ‘negating their choice’ or ‘overriding their will’.¹¹ To satisfy

⁷ For descriptions of these exposures, see Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton & Stewart’s Labour Law* (Federation Press, 6th ed, 2016) chs 26–7; Carolyn Sappideen, Paul O’Grady and Joellen Riley, *Macken’s Law of Employment* (Thomson Reuters, 8th ed, 2016) ch 14.

⁸ Emphasis added.

⁹ ‘Workplace right’ for this purpose would include (s 341) participation in the making, varying or terminating of an enterprise agreement: *FW Act* ss 341(1)(b), (2)(e).

¹⁰ *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463.

¹¹ See, eg, *Seven Network (Operations) Ltd v Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378, 388 [41] (‘*Seven Network v CEPU*’); *National Tertiary Education Industrial Union v Commonwealth* (2002) 117 FCR 114, 143 [103], 144 [112] (‘*NTEU v Commonwealth*’); *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172, 187 [70]–[72].

this requirement, the conduct must be ‘unlawful, illegitimate or unconscionable’.¹²

In *NTEU v Commonwealth*,¹³ Weinberg J, having reviewed a number of decisions under s 170NC of the *Workplace Relations Act 1996* (‘*WR Act*’),¹⁴ concluded that:

The approach to the expression ‘intent to coerce’ taken in each of the authorities ... makes it clear that what is required is an intent to *negate* choice, and not merely an intent to influence or to persuade or induce. Coercion implies a high degree of compulsion, at least in a practical sense, and not some lesser form of pressure by which a person is left with a realistic choice as to whether or not to comply.¹⁵

- Third, it is not necessary that the will of the target party actually be ‘negated’, it is sufficient that the party taking or threatening to take the ‘action’ *intended* to negate the will of the target.

As discussed below, it is arguable that there ought to be a fourth requirement: that the ‘action’ be ‘reasonably capable’ of negating the will of a target that displays a reasonable level of industrial fortitude, even when faced with unprotected industrial action or action that does not constitute ‘industrial action’ for purposes of s 19 of the *FW Act*.

In determining whether there was an intention to coerce for purposes of s 343, s 360 provides that a person will take action for a particular reason ‘if the reasons for the action include that reason’, while s 361 imposes a reverse onus of proof whereby action will be presumed to have been taken with the necessary intent unless the perpetrator proves otherwise. This means, for example, that in *Esso v AWU* it was for the Australian Workers’ Union (‘AWU’) to prove that it did not intend to coerce Esso for purposes of s 343. That, in the opinion of both Jessup J at first instance and Buchanan and Siopis JJ on appeal, it failed to do.

II The Proceedings

As noted above, Esso obtained a s 418 order from the Fair Work Commission directing that the alleged ‘unprotected’ industrial action cease. In the Federal Court of Australia, the AWU sought to have the order set aside on the basis that it was beyond the power of the Fair Work Commission. As also indicated, Esso sought a declaration in relation to an alleged breach of s 343 of the *FW Act*.

At first instance, Jessup J found that parts of the order were beyond power, but key aspects of the order were upheld.¹⁶ The legitimate scope of the order was further narrowed on appeal by the majority of the Full Federal Court, but the validity

¹² *Seven Network v CEPU* (2001) 109 FCR 378, 388 [41].

¹³ (2002) 117 FCR 114.

¹⁴ Section 343(1) is the lineal descendent of s 170NC. That provision was originally inserted in the *WR Act* in 1996, and was given extended effect by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), becoming s 400 of the amended *WR Act*.

¹⁵ *NTEU v Commonwealth* (2002) 117 FCR 114, 143 [103] (emphasis in original).

¹⁶ *Esso v AWU* (2015) 253 IR 304, 345 [116].

of the order was maintained.¹⁷ The AWU was found to have taken unprotected industrial action contrary to the valid s 418 order.¹⁸

In addition to orders under s 418, Esso sought declarations that the AWU and its members had engaged in coercion within the meaning of s 343 of the *FW Act*. At first instance, Jessup J granted this application,¹⁹ and in due course this finding was upheld by the majority of the Full Federal Court.²⁰

A Breaches of Orders

The first issue on appeal was whether the AWU had contravened orders of the Fair Work Commission for purposes of s 413(5).

In support of its application, Esso argued that the breach of the s 418 order by the AWU and its members meant that they were prevented from taking any further protected industrial action during the life of the negotiations for the proposed agreement because they could no longer satisfy the requirements of s 413(5).

At first instance, Jessup J clearly favoured the restrictive interpretation of the section urged by Esso, but decided that, for reasons of comity, he was bound by the decision of Barker J in *Australian Mines and Metals Association Inc v Maritime Union of Australia*.²¹ Accordingly, with evident reluctance, His Honour found that s 413(5) did not remove protection from industrial action where the breach of order in question was not current.²²

The first instance decisions of Barker J and Jessup J were appealed to the Full Federal Court. Each appeal was heard by the same Bench, and the decisions in both matters were handed down at the same time.²³

The breach of orders under consideration in *AMMA v MUA* involved a failure by the Maritime Union of Australia ('MUA') to provide undertakings required by bargaining orders of the Fair Work Commission within a specified timeframe. By the time of the first instance hearing, the breach had been rectified, but *AMMA* argued that the MUA's failure to comply with the orders in a timely manner meant that it could not satisfy the requirements of s 413(5) for the remainder of the negotiations.

The majority in *Esso v AWU* adopted the reasoning and findings of Buchanan J in *AMMA v MUA* in relation to the interpretation of s 413(5).²⁴ It will be

¹⁷ *Esso v AWU* (2016) 258 IR 396, 435–8 [130]–[145].

¹⁸ Note that Bromberg J observed that as his factual finding was that the AWU had not engaged in unprotected industrial action, there were no relevant contraventions of s 418 orders: *ibid* 485 [369].

¹⁹ *Esso v AWU* (2015) 253 IR 304, 355–63 [154]–[188].

²⁰ *Esso v AWU* (2016) 258 IR 396. The principal judgment was delivered by Buchanan J, with Siopis J concurring. Justice Bromberg dissented on the ground that because the industrial action was protected, there was no exposure under s 343.

²¹ (2015) 251 IR 75 ('*AMMA v MUA*').

²² *Esso v AWU* (2015) 253 IR 304, 354–5 [144]–[152].

²³ *AMMA v MUA* (2016) 258 IR 374; *Esso v AWU* (2016) 258 IR 396.

²⁴ *Esso v AWU* (2016) 258 IR 396, 400 [1], 440 [161]–[163]. Given the position His Honour adopted in relation to the meaning of 'de-isolation', Bromberg J did not need to decide the s 413(5) point,

recalled that s 413(5) stipulates that the relevant persons ‘must not have contravened any orders that apply to them’ in the context of negotiations for an enterprise agreement. The shift of tense is potentially significant in that it leaves open at least two possible readings of s 413(5).

Justice Jessup’s preferred reading was that s 413(5) would apply where there had been a contravention of an order ‘which applied to the person at the time when the contravention occurred’.²⁵ Therefore, if an order applied to a person, and they contravened it while it applied, then that would be a contravention for purposes of s 413(5), and the person would be unable to satisfy the requirements of that subsection for the remainder of the negotiations.

In support of this approach, His Honour referred to the legislative history of the provision and, in particular, to s 443(1) of the *WR Act*, which provided that industrial action by an employee organisation or an employee would not be protected industrial action unless ‘before the person begins to engage in the industrial action, [the person] has complied with the order or direction’. Justice Jessup noted that the difference between the wording in the *WR Act* and the *FW Act* was ‘of substance’; that it evidenced a conscious resolve of the drafter to express the term differently; and that there was ‘every reason to suppose that this was a change in substance that reflected the intention of the legislature’.²⁶

The alternative interpretation relies on the use of the present tense in s 413(5) to refer to orders that apply to the persons organising or engaging in the ‘action’. This suggests that if the order does not currently ‘apply’, then any past contravention of orders is irrelevant for purposes of the exclusion. Justice Buchanan took the view in *AMMA v MUA* that ‘the identified persons must not have contravened any such orders *when* organising or engaging in the particular industrial action’²⁷ and, as such, ‘only such orders as are relevantly prohibitory and operative at the time of organising and engaging in the particular industrial action will require consideration under s 413(5)’.²⁸

His Honour supported this interpretation by reference to the statutory context, starting from the premise that the meaning of the section is to be discerned, as far as possible, ‘as a natural consequence of the statutory text, having regard to its place and evident purpose in the legislation’.²⁹ His Honour also derived support for his position from the fact that the provision for ‘serious breach declarations’ under s 235(1) operates on past conduct and that the prerequisites for such an order are extremely stringent. His Honour also pointed out that the interpretation of s 413(5) advanced by *AMMA* (and *Esso*) ‘would operate more drastically and more extensively than s 235’ in the event of breach of a bargaining order by a party to negotiations.³⁰ It would also remove access to protected industrial action without the

but he indicated (at 485 [370]) that had it been necessary to do so, he too would have adopted the position taken by Buchanan J in *AMMA v MUA*.

²⁵ (2015) 253 IR 304, 354 [144].

²⁶ *Ibid* 351 [136].

²⁷ (2016) 258 IR 374, 392 [94] (emphasis in original).

²⁸ *Ibid* 393 [97].

²⁹ *Ibid* 385 [54].

³⁰ *Ibid* 391 [88].

compensating benefit of access to arbitration of the underlying dispute provided by ss 235 and 269.

The approaches adopted by both Jessup J and Buchanan J are open on the literal text of the section, and both Justices referred to the scheme of the *FW Act* and the surrounding sections to support their preferred interpretation.

With respect, the approach taken by Buchanan J appears to be more in keeping with the scheme of the *FW Act* than that adopted by Jessup J. That scheme requires that when industrial actors wish to take protected industrial action, they must comply with the statutory prerequisites at the point at which they seek to take the action. Justice Buchanan's approach is also consistent with a literal reading of the section, and helps preserve the integrity of the provisions for the enforcement of bargaining orders. If it was intended that breach of such orders was to remove the capacity to take protected industrial action for the entire duration of the negotiation, surely this would have been spelled out in the relevant statutory provisions? It should also be noted that the approach advocated by Buchanan J is consistent with the international obligations arm of the objects section — recognising, as it does, that access to protected industrial action is a worker right that should not be unreasonably or unnecessarily curtailed.

In contrast, Jessup J's preferred interpretation would change the nature of s 413(5) from the status of a 'prerequisite' to taking protected industrial action, to that of a punitive provision that has the effect of punishing wrongdoers for past transgressions. There is no warrant for reading this part of the Act in this manner. Remedies for breaches of bargaining or other orders are provided through the penalty provisions of the *FW Act*, and the possible making of serious breach declarations and (theoretically, at least) the imposition of arbitrated outcomes.

Justice Jessup's analysis relies on a reading of the change of wording from the *WR Act* to the *FW Act* as indicative of a resolve on the part of the drafter to make a substantive change to the operation of the section. With respect, this argument is not impelled by the wording of the statute, and it is significant that His Honour did not refer to any extrinsic or other materials to support his reading of the section.

B *Unprotected Action as 'Coercion'*

In light of the fact that the AWU had complied with all of the formalities for taking protected industrial action, and had issued notices to Esso of its intention to undertake such action, the question of whether it had any exposure under s 343 turned upon whether the reference to 'de-isolation' in the notice of industrial action extended to the proposed actions of the employees concerned. Much of the discussion both at first instance and on appeal was devoted to consideration of this issue, and in the end it was determined by both Jessup J and Siopis and Buchanan JJ that 'de-isolation' was limited to the narrower range of actions submitted by Esso.³¹

³¹ See, respectively, *Esso v AWU* (2015) 253 IR 304, 309–16 [8]–[28], 331–8 [66]–[90]; *Esso v AWU* (2016) 258 IR 396, 414–34 [58]–[125].

Justice Bromberg, on the other hand, considered that de-isolation extended to the full range of matters as contended by the AWU.³²

On appeal, it seems to have been assumed by the majority that the principal issue to be determined was whether the AWU had intended to use unlawful, illegitimate or unconscionable means in order to exert industrial pressure on Esso, and that if the Union had used, or intended to use, such means then the requirement that there be a negation of will was ipso facto satisfied. Since Bromberg J considered that the action was protected, His Honour did not need to, and did not, express any view on this issue.

The AWU, referencing the judgment of Merkel J in *Seven Network v CEPU*,³³ argued that because it had, at all times, intended to take protected industrial action, and believed that the action was in fact protected, it lacked actual knowledge of the circumstances (namely, the fact that ‘de-isolation’ did not extend to the range of conduct contemplated by the Union) that would render its conduct unlawful.

In *Esso v AWU*, this argument was rejected both at first instance and on appeal, as was the reasoning of Merkel J upon which it was based. Instead, both Jessup J and Siopis and Buchanan JJ proceeded on the premise that the relevant intent to coerce refers only to the first element — the intent to negate will — and that it did not refer to the second element — the circumstances by which the intent to negate will is actioned (that is, utilising unlawful, illegitimate or unconscionable action). Justice Buchanan observed that this approach is ‘consistent with the common law origins of the notion of coercion’ in which ‘the notion of purpose, or intent, applies to the first element but not the second’.³⁴ Justice Buchanan also noted with approval Jessup J’s observation that s 343(2) provided a complete defence for protected industrial action, but that an erroneous belief that action was protected ‘would afford no defence’.³⁵

The concept of ‘intent to coerce’ for purposes of s 343(1) is clearly open to interpretation. The ‘intent’ element could be applied only to the negation of will as determined by Jessup J and by Buchanan and Siopis JJ. Alternatively, as submitted by the AWU, it could also be applied to the means by which the will of the target is to be negated. Of the two options, the second appears to be the more consistent with the scheme and purposes of the *FW Act*. That measure is based on the premise that industrial actors are permitted to take protected industrial action during negotiations for an enterprise agreement for purposes of coercing other parties to submit to their preferred position. The protected industrial action provisions are complex, both in form and in substance. As the facts and litigation history of *Esso v AWU* itself demonstrate, the outcome in such cases may come down to fine factual distinctions over which reasonable minds may differ.

The effect of the majority position in *Esso v AWU* is that virtually all instances of unprotected industrial action taken in the context of collective

³² (2016) 258 IR 396, 466–80 [287]–[347].

³³ (2001) 109 FCR 378.

³⁴ (2016) 258 IR 396, 446 [194].

³⁵ *Ibid* 443 [179].

bargaining negotiations will breach s 343, irrespective of the motivations of the industrial actor, or their genuine efforts to comply with a complex statutory regime.

It can readily be conceded that ‘action’ that is ‘unprotected’ within the meaning of the *FW Act* will be ‘unlawful’, and parties adversely affected by it retain their capacity to obtain relief in respect of it. Most obviously this could be done through proceedings in contract or in tort and, in the case of unprotected action that falls within the definition of ‘industrial action’ in s 19 of the *FW Act*, by means of applications under ss 417 or 418 of the *FW Act*. It does not, however, follow that all unprotected industrial action, or action that falls outside the scope of the statutory definition of industrial action, should necessarily be regarded as coercive in character for purposes of s 343(1).

Take, for example, action by employees that involves typing all internal email correspondence with the ‘Caps Lock’ key engaged, or a refusal by firefighters to refuse to salute superior officers.³⁶ Such action may or may not be ‘unlawful’ as a breach of contract (or in tort). If it was not unlawful, it would not require protection, and could not satisfy the ‘unlawfulness’ criterion for purposes of potential liability for coercion. It would then be a question of fact whether the conduct could nevertheless be found to be ‘illegitimate’ and/or ‘unconscionable’. If the proposed conduct was unlawful, it would need to be ‘protected’ in accordance with pt 3-3. If it was not so protected, then the employees concerned would be exposed to proceedings in contract and/or tort. The conduct would also, in principle, satisfy the ‘unlawfulness’ criterion for purposes of s 343(1). Whether it would be ‘illegitimate’ and/or ‘unconscionable’ may well be in the eye of the beholder.

Whether unlawful or not, the conduct would clearly be intended to exert some level of industrial pressure on the employer, if only by irritating members of management. It does, however, seem to be far-fetched to suggest that such action is ‘intended’ to negate the will of the employer in any meaningful sense — as becomes particularly clear if it is assumed that the employer concerned is a major multinational enterprise or a well-resourced government department or public authority. Of course, it could be said that there was an ‘intent’ in the sense that the action was deliberate, but as noted earlier, common sense suggests that for ‘action’ to have the requisite ‘intent’ to negate the will of the employer, it must actually have the capacity to do so. Furthermore, it seems reasonable to suppose that employers — especially where they are large corporations or public authorities — could be expected to demonstrate some level of fortitude in the face of unprotected industrial action, especially if the action concerned had little or no capacity to interfere with the employer’s conduct of its business.

At first instance in *Esso v AWU*, Jessup J determined that the intent of the AWU in organising the impugned action ‘was to apply sufficient direct pressure on Esso to cause it to act otherwise in the exercise of its own free choice’ by causing it ‘to agree to terms in a prospective enterprise agreement to which it would not, as a

³⁶ Both of these forms of action were identified in a protected action ballot application in *United Firefighters’ Union Australia v Country Fire Authority* (PR569907, 29 July 2015).

matter of choice, have agreed in the absence of that pressure'.³⁷ This, in the opinion of Jessup J, was 'illegitimate'.³⁸ It was also unlawful:

The obligation to serve lies at the heart of any employment relationship. The conclusion that it is illegitimate for an employee to refuse to serve as a means of extracting beneficial terms from his or her employer is one that will rarely be difficult to draw.³⁹

On this reading, if the action was unprotected, it was necessarily coercive. Justice Jessup does leave open the possibility that there *could* be circumstances where it would not be possible to draw the inference that it was illegitimate for an employee to refuse to serve. However, in his Honour's own terms, such instances would be rare.⁴⁰

The approach adopted by Jessup J at first instance was endorsed by Siopis and Buchanan JJ on appeal.⁴¹ Justice Buchanan did acknowledge that 'industrial action is not rendered unlawful, illegitimate or unconscionable only because it is not protected industrial action'.⁴² This seems to suggest that there could be situations where 'action' would not be 'unlawful, illegitimate or unconscionable' even though it was not protected. As a matter of logic, if the action required protection in the first place, it is hard to see how it could be said not to be 'unlawful', although in principle it could certainly be said not to be 'illegitimate' or 'unconscionable'. His Honour did not provide any examples of situations where this would arise and, in light of his endorsement of the approach of Jessup J, they are likely to be few and far between in practice.

The unsatisfactory character of the approaches adopted at first instance and by the majority of the Full Court in relation to the coercion issue is indicative of a failure to take adequate account of the underlying rationale for the protected industrial action provisions of the *FW Act*, or for s 343. In terms of the dichotomy noted at the start of this column, Jessup J, and Siopis and Buchanan JJ, appear to have proceeded from the assumption that the capacity to take protected industrial action is a privilege, and that the relevant statutory provisions ought to be accorded a restricted interpretation in light of the fact that they constitute a limitation upon the employer's common law and (to a lesser extent) statutory rights. Their Honours do not appear adequately to have recognised that the capacity to take industrial action is a necessary incident of a system based on direct negotiation between employees and their representatives on one hand and employers and their representatives on the other. They also appear to accord insufficient weight to the fact that the right of employees to take industrial action to protect and to promote their legitimate social and economic interests is recognised in international law as a fundamental human right, and that, as such, the law should be interpreted and applied in a manner that accords proper recognition to that principle.

³⁷ (2015) 253 IR 304, 361 [174].

³⁸ *Ibid* 361 [175].

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ (2016) 258 IR 396, 448 [201].

⁴² *Ibid* 443 [181].

III Conclusion

In summary, therefore, it is suggested that it would be appropriate for the High Court to uphold the interpretation accorded to s 413(5) by the majority in *Ezzo v AWU*. This appears to be consistent with both the letter and the spirit of the legislation, and sits comfortably with Australia's international obligations.

That is not the case in relation to the s 343 issue. The fact that engaging in unprotected industrial action may expose employees and their representatives to proceedings in contract, tort or under statute does not mean that those who organise or participate in such action should necessarily be regarded as having an intention to negate the will of the party to whom the action is directed for purposes of a statutory proscription of coercion. This is especially the case in situations where the conduct is not, in fact, unlawful, or, where it is unlawful but, has little or no capacity to exert significant pressure on the target of the action. There is much to be said for the AWU's contention that the intention to coerce requirement applies both to the negation of choice and to the means to achieve that end. Logically, to be coercive in the relevant sense, 'action' must also have a real capacity actually to negate choice in the requisite sense.