HIGH COURT OF AUSTRALIA

## NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 30 Oct 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

### Details of Filing

| | |
|---|---|
| File Number: | M96/2020 |
| File Title: | Victoria International Container Terminal Limited v. Lunt & C |
| Registry: | Melbourne |
| Document filed: | Form 27A - Appellant's submissions |
| Filing party: | Appellant |
| Date filed: | 30 Oct 2020 |

### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED**
Appellant

and

**RICHARD SIMON LUNT**
First Respondent

**FAIR WORK COMMISSION**
Second Respondent

**AUSTRALIAN MARITIME OFFICERS UNION**
Third Respondent

**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION**
Fourth Respondent

# APPELLANT'S SUBMISSIONS

## Part I: Certification

1. This submission is in a form suitable for publication on the internet.

## Part II: Statement of issue

2. More than a year after it induced the approval of an enterprise agreement, the union decided it wanted that approval quashed. To avoid scrutiny, the union enlisted a *"front man"* to apply in its place. Should the Full Court have found that the application brings the administration of justice into disrepute?

## Part III: Section 78B notices

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) are not necessary.

## Part IV: Decisions below

4. The primary judgment, that of the Federal Court of Australia (Rangiah J), is reported as *Lunt v Victoria International Container Terminal Limited (No 2)* (2019) 165 ALD 542 (**'PJ'** [Core Appeal Book (**'CAB'**) tab 1]).

5. The judgment of the Full Court of the Federal Court of Australia (Bromberg, Kerr and Wheelahan JJ) has not been reported. The Internet citation is *Lunt v Victoria International Container Terminal Limited* [2020] FCAFC 40 (**'FC'** [CAB tab 4]).

## Part V: Facts

6. The fourth respondent (**'union'**) used the first respondent (**'Mr Lunt'**) as *"front man"* to bring the proceeding and apply for orders quashing the approval of the appellant's (**'VICT's'**) foundational enterprise agreement (**'EA'**).[1] The union did so to avoid avoiding scrutiny of its acquiescence to that approval.[2]

7. Despite the union's and Mr Lunt's efforts to keep the arrangement secret, the primary judge saw through the sham. His Honour dismissed the proceeding as an abuse of process.[3] The order was based on the following unchallenged facts:

(a) VICT applied to the Fair Work Commission (**'FWC'**) for the EA's approval.[4] The union filed a statutory declaration in support of the EA's approval and applied to be covered by it.[5]

(b) In these circumstances, the FWC approved the EA.[6] VICT was thereby deprived the opportunity to address concerns the union might have had with the EA.

(c) The union did nothing to challenge the EA's approval, by appeal[7] or otherwise.[8] To the contrary, the union brought proceedings against VICT in reliance on the validity of the EA.[9]

---

1 The union (through Mr Lunt) seeks, inter alia, declarations and orders in the nature of certiorari and mandamus (see Amended Originating Application dated 23 November 2018 in Federal Court of Australia proceeding VID511/2018 [1A], [1B], [1C], [1], [2] and [4]).

2 PJ [134] [CAB 27].

3 Order of Rangiah J in *Lunt v Victoria International Container Terminal Limited* (Federal Court of Australia, VID511/2018, 2 July 2019) [CAB tab 2].

4 PJ [11] [CAB 7].

5 PJ [11]-[13] [CAB 7], [16] [CAB 8], [121] [CAB 25]. See *Fair Work Act 2009* (Cth) (**'FW Act'**), sub-ss 183(1) and 201(2). The benefits of being covered by an enterprise agreement include the right to apply for a variation of the EA (FW Act, s 210); the right to apply for the termination of the EA (FW Act, ss 222, 225); the right to have its views considered in relation to the termination of the EA (FW Act, ss 223(d), 226); and rights in relation to transfers of business (FW Act, ss 318, 319, 768BG).

6 PJ [16] [CAB 8].

7 PJ [17] [CAB 8].

8 PJ [121] [CAB 25].

9 PJ [18] [CAB 8], [32] [CAB 10], [116] [CAB 24].

(d) For over a year, VICT and its employees relied on the EA's validity.[10] Then, the union changed its mind. After enjoying the privileges of EA coverage, it became dissatisfied and wanted the Federal Court to quash the EA's approval.[11]

(e) The union was unwilling to bring the proceeding in its own name. It feared refusal on discretionary grounds.[12]

(f) To overcome this, the union *"organised, orchestrated and funded"*[13] Mr Lunt to bring the proceeding as *"front man"*.[14] The union's purpose was to use Mr Lunt to avoid scrutiny and the Court's discretion.[15]

(g) The union effectively conducted the proceeding; and the application was effectively the union's own application.[16] Were it not for the union's use of him as *"front man"*, Mr Lunt would not have commenced the proceeding.[17]

(h) Mr Lunt's purpose was not to seek the relief for himself.[18] Rather, his purpose was to enable the union to obtain relief which it could not, or might not, obtain if it brought the proceeding itself.[19]

(i) All of this was done in secret. Mr Lunt went so far as to destroy and dispose of (*"smash"* and *"turf"*, in his words) a discoverable mobile phone because he feared messages on it *"would tell against his case"*.[20]

(j) The result of this sham (if it is allowed to stand) is that the union will be free to effect its purpose: seeking the relief while avoiding scrutiny of its inducement of the approval of the EA.[21]

---

10 PJ [133] [CAB 27].

11 PJ [20]-[28] [CAB 8-9].

12 PJ [121] [CAB 25], [124] [CAB 26], [133] [CAB 27].

13 PJ [129] [CAB 26].

14 PJ [129] [CAB 26], [133] [CAB 27] (see also [125] [CAB 26]).

15 PJ [129] [CAB 26], [133]-[134] [CAB 27].

16 PJ [125] [CAB 26], [128] [CAB 26] and [129] [CAB 26].

17 PJ [111] [CAB 23], [125] [CAB 26].

18 PJ [119] [CAB 25], [132] [CAB 27].

19 PJ [119] [CAB 25], [129] [CAB 26], [131] [CAB 27].

20 See PJ [85]-[86] [CAB 19-20], [97] [CAB 21], [99] [CAB 21]. For the efforts to conceal the arrangement from the Court, see PJ [29]-[58] [CAB 10-14].

21 PJ [134] [CAB 27].

8. These are the facts. None of them were challenged before the Full Court. None of them are challenged in this Court.

## Part VI: Argument

9. The conduct the union wants to wash its hands of is central to the proceeding. Were it not for the union's support of the EA, VICT could, prior to approval, have responded to and dealt with the very matters on which the union now, through its *"front man"*, relies in impeaching the EA.[22]

10. There are two bases on which VICT's appeal may be upheld.[23] Before engaging with them, we outline why – on the unchallenged facts – the proceeding brings the
10 administration of justice into disrepute.

11. Courts have an inherent power to prevent their procedures from abuse.[24] *"Abuse of process"* has no set meaning.[25] What amounts to abuse is insusceptible to a formulation comprising closed categories,[26] and *"development continues"*.[27] The circumstances in which an abuse may arise have been described as *"very varied"*,[28] and *"limited only by human ingenuity"*.[29] In some cases, reasonable minds may differ as to whether an abuse exists.[30]

---

22 See Amended Statement of Claim dated 23 November 2018 in Federal Court of Australia proceeding VID511/2018 [11]-[16C] (as to whether EA was "made"); [17]-[17C] (as to whether EA was "genuinely agreed"); and [18]-[22] (as to whether EA passed the "better off overall test").

23 See paragraphs [21]-[28] and [29]-[31] hereof.

24 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 (***'Batistatos'***) [7] (Gleeson CJ, Gummow, Hayne, Crennan JJ). See also *Williams v Spautz* (1992) 174 CLR 509 (***'Spautz'***), 518 (Mason CJ, Dawson, Toohey, and McHugh JJ).

25 *Batistatos* [1] and [9] (Gleeson CJ, Gummow, Hayne, Crennan JJ).

26 *Batistatos* [9]-[15] (Gleeson CJ, Gummow, Hayne, Crennan JJ); *PNJ v The Queen* (2009) 252 ALR 612 (***'PNJ'***) [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

27 *Batistatos* [19] (Gleeson CJ, Gummow, Hayne, Crennan JJ).

28 *Batistatos* [6] (Gleeson CJ, Gummow, Hayne, Crennan JJ, citing with approval the speech of Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 (***'Hunter'***), 536).

29 *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275, 279 (***'Sea Culture'***) (French J).

30 *Batistatos* [7] (Gleeson CJ, Gummow, Hayne, Crennan JJ).

**The proceeding brings the administration of justice into disrepute**

12. This Court has held repeatedly that an abuse of process exists where the use of the Courts' procedures serves to bring the administration of justice into disrepute.[31]

13. By its nature, the expression *"bring the administration of justice into disrepute"* is not susceptible to precise definition. Judges of this Court have described the expression in varying ways, including:

(a) properly understood, the concept refers to *"the inherent power… to prevent misuse of its procedure in a way which… would otherwise bring the administration of justice into disrepute among right-thinking people"*;[32]

10 (b) the words *"bring the administration of justice into disrepute among right-thinking people"* are not words of exact meaning;[33]

(c) the administration of justice may be brought into disrepute if the Court's procedures are permitted to be used in a manner that would be substantially unfair: the inconsistency with the due administration of justice lying *"in the tendency of the court, in permitting that use of its procedures to occur, to erode public confidence in the court's administration of justice in that and other cases"*;[34]

(d) the administration of justice may be brought into disrepute where allowing a proceeding to continue suggests tolerance of *"behaviour that is contrary to the just, efficient and timely resolution of disputes"*;[35] and

---

31 See, e.g., *Walton v Gardiner* (1993) 177 CLR 378 (***'Walton'***), 393 (Mason CJ, Deane and Dawson JJ); *Rogers v The Queen* (1994) 181 CLR 251 (***'Rogers'***), 286 (McHugh J); *Batistatos* [15] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *PNJ* [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Moti v The Queen* (2011) 245 CLR 456 (***'Moti'***), [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 [25] (French CJ, Bell, Gageler and Keane JJ); *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1 (***'Strickland'***) [170] (Keane J) and [256] (Edelman J); and *UBS AG v Tyne* (2018) 265 CLR 77 (***'UBS'***) [1] (Kiefel CJ, Bell and Keane JJ).

32 *Walton*, 393 (Mason CJ, Deane and Dawson JJ), citing with approval Lord Diplock in *Hunter*, 536. See also *Batistatos* [6] (Gleeson CJ, Gummow, Hayne, Crennan JJ).

33 *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 [58] (Heydon J).

34 *Strickland* [154] (Gageler J).

35 *UBS* [151] (Gordon J).

(e) the reference to *"repute"*, or public confidence, is a construct that is concerned with the systemic protection of the integrity of the Court within an integrated system of justice. It represents *"the trust reposed constitutionally in the courts"*.[36]

14. This is partly because, as French J (as his Honour then was) observed in *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275, the circumstances in which an abuse of process may arise are *"limited only by human ingenuity"*.[37] That observation is apt. This sham is of a type not previously detected in a decided Australian case.

15. The union's conduct is such that an application by it would be susceptible to refusal on discretionary grounds.[38] The union was alive to this.[39] Instead of accepting the consequences of its conduct, it funded Mr Lunt (who would not otherwise have sued) to sue VICT and thereby avoid scrutiny. When the sham was alleged, the union filed submitting appearances and proffered no evidence. Mr Lunt denied the existence of the sham and destroyed potential evidence in an attempt to cover it up.[40]

16. The union supported and thereby induced the approval of the EA. If the proceeding is permitted to continue, the union will be permitted to seek relief entirely inconsistent with that conduct. The union will be allowed to avoid scrutiny and consequences. That would bring the administration of justice into disrepute among right-thinking people.

---

36 *Strickland* [257] (Edelman J).

37 *Sea Culture*, 279 (French J).

38 The remedies sought in the proceeding do not lie as of right, but are discretionary: see, e.g., *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 [5] (Gleeson CJ), [17] (Gaudron and Gummow JJ), [144] (Kirby J) and [172] (Hayne J); *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 [17] (Gummow, Hayne and Crennan JJ); and *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 [28] (Gleeson CJ, Gummow, Callinan, Heydon And Crennan JJ).

39 PJ [121] [CAB 25] and [133] [CAB 27].

40 See PJ [43]-[58] [CAB 12-14] and [77]-[91] [CAB 18-20].

## The Full Court's error

17. As the third of three independent[41] rationes decidendi, the primary judge found that the proceeding was an abuse of process as follows (**'justice ratio'**):

> "[134] Further, it would bring the administration of justice into disrepute if the CFMMEU were permitted, by using the device of having a "front man", to bring the proceeding to challenge the approval of the Enterprise Agreement while avoiding scrutiny of its acquiescence to that approval."[42]

18. Mr Lunt's grant of leave to appeal to the Full Court was limited to a single ground:

> "The primary judge acted upon a wrong principle in concluding that it was an abuse of process for the appellant to bring a proceeding for the predominant purpose of seeking relief because another person (here, the fourth respondent) wanted that relief (see at [116], [119], [131]-[132])."[43]

19. The Full Court upheld the appeal; ordered that the primary judge's order dismissing the proceeding be set aside; and ordered that VICT's application to dismiss the proceeding as an abuse of process be dismissed.[44] No fact was challenged or disturbed on appeal. Instead, the Full Court based its orders on its finding that: *"[t]here was therefore "no impropriety of purpose" and no abuse of process."*[45]

---

41 See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***'Hossain'***) [5] and [35] (Kiefel CJ, Gageler and Keane JJ), [41] (Nettle J) and [44] (Edelman J).

42 PJ [134] [CAB 27]. In addition, the primary judge's order was supported by the **'purpose ratio'** described in PJ [131] [CAB 27] (the proceeding is an abuse of process because it has been brought for an illegitimate and collateral purpose); and the **'oppression ratio'** described in PJ [133] [CAB 27] (the proceeding is an abuse of process because the union bringing the proceeding in Mr Lunt's name is unjustifiably oppressive to VICT).

43 *Lunt v Victoria International Container Terminal Limited* [2019] FCA 1599 [59] (Kerr J). Mr Lunt had also sought leave to appeal on two other grounds. Leave was not granted in respect of those grounds on the basis that they were, respectively, *"without merit"* and lacking *"any merit as a distinct basis for leave to granted to appeal out of time"* (*Lunt v Victoria International Container Terminal Limited* [2019] FCA 1599 [32] and [37] (Kerr J)).

44 Order of Bromberg, Kerr and Wheelahan JJ in *Lunt v Victoria International Container Terminal Limited* (Federal Court of Australia, VID777/2019, 18 March 2020) [CAB tab 5].

45 FC [18] [CAB 46].

20. As we said in paragraph [10] hereof, there are two bases on which VICT's appeal may be upheld:

(a) The Full Court failed to find a *House v The King*-type error[46] affecting the justice ratio (upon which appellate intervention is conditioned).

(b) The Full Court failed to appreciate that the appeal before it lacked utility.

**The primary judge did not err**

21. The Full Court's intervention was contingent on it finding a *House v The King*-type error affecting the justice ratio.[47] Its consideration was confined, consistent with the sole ground of appeal, to whether the primary judge acted upon a wrong principle:

> "[13] Mr Lunt contended that the primary judge acted upon a wrong principle in concluding that it was an abuse of process for him to bring the proceeding for the predominant purpose of seeking relief because another person – the Fourth Respondent ("CFMMEU") – wanted that relief."[48]

22. The Full Court's reasons do not disclose how (or even if) it found error affecting the justice ratio. At FC [18] the Full Court confirms its judgment was based on it reasoning that, because Mr Lunt's *"…purpose in commencing and maintaining the proceeding was to obtain a result within the scope of the remedy which his proceeding sought…"*, there was *"…therefore "no impropriety of purpose" and no abuse of process."*

23. That is, the Full Court found that, because it concluded that Mr Lunt's predominant purpose was not improper, the proceeding was not an abuse of process. As support for finding error in the justice ratio, this is problematic for three reasons.

24. **First**, the Full Court misstates the unchallenged finding as to predominant purpose. The primary judge found Mr Lunt's predominant purpose to be: (emphases added)

(a) *"…allowing the CFMMEU to obtain relief which it could not, or might not, obtain if the proceeding were brought in its own name"*;[49] and

---

46 Of the type identified by this Court in *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

47 *Batistatos* [7] (Gleeson CJ, Gummow, Hayne, Crennan JJ).

48 FC [13] [CAB 45].

49 PJ [119] [CAB 25].

(b) put another way, *"…enabling the CFMMEU to obtain relief which it was unlikely to obtain if the proceeding were brought in its own name"*.[50]

25. The emphases identify the Full Court's omissions. Those omissions alter fundamentally Mr Lunt's predominant purpose and, therefore, any finding of error made on the basis of that purpose.

26. **Second**, the justice ratio was not reached on the basis of *Mr Lunt's* purpose understood in isolation to the exclusion of the surrounding context. The primary judge's analysis was more complex; and focussed on the purpose of *the sham* (for which Mr Lunt is the vehicle). *That* purpose was to enable the union to obtain relief in relation to the EA while avoiding scrutiny of its acquiescence to its approval.

27. **Third**, properly understood, Mr Lunt's contention on appeal was not that the primary judge acted upon a wrong principle. To act on a wrong principle is to offend a *"binding rule"*.[51] No binding rule, whether statutory or general, was identified. None exists. Binding rules are inconsistent with the variable nature of *"bringing the administration of justice into disrepute"* (as set out in paragraph [13] hereof).

28. Rather, Mr Lunt's complaint, understood properly through the lens of *House v The King*, must have been that the primary judge was guided or affected by an extraneous or irrelevant matter (i.e. purpose). But that is misconceived. Far from being an irrelevant consideration, the sham's purpose is fundamental to assessing whether the proceeding brings the administration of justice into disrepute. The purpose was to enable the union to obtain relief *"which it could not, or might not, obtain if the proceeding were brought in its own name"*.[52] Therein lies the abuse of process.

---

50 PJ [131] [CAB 27].

51 *Norbis v Norbis* (1986) 161 CLR 513, 520 (Mason and Deane JJ, with whom Brennan J at 536 agreed).

52 PJ [119] [CAB 25].

**The Full Court appeal lacked utility**

29. In any event, the appeal was limited to the correctness of the purpose ratio.[53] Having noted this *"confined"* scope, the presiding judge suggested Mr Lunt may want to *"regularise"* the Notice of Appeal to also attack the justice ratio.[54] So-prompted, Mr Lunt's counsel applied to amend.[55] VICT's counsel objected.[56] The Full Court did not order the amendment; instead describing it as *"minor"* and *"unnecessary"*, saying it *"need not be further addressed"*.[57]

30. Confined as the appeal thus was, the Full Court should have found it inutile.[58] The Full Court's error in not doing so was a product of its failures to:

10 (a) appreciate that one set of facts might constitute an abuse in a variety of ways (i.e. might give rise to illegitimacy of purpose[59] and bring the administration of justice into disrepute);[60]

(b) engage with the primary judge's reasons. His Honour set out the separate factual bases for the purpose and justice rationes.[61] The Full Court does not refer at all to the latter;

---

53 See paragraph [21] hereof.

54 Transcript of Proceedings, *Lunt v Victoria International Container Terminal Limited* [2020] FCAFC 40 (**'T'**) 16:5-13.

55 T 16:23-25.

56 See T 38:15-19 and T 39:24-40. The proposed amendment would have expanded the scope of the appeal fundamentally. Such an expanded appeal would have involved an attack on either the factual underpinnings of the six bases for the oppression and justice rationes, or – through the prism of *Warren v Coombes* (1979) 142 CLR 531 and *House v The King* (1936) 55 CLR 499 – an attack on the legal characterisations of those six bases (as not constituting an abuse of process by reason of oppression or the effect on the administration of justice).

57 FC [10] [CAB 45].

58 See, e.g., *Hossain*.

59 See, e.g., *Spautz*.

60 See, e.g., *Strickland*.

61 For purpose ratio, see PJ [103]-[119] [CAB 22-25]; for justice ratio, see PJ [120]-[129] [CAB 25-26].

(c) pay regard to the primary judge's language (*"each"*,[62] *"I also find…"*,[63] *"Further…"*[64]) in describing his separate rationes as distinct from each other; and

(d) engage in a textual analysis of what the primary judge found; instead eliding the issue by repeatedly asserting that the primary judge found *"one instance"* of *"conduct"* or *"abuse"*: which founded the conclusion that the primary judge found *"one instance of an abuse of process, and not three"*.[65]

31. As a consequence, the Full Court examined abuse of process solely through the prism of propriety of purpose. At FC [18] [CAB 46], the Full Court concluded that *"[t]here was therefore "no impropriety of purpose" and no abuse of process."*

32. Given the absence of *any* analysis of the justice ratio, it might be assumed that the Full Court reasoned that there was no abuse of process *because* there was no impropriety of purpose. If that is what the Full Court did, it committed the fallacy of the inverse: While it is correct that an improper purpose *must* give rise to an abuse of process, it is fallacious to imply the inverse (i.e. "not finding improper purpose means that there *must not* be an abuse of process").

33. The Full Court effectively ignored the primary judge's conclusion that it would bring the administration of justice into disrepute if the union were permitted to bring the proceeding while avoiding scrutiny of its acquiescence to the EA's approval. In doing so, the Full Court failed to consider what in truth happened (as reflected in the primary judge's uncontested findings). Whether or not Mr Lunt's purpose was proper says nothing about the effect of the sham upon the administration of justice.

---

62 See, e.g., *PNJ* [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Rogers*, 286 (McHugh J); *Batistatos* [15] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Moti* [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); and *Strickland* [170] (Keane J) and [256] (Edelman J).

63 PJ [133] [CAB 27].

64 PJ [134] [CAB 27].

65 FC [6] [CAB 44]. The Full Court used the phrase *"instance of conduct"* or *"instance of abuse"* seven times in FC [6]-[9] [CAB 44-45]. Neither expression finds home in the PJ, and the Full Court gives them a chameleon-like quality that confuses rather than clarifies.

**VICT should be awarded its costs**

34. This Court has power to order the payment of the costs of the appeal to this Court,[66] and in the Federal Court (including the Full Court).[67]

35. Where s 570 of the *Fair Work Act 2009* (Cth) applies, the circumstances in which a party may be ordered to pay costs are limited. Subsection 570(2)(b) provides that a party may be ordered to pay costs if the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs.[68]

36. VICT concedes that s 570 applies to the proceedings in the Federal Court. While this Court has not considered whether s 570 in its current form applies to proceedings before it,[69] VICT accepts that Mr Lunt and the union are likely entitled to the protection afforded by s 570 unless an exception in sub-s 570(2) applies.

37. This Court has not considered sub-s 570(2)(b) (or its predecessor provision),[70] which requires unreasonableness and causation:

    (a) As to **unreasonableness**, the position in the Federal Court is that the reasonableness of a party's acts and omissions is to be determined objectively in light of the circumstances of the case.[71] No litigant acting reasonably uses a *"front man"* device to avoid scrutiny of conduct giving rise to the proceeding. No litigant acting reasonably commences a proceeding so that they may be used in that way.

---

66 *Judiciary Act 1906* (Cth) s 26.

67 See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 [111] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Roncevich v Repatriation Commission* (2005) 222 CLR 115 [29] (McHugh, Gummow, Callinan and Heydon JJ).

68 FW Act sub-s 570(2)(b).

69 In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]* (2012) 86 ALJR 1253 this Court held that s 570 did not apply to proceedings before it. However, that decision concerned a previous iteration of s 570. That previous iteration read *"exercising jurisdiction under…"* in place of the (current) words *"in relation to a matter arising under…"*.

70 *Workplace Relations Act 1996* (Cth) s 824 (until 27 March 2006, s 347). Until 27 March 2006, the present equivalent of sub-s 570(2)(b) did not exist (costs could only be ordered in proceedings instituted vexatiously or without reasonable cause) (see *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1 item 206 (for renumbering, see sch 5 item 1)).

71 See, e.g., *Australian and International Pilots Association v Qantas Airways Ltd (No 3)* (2007) 162 FCR 392 [32] (Tracey J); *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 3)* [2017] FCA 810 [25] (Katzmann J); *Wang v MTC Australia Ltd* [2018] FCA 1037 [27] (Flick J).

(b) As to **causation**, were it not for the unreasonable acts, the proceeding would not have been commenced or maintained *at all*. It follows that VICT would not have incurred *any* costs but for the unreasonable acts.

38. Once sub-s 570(2)(b) has been satisfied, the usual costs principles apply.[72] This Court has observed that the power to award costs is discretionary and that: (citations omitted)

> "A guiding principle by reference to which the discretion is to be exercised – indeed, "one of the most, if not the most, important" principle – is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party."[73]

39. While the union filed submitting notices, it is the true moving party.[74] It used Mr Lunt as *"front man"*; a role he accepted. Nothing VICT has done weighs against the exercise of the discretion in its favour. Justice requires that both Mr Lunt and the union should be required to indemnify VICT against the costs it was obliged to incur in order to vindicate its rights and protect the administration of justice.

40. This case involves delinquency on the parts of the union and Mr Lunt.[75] In such cases, costs should be ordered on an indemnity basis to more adequately compensate VICT *"to the disadvantage of what otherwise would have been the position of the unsuccessful [parties] in the absence of such delinquency on [their] part."*[76]

## Part VII: Orders sought

41. VICT seeks the following orders:

(a) Appeal allowed.

(b) Set aside the order made by the Federal Court on 18 March 2020, and in its place order that the appeal to that Court be dismissed.

---

72 See, e.g., *Ashby v Slipper (No 2)* (2014) 314 ALR 84 [7] (Mansfield, Siopis and Gilmour JJ).

73 *Northern Territory v Sangare* (2019) 265 CLR 164 [25] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

74 PJ [118] [CAB 25], [129] [CAB 26], [133] [CAB 27] (none of which were disturbed by the Full Court).

75 See PJ [29]-[58] [CAB 10-14]; [82]-[91] [CAB 19-20], [97]-[101] [CAB 21-22], [124]-[129] [CAB 26].

76 *Oshlack v Richmond River Council* (1998) 193 CLR 72 [44] (Gaudron and Gummow JJ).

(c) The first and fourth respondents pay the appellant's costs (on an indemnity basis) in:

(i) the Federal Court (including the Full Court of the Federal Court); and

(ii) this Court.

## Part VIII: Estimate of time required

42. VICT estimates it will require one hour for the presentation of its oral argument in chief.

Dated: 30 October 2020

10

**Stuart Wood AM QC**
Aickin Chambers
Telephone: (03) 9225 6719
Fax: (03) 9225 7967
swood@vicbar.com.au

**Nico Burmeister**
Aickin Chambers
Telephone: (03) 9225 6902
Fax: (03) 9225 7967
nico.burmeister@vicbar.com.au

**Chris Gardner**
Seyfarth Shaw Australia
Solicitor for the Appellant

# ANNEXURE

## List of constitutional provisions, statutes and statutory instruments

*Constitutional provisions*

None.

*Statutes*

1. *Fair Work Act 2009* (Cth):
   (a) compilation 40 (28 September 2020), s 570;
   (b) compilation 28 (13 October 2016), ss 183, 201, 210, 222, 223, 225, 226, 318, 319, 768BG;
   (c) compilation prepared on 22 November 2012, s 570.
2. *Judiciary Act 1906* (Cth), compilation 47 (25 August 2018), ss 26, 78B.
3. *Workplace Relations Act 1996* (Cth) (now *Fair Work (Registered Organisations) Act 2009* (Cth)):
   (a) compilation prepared on 27 March 2006, s 824;
   (b) compilation prepared on 16 December 2005, 347.
4. *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), as enacted, sch 1 item 206, sch 5 item 1.

*Statutory instruments*

None.