HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S153 of 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

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and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

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

20 ## Part II: Statement of issues

2. Does s 340(1)(b) of the *Fair Work Act 2009* (Cth) (**FW Act**) extend to adverse action taken to prevent circumstances arising whereby a workplace right, even if not presently in existence, might arise and could be exercised in the future?

3. In particular, does s 340(1)(b) of the FW Act extend to adverse action in the form of an employer making a decision to bring an employment relationship to an end at a time when it would not be lawful for the employee to exercise a particular workplace right; but the employer anticipates that it might become lawful for the employee to exercise such a workplace right at a future date if the employment relationship were permitted to continue?

30 ## Part III: Section 78B notices

4. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Reasons for judgment below

5. The reasons of the Full Court are at *Qantas Airways Limited v Transport Workers' Union of Australia* (2022) 402 ALR 1; [2022] FCAFC 71 (**FC**). The reasons of the

primary judge on liability are at *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244; [2021] FCA 873 (**LJ**) and in relation to declaratory relief at *Transport Workers' Union of Australia v Qantas Airways Ltd (No 2)* (2021) 308 IR 333; [2021] FCA 1012 (**DJ**).

Part V: Facts

6. As at early 2020, the appellants' (together, **Qantas**) ground handling operations, consisting of ramp and baggage (which included baggage handling) and fleet presentation (cleaning), at 10 Australian airports were undertaken in-house by employees of the first appellant (**QAL**), and employees of QAL's wholly-owned subsidiary, the second appellant (**QGS**) (FC [5]; Core Appeal Book (**CAB**) 152).

7. However, in 2020, the COVID-19 pandemic wreaked "devastating and wholly unprecedented" impacts on Qantas' operations and revenues that "cannot be overstated" (LJ [4], [34], [36]; CAB 12, 21–22). From January 2020, Qantas progressively experienced an almost total reduction in travelling passengers and thus passenger flights on its international networks, and a very significant reduction in travelling passengers and thereby passenger flights on its domestic networks (FC [32] and LJ [33]; CAB 159 and 21). From February 2020, Australian governments implemented progressive restrictions on international travel and then domestic travel in response to the pandemic (FC [34]; CAB 159). By May, outsourcing Qantas' remaining ground handling operations was on the table as one option to keep the airline viable (FC [35]–[37]; CAB 160).

8. On 29 June 2020, Qantas commenced a request for information (**RFI**) process with potential third-party suppliers of ground handling services and, in July, received responses (FC [53(a)] and LJ [142]; CAB 165 and 69–70).

9. On 20 August 2020, the Qantas Group released its FY2020 results which included a 91% profit reduction on FY2019 and a $2.7b statutory before-tax loss, plus significant, anticipated underlying losses for FY2021 (FC [54(b)] and LJ [34]; CAB 165–166 and 21–22).

10. On 24–25 August 2020, Mr Andrew David (CEO, Qantas Domestic and International) commenced a review of ground handling operations (FC [54(c)]; CAB 165–166). Qantas notified affected employees about the review, including details of an in-house

bid process, and made a public announcement about the same (FC [9], [56]; CAB 152–153, 166–167).

11. The respondent (**TWU**) presented an in-house bid on 19 November 2020 (LJ [176]; CAB 78) which was less competitive than outsourcing (FC [58]; CAB 167–168).

12. On 27 November 2020, Mr David made the decision to outsource (FC [61]; CAB 169). On 30 November 2020, QAL announced a decision to reject the in-house bid and outsource its ground handling operations at 10 Australian airports (FC [61]; CAB 169).

13. Qantas had sound commercial reasons for outsourcing: it would save $100 million each year once things "returned to normal" (FC [56]; CAB 166–167). There were three commercial "imperatives" for the decision. It would (i) reduce operating costs; (ii) increase variability in Qantas' cost base; and (iii) minimise capital expenditure (FC [12]; CAB 153–154).

14. In the context of an existing agreement, the following is required to organise or engage in protected industrial action (**PIA**):

    (a) the employer agrees to bargain or initiates bargaining for the agreement, or a majority support determination in relation to the agreement comes into operation (s 173);

    (b) a bargaining representative makes an application for a protected action ballot (ss 437–438);

    (c) if satisfied that the statutory prerequisites in s 443 are met, the Fair Work Commission (**FWC**) makes an order for a protected action ballot for the agreement;

    (d) the protected action ballot must occur (s 449), at least 50% of eligible employees must vote in the ballot and more than 50% of those employees must validly approve the action (s 459(1)); and

    (e) the proposed action must meet the requirements imposed by ss 409, 413, 414 and 459.

15. At the time the outsourcing decision was made, for QAL employees, none of the steps in [14(a)] to [14(e)] above had occurred and, by operation of the FW Act, steps [14(b)]

to [14(e)] could not lawfully occur. Further, s 417 prohibited those employees from organising or engaging in PIA until the nominal expiry date of their enterprise bargaining agreement, which was 31 December 2020 (FC [10(b)]; CAB 153).

16. In relation to QGS employees, at the time the outsourcing decision was made, their enterprise agreement had passed its nominal expiry date of 1 September 2019 (so been "open" for more than 12 months) and bargaining (step [14(a)] above) had commenced. However, none of the steps in [14(b)] to [14(e)] had occurred and, by operation of the FW Act, steps [14(c)] to [14(e)] could not lawfully occur (FC [10(c)]; CAB 153). Thus, as at 27 November 2020, affected QGS employees did not have a workplace right to organise, engage in, or otherwise participate in, PIA.

17. In December 2020, the TWU commenced proceedings alleging that the decision contravened (relevantly) s 340(1)(b).[1] The primary judge accepted that Mr David's reasons for outsourcing were substantially the three commercial imperatives. However, the primary judge also concluded that, because Mr David was "subjectively conscious of other considerations", Qantas had not discharged its onus under s 361 of disproving that a substantial and operative reason for Mr David outsourcing the ground handling operations was to prevent employees organising and engaging in PIA and participating in bargaining in 2021 (LJ [272], [282], [287], [288]; CAB 104, 107–108). The reference to bargaining was made in the context that any relevant PIA must necessarily have been taken in support of a proposed enterprise agreement: s 409. A case that Qantas had taken adverse action to prevent employees participating in enterprise bargaining was rejected (DJ [4], [21]; CAB 122–123, 128).

18. Qantas appealed unsuccessfully to the Full Court. In the context of the reverse onus in s 361, which meant Qantas had to exclude all reasonable possibilities inconsistent with its case (FC [171]–[173], [249]–[250]; CAB 211–212, 235–236), the Full Court affirmed the decision of the primary judge that Qantas did not disprove that it made the decision for an additional, prohibited reason, namely preventing employees from disrupting services in 2021 by taking PIA (FC [216]–[217]; CAB 226).

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[1] The TWU also alleged contraventions of ss 340(1)(a) and 346, but these claims were dismissed by the primary judge, whose findings were not disturbed by the Full Court.

Part VI: Summary of argument

19. Qantas' position can be stated simply. The Full Court erred in rejecting Qantas' argument that, on its proper construction, s 340(1)(b) only prohibits adverse action to prevent the exercise of a presently existing "workplace right", as opposed to a "workplace right" which does not yet, and may never, exist. The Full Court's reasoning is particularly stark in the present case where the FW Act expressly precluded Qantas employees from exercising the "workplace right" to participate in PIA, subject to the immunity protection afforded by s 415, at the time of the adverse action. Section 340(1)(b) should not be construed to impose a civil penalty on an employer for taking adverse action to prevent an employee acquiring future rights, the exercise of which at the time of the adverse action would have been unlawful.

20. The Full Court reasoned that to discharge the reverse onus in s 361, the employer must exclude all reasonable possibilities inconsistent with the employer's case (FC [171]–[173], [249]–[250]; CAB 211–212, 235–236). Every termination of employment, of necessity, prevents the employee from obtaining fresh workplace rights in the future and thereby, being able to exercise them thereafter, and any informed employer can be expected to be subjectively aware of that fact. As the primary judge's reasoning indicates, subjective consciousness of that fact was sufficient to prevent Qantas discharging the onus of proof imposed by s 361. Thus, given the extremely high burden of proof placed on the employer, it is difficult to conceive of a circumstance that would not result in an employer being found to have terminated the employee for a substantial and operative reason of preventing the employee from obtaining those "workplace rights" in the future and thereby being able to exercise them thereafter. As a practical matter, on the Full Court's construction it is difficult to conceive how an employer could ever discharge the onus in relation to an outsourcing decision.

21. As explained below, the text, context (including legislative history) and purpose of s 340 support the proposition that s 340(1)(b) simply does not extend so far as to protect a person from adverse action in respect of rights that they do not presently have, may never come into existence, and/or indeed concern conduct currently positively prohibited.

Text

22. Section 340(1) prohibits the taking of adverse action if it is motivated in one of two ways, as reflected in the "because" limb in (a) and the "prevent" limb in (b). "Adverse action" is defined in s 342, which contains at s 342(1) a table setting out when "adverse action" will have been taken by certain classes of persons (employers, employees, a principal or independent contractor, amongst others) against certain other classes of persons. The breadth of the concept works to deliver a broad protection under s 340 to the person the subject of adverse action.

23. **The "because" limb:** The two limbs in s 340(1) perform different functions. Section 340(1)(a) is directed towards circumstances where the person taking adverse action does so *because* of certain matters. Section 340(1)(a)(i) concerns the circumstance where adverse action is taken because a person *has* a workplace right (e.g., adverse action because the person *is* a health and safety representative, having regard to the workplace right identified in s 341(1)(a)). Section 340(1)(a)(ii) proscribes adverse action taken because the other person has (or has not) exercised a workplace right *in the past*. Section 340(1)(a)(iii) proscribes adverse action taken because of a current or past proposal by a person to exercise, or not to exercise, a workplace right.

24. Under each aspect of the "because" limb, the workplace right must be one that the person affected has (or at least had in the past). The Full Court's suggestion that s 340(1)(a)(i) is so limited but s 340(1)(a)(ii) and (iii) are not (FC [120]; CAB 192–193) is simply not reflected in the text, as we return to at [39]–[44] below.

25. What unites the "because" limb is a concern to prohibit action which is essentially *retaliatory* in nature. Where persons have (or have had) workplace rights, their past, present or proposed exercise of them should not be made the subject of any of the forms of adverse action defined in s 342; typically dismissal, injury, alteration of position to prejudice or discrimination. Such actions are wrongful because of their tendency to diminish or undermine the other person's full enjoyment of the rights.

26. **The "prevent" limb:** Section 340(1)(b) plays a complementary role to s 340(1)(a), and only applies to a workplace right capable of being exercised. It prohibits a person from "preventing the exercise" of a workplace right by another. A prevents B from exercising a workplace right if A puts a barrier or obstacle, whether temporary or

permanent, in the way of B exercising a workplace right which B has, or if A removes the conditions necessary for B's exercise of a workplace right. The prevent limb will have particular work to do where the other person has not yet exercised or proposed to exercise the right and so would not be covered by s 340(1)(a)(i), (ii) or (iii).

27. To take a practical example, albeit not this case. An employer might have certain employees with the existing right to initiate or participate in a process or proceeding of PIA, or a protected action ballot, which are workplace rights identified in s 341(1)(b) when read together with s 341(2)(c) and (d). The employer might roster them on to work at the time the employer knows they were planning to meet to discuss what form of industrial action they might wish to take. On a natural reading of s 340, this fact pattern falls more naturally within limb (b) than within limb (a). The adverse action is not a response to, or retaliation for, the existence of the employees' right to PIA *per se*, the exercise of that right (which exercise has not yet occurred) nor even the proposal to exercise the right (which has not yet been formulated); rather, the employer seeks to put a temporary barrier or obstacle in the way of exercising the right, or to interfere with the conditions necessary for the exercise of the right.

28. That said, it is conceivable that there could be some overlap between (a)(i) and (b), and that one set of conduct could contravene both limbs: for instance, if an employer was driven not only to remove the conditions necessary for the exercise of a workplace right, but also to impose the adverse action as a response to, or retaliation for, the fact that the employee had had the workplace right, the employer would likely contravene both (a)(i) and (b).

29. **Commonality between the "because" and "prevent" limbs:** The "prevent" limb, as much as the "because" limb, is concerned with workplace rights held by a person. It is not concerned with rights that the person may, or may not, acquire at a future date; or with rights which, by definition, the person may or may not ever be in a position to exercise.

30. **Section 340(2):** While not directly in issue in this case, s 340(2), which is a type of "third-line forcing" provision, operates on a similar plane to s 340(1). It prohibits adverse action by A against B "because" (that is in the responsive or retaliatory sense) C has engaged in a subset of the behaviours protected by the "because" limb.

31. **The definition in s 341:** Importantly, each of the four criteria in s 340(1) (and indeed s 340(2)) rely upon the definition of "workplace right" in s 341. The Full Court reasoned that because s 340(1)(b) is "obviously focussed on the future and its protective subject is the future possible exercise of a particular workplace right by the targeted person which the perpetrator has anticipated", the text of the provision necessarily encompasses future workplace rights (FC [99]–[100]; CAB 184–185). That reasoning begs the question. The fact that the provision is focused on the prevention of the future exercise of a "workplace right" does not determine whether the workplace right must be in existence at the time of the alleged adverse action or extends so far as to include a right which may or may not ever come into existence in the future. Rather, it directs immediate attention to the definition of "workplace right" in s 341.

32. The Full Court considered that the definition of "workplace right" in s 341 "is not an orthodox definitional provision which states what the term being defined means" because s 341 "states the circumstances in which a person has a workplace right" (FC [103]; CAB 186–187). That observation misunderstands much modern Commonwealth drafting. The heading to s 341 can be taken into account at least as extrinsic material.[2] It is an accurate description of what s 341 is doing. Section 341 is giving the meaning of the term "workplace right" whenever it appears in the FW Act, such as in ss 340(1) or (2), 343 or 345.

33. Structurally, s 341 operates as a definition in exactly the same way that s 342 operates as a definition of adverse action. The same structural approach is taken elsewhere in the FW Act[3] and indeed widely across the modern Commonwealth Statute Book.[4]

34. The Parliament has chosen to define a "workplace right" in s 341 through a description of when a person *has* a "workplace right", indicating a deliberate legislative choice to

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2 By reason of s 40A of the FW Act, the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009 applies to the FW Act. At that time, section headings and certain notes did not form part of the FW Act: *Acts Interpretation Act 1901* (Cth), s 13. However, the heading to s 341 may be taken into account in interpreting the Act as extrinsic material: *Mondelez v AMWU* (2020) 271 CLR 495, [17] fn 21 (Kiefel CJ, Nettle and Gordon JJ).

3 See, e.g., 22(7) (definition of "transfer of employment"), 347 (definition of "engages in industrial action").

4 See, e.g., *National Consumer Credit Protection Act 2009* (Cth), s 6 (definition of "credit activity"); *Income Tax Assessment Act 1997* (Cth), s 109-5 (definition of "acquire"); *Corporations Act 2001* (Cth), s 763B (definition of "makes a financial investment").

define "workplace right" in the present tense. That choice points heavily in favour of "workplace rights" being existing rights, not future rights which rest in the realm of mere possibility.

35. The Full Court attempted to marginalise the drafting of the definition of "workplace rights" in the present tense, because "[g]rammatically, when a person has a workplace right is best described in the present tense" (FC [103]; CAB 186–187) and it would have been "incongruous and illogical" to define a "workplace right" in terms of what a person *will be* able to do. This reasoning misses the point. There would have been nothing "incongruous and illogical" about defining a "workplace right" in an expanded, future tense (i.e., that a person has a workplace right if they *will* be entitled to the benefit of a workplace law or *will* be able to participate in a process or proceeding) if that had been the scope of "workplace rights" intended by Parliament. Contract and property law are replete with executory rights. There would have been nothing novel or difficult about defining "workplace rights" in that way. But that is not what Parliament chose to do.

36. **Other textual features of s 341:** There are a number of other textual features of s 341 that confirm that workplace rights are presently existing rights. Section 341(3) is a deeming provision. It deems a prospective employee to have the workplace right he or she would have if he or she were employed in the prospective employment. If, as the Full Court concluded, workplace rights include future possible rights, s 341(3), and the related provisions of s 341(4) and (5), would be otiose.

37. In addition, in s 341(2) Parliament delineated a number of separate workplace rights that would be unnecessary if "workplace right" extended to future possible rights. The separate identification of workplace rights as the ability to initiate, or participate in, a protected action ballot (s 341(2)(d)) and the ability to initiate or participate in PIA (s 341(2)(c)) shows that Parliament is concerned with a person's *present* ability, not a future possible ability.

38. **The nature of the "prevent" enquiry:** Relatedly, the Full Court erred in its construction of the word "prevent" at FC [125]ff; CAB 194ff. What the Full Court appears to suggest is that one is to undertake a factual inquiry into the state of mind of the person undertaking the adverse action, as to how likely they think it is that the employee might acquire (at a future date) a given workplace right and might then seek

to exercise that workplace right (FC [127]; CAB 194–195). In the case of PIA, that appears to contemplate a subjective and open-ended inquiry into how likely the employer thinks it is that each of the steps contemplated by Division 8 of Chapter 3, Part 3-3 may be initiated and succeed. Will there be an application for a protected action ballot order (cf s 437)? Will the FWC make such an order (cf s 443)? Will the vote pass (cf s 459)? What action might then be taken and when? These enquiries are far removed from the text of s 340(1)(b), which suggests an inquiry into whether the employer acted to remove the conditions under which a right could be exercised.

39. **Further matters:** A further textual matter relied upon by the Full Court was that it was "clear", or "at least that there is no coherent reason" why, if s 340(1)(a)(ii) and (iii) apply to future workplace rights (see the end of FC [120]; CAB 192–193), s 340(1)(b) should not do so as well. There are a number of errors with this aspect of the Full Court's reasoning.

40. *First*, s 340(1)(a)(ii) refers to a person who "has, or has not, *exercised* a workplace right". A person cannot have exercised a right which they do not have. Thus, the Full Court was respectfully wrong to treat s 340(1)(a)(ii) as supporting its construction.

41. *Secondly*, as *CFMEU v Mammoet Australia Pty Ltd* (***Mammoet***)[5] makes clear, to identify as the Full Court did at FC [120] (CAB 192–193) that the object of Chapter 3, Part 3-1 is "to protect workplace rights" does not assist in the more specific enquiries into what is meant by workplace rights, or the extent to which Parliament has protected those rights.

42. *Thirdly*, the penultimate sentence of FC [120] (CAB 192–193) is a non sequitur. If adverse action is taken because of the past exercise or non-exercise of a workplace right, no question arises about whether the employee continued to hold the workplace right at the time of adverse action. The position is the same if an employee had proposed historically to exercise or not exercise a then existing workplace right.

43. Another oddity of the Full Court's construction is treating s 340(1)(a)(i) as though it were limited to dealing with rights which were in existence on account of the word "has" (FC [99] last sentence; CAB 185), while ss 340(1)(a)(ii), (iii) and (1)(b) are not restricted to presently held rights (FC [120]; CAB 192–193). That is, notwithstanding

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5 (2013) 248 CLR 619, [40]–[42] (the Court).

that a "workplace right" is defined in a singular fashion for the whole of Division 3, the Full Court introduced a distinction not apparent on the face of s 340 that the only part of that provision concerned with presently held rights is s 340(1)(a)(i).

44. Moreover, on the Full Court's construction, s 340(1)(b) does not work in harmony with s 340(1)(a). On the Full Court's construction, a person can run a "prevent" case as their primary case, because it involves a lower threshold for success: the person does not need to first prove the existence of a "workplace right" to prove a contravention. This inverts the natural reading of s 340, giving primacy to what, on its face, is a complementary limb.

10 ***Context – the FW Act as a whole***

45. It is trite that in construing s 340(1)(b) it is necessary to have regard to the whole of the FW Act, and to seek to achieve a construction that is harmonious with the rest of the Act. As explained below, the Full Court's construction is inconsistent with a number of other provisions of the FW Act.

46. **"Time bound rights":** Strikingly, the Full Court completely ignored Qantas' submission that the construction adopted by the Full Court is apt to defeat legislative restrictions placed on rights under the FW Act limited by reference to particular timeframes. Adverse action cannot be said "to prevent the exercise of a workplace right" if the exercise of the workplace right is *unlawful, prohibited or otherwise*
20 *restricted* by the FW Act at the time of the adverse action. To construe s 340(1)(b) in such a way would be inconsistent with the statutory purpose of prohibiting or restricting the exercise of the workplace right.

47. The FW Act contains a number of workplace rights that bear this more particular character. They can be described as "time bound rights"; that is, rights which Parliament has deliberately stipulated are to be available, if at all, only during some times, or in some circumstances, within the employment relationship. Two key examples can be given.[6]

48. The first example – which Qantas developed in the Full Court, but is not mentioned in the Full Court's reasons – concerns the FW Act's unfair dismissal provisions. The

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[6] See also, e.g., ss 65(2) (flexible working arrangements), 66F(1) (casual conversion), 67(1) (parental leave).

rights and remedies which those provisions confer are available only if a dismissal occurs at a time when the employee has satisfied the minimum employment period (6 months or a year, depending on the nature of the employer): ss 382, 383, 390(1)(a)). That reflects a deliberate legislative choice that the rights conferred by those provisions should be able to be exercised only where the employee has served a minimum employment period. So strong is this legislative intention that s 194(c) makes it unlawful for the parties to an enterprise agreement to agree to confer *any* entitlement or remedy in relation to unfair dismissal (however described) before the employee has completed the minimum employment period.

10 49. However, on the Full Court's construction of s 340(1)(b), if an employee who has been employed for five months is terminated for the substantial and operative reasons of *both* the employee's poor performance *and* the employer's desire to avoid the employee's possible exercise of unfair dismissal rights in the future, the employee would be able to rely on the employee's loss of the *future* ability to initiate unfair dismissal proceedings to establish a breach of s 340(1)(b).

50. The employee in such a case would not only circumvent the overriding statutory purpose that employees are not entitled to unfair dismissal remedies before the minimum employment period, but would obtain even stronger remedies than those available under the unfair dismissal regime; that is, a civil penalty and broader
20 remedial orders not confined to reinstatement and capped compensation (see ss 382, 383, 390(1)(a)), as well as the benefit of the reverse onus in s 361.

51. The present case, which concerns PIA, provides the second example. Unless protected, industrial action can have a range of civil and/or criminal consequences for employees taking that action. An employer may obtain stop orders under ss 418–420, and s 417 expressly prohibits employees covered by an enterprise agreement from taking industrial action until the nominal expiry of the agreement. On the other hand, if the employment relationship continues into a period in which the conditions for the industrial action to be "protected" are present, the FW Act confers an immunity on the action from the operation of State or Territory Law: s 415.

30 52. There are various additional requirements before employees can take PIA, including most significantly that the industrial action is authorised by a protected action ballot: s 409(2). In order for that authorisation to occur, there must, among other things, be

an application to the FWC for a protected action ballot order, and the ballot must achieve the necessary majority of votes of employees: see ss 437, 459.

53. Again, the fact that, pursuant to s 194(e) of the FW Act, parties are prohibited, even by agreement, from giving employees a right to PIA inconsistent with the limits of the FW Act, shows a Parliamentary choice to ensure, without exception, that an employer is not to be faced with PIA unless the various steps have been taken.

54. For an employer to decide to terminate an employee at a time when the FW Act does *not* protect industrial action (whether by prohibiting it or rendering it not lawful) but in the knowledge (which any informed employer would have) that industrial action *might* attract the protected status of PIA at a future date does not involve action "*to prevent* the exercise of a workplace right". Rather, it is no more than the exercise by the employer of a lawful common law right to bring the employment relationship to an end, in preference to the alternative of permitting it to continue into a future period in which the FW Act might confer on the employee greater rights and the employer might face greater correlative obligations.

55. **Primary remedies elsewhere:** Relatedly, it is important to recognise that the workplace rights the subject of Division 3 of Part 3-1 headed "*Workplace rights*" are created and given their primary remedies elsewhere; e.g., rights created by the National Employment Standards (Part 2-2), modern awards (Part 2-3) or enterprise agreements (Part 2-4). Section 340's purpose is to employ the sanctions of civil contravention and penalty for certain types of conduct which are regarded as wholly antithetical to these workplace rights because of their tendency to undermine the full enjoyment of those rights. However, on the Full Court's construction of s 340, employees are effectively entitled to a broad range of additional remedies under s 545 before those workplace rights even exist and when they may never exist. On that approach, rather than protecting workplace rights, s 340 is a source of a whole new body of future possible rights.

56. **Section 343:** If the Full Court's construction is correct, the expanded concept of a "workplace right" must also inhere in s 343. Notably, s 343, like s 340, is not targeted solely to adverse action by employers against employees. It could be one employee, or a union, which seeks to engage in the types of coercion the subject of s 343, just as much as an employer. But it is difficult to envisage real-life situations in which an

employer, union or fellow employee would coerce a person to exercise a workplace right that they do not yet have, let alone coerce a person to exercise a workplace right that they do not yet have "in a particular way". The Full Court's expanded concept of "workplace rights" is not necessary to make technical or purposive sense of s 343.

57. **Section 345:** The Full Court identified that if "workplace rights" did not include future possible rights, the scope of s 345 – which prohibits misrepresentations about the workplace rights of another person, or the exercise or "the effect of the exercise" of a workplace right – would be significantly narrowed (FC [104]; CAB 187).

58. This reasoning commits the fallacy of assuming that because one of the general purposes of Part 3-1 is to protect workplace rights (s 336(1)(a)), that all provisions of Part 3-1 should be given their broadest possible construction. However, as this Court explained in *Mammoet*,[7] generalised assertions of purpose are of little assistance where, as here, the provision strikes a balance between competing interests, and the problem of interpretation is deciding how the balance has been struck. One of the general objects of the FW Act is to create a "*balanced* framework for cooperative and productive workplace relations": s 3. The object in s 336(1)(a) – "to protect workplace rights" – does not assist in determining either the scope of "workplace rights" or the scope of the protections which such rights are afforded.

59. Section 345 still has substantial work to do if a "workplace right" is understood as limited to a right that currently exists. For example, the prohibition on representations about the "effect of the exercise" of a workplace right will prohibit representations about the consequences of a future exercise of an existing right. The scope of s 345 is further expanded by the deeming provision in s 341(3) which treats prospective employees as if they had the workplace rights they would have had if employed.

Context – legislative history

60. The Full Court placed significant reliance on the legislative history to s 340(1)(b). As explained below, the legislative history to s 340 is generally of limited assistance. However, insofar as it does bear on the present question, it supports Qantas' construction.

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7 (2013) 248 CLR 619, [40]–[42].

61. At FC [121]–[123] (CAB 193–194), the Full Court said that the construction of s 340(1)(b) was informed by provisions of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (**CC&A Act**) and its successors. In particular, the Full Court identified that, between 1920 and 1996, federal industrial legislation[8] prohibited an employer threatening to dismiss an employee, or to injure or to alter the position of the employee, "with the intent to dissuade or prevent the employee" from becoming an officer or member of an industrial organisation, or from appearing or giving evidence as a witness in a proceeding under those Acts.

62. There are various differences between those earlier provisions and s 340(1)(b). *First*, the earlier provisions were concerned with threats made with a specific intent and were thus more akin to the current s 343, which does not contain a "prevent" limitation.

63. *Secondly*, s 340(1)(b) does not contain protection on terms in relation to union membership or becoming an officer of an industrial organisation. Those matters are now addressed in s 346, which also does not contain a "prevent" limitation.

64. *Thirdly*, the "prevent" limitation in the earlier provisions was confined to specific matters and did not extend to the full range of "workplace rights" now defined in s 341. The FW Act introduced for the first time in s 341 the concept of a "workplace right" and in so doing sought to simplify and rationalise in a single provision the various rights to which protection was to be afforded. As Bromberg J noted in *Fair Work Ombudsman v Australian Workers' Union*,[9] the general protection afforded by s 340(1)(b) was a "new provision" introduced by the FW Act. Accordingly, s 340(1)(b) is not in any meaningful sense a re-enactment of earlier provisions of Commonwealth industrial legislation (cf FC [121]; CAB 193).

65. Even if one assumed that the prohibitions in the CC&A Act identified in [61] above were intended to be replicated in the FW Act, at most it would suggest that s 340(1) should provide protection for an employee from adverse action taken to prevent that person appearing as a witness in proceedings under the FW Act. However, there is no need to construe s 340(1)(b) as extending to workplace rights which do not yet (and

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8 See *Commonwealth Conciliation and Arbitration Act 1904* (Cth), s 9(1A) (introduced by *Commonwealth Conciliation and Arbitration Act 1920* (Cth), s 5)); *Industrial Relations Act 1988* (Cth), s 334(3).

9 (2017) 271 IR 139, [73].

may never) exist to achieve that result. A person has an existing workplace right if they can participate in court proceedings under a workplace law: ss 341(1)(b), 341(2)(b). A potential witness can always be a witness in proceedings.

66. Likewise, there is nothing in ss 298K and 298L of the *Workplace Relations Act 1996* (Cth) (**WRA**) that supports the Full Court's construction (contra FC [107]–[112]; CAB 188–190). Those WRA provisions did not contain a prohibition on action taken "to prevent" anything, and there is nothing in them to suggest that the protection afforded by s 340(1)(b) extends to future workplace rights.

67. The most assistance one can draw from the WRA when seeking to construe the FW Act on this topic comes from the decision of the Full Federal Court in *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (***Burnie Port***)[10] (cf FC [113]–[117]; CAB 191–192). The court in *Burnie Port* construed the phrase "is entitled to the benefit of an industrial instrument or an order of an industrial body" in s 298L(1)(h) of the WRA. Those words are now found in s 341(1)(a) of the FW Act. The court in *Burnie Port* found that the phrase "is entitled" was a reference to a present or existing – rather than prospective – entitlement, although it could cover the situation where a payment was accruing or the entitlement to a specific payment of a benefit was contingent on an event.[11] Had Parliament intended to expand the protection afforded by ss 340 and 341 to include future rights within the concept of workplace rights, it would have stated that expressly. Yet what it did, in s 341(1)(a), was to use the very type of language ("is entitled to") previously deployed in the WRA as considered in *Burnie Port*; and in s 341(1)(b) and (c) used the same tense ("is able to").

68. The clearest inference from the legislative history is that modern drafting practice was deployed to capture the essence of the former regime in simpler language. The complicated and lengthy provisions of the former WRA were reduced to their essence by conceptualising persons as having "workplace rights" which required protections against identified forms of conduct undermining them. In that redrafting, various policy choices were made. "Prevention" was drawn out as a species of wrongful conduct in addition to the traditional prohibitions on retaliatory adverse action.

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10 (2000) 104 FCR 440 (Wilcox, Kiefel and Merkel JJ).

11 At [24], [26], [30].

69. But there is simply no reflection in the text of the FW Act, or in any extrinsic material, that in that course of redrafting, Parliament intended to extend civil penalty sanctions into wholly new territory – where the employee does not have a present workplace right and indeed it may currently be unlawful or prohibited for the employee to engage in the action in question.

70. Thus, whatever force the presumption from re-enactment may have in industrial relations legislation,[12] in the present case the Full Court could not identify any predecessor provision which, either in the same language or different terms, extended into the territory of its decision; let alone any authority which had considered and so construed the predecessor provisions.

71. So, if history points anywhere, it is against the Full Court's conclusions.

Purpose

72. The final matter relied upon by the Full Court was the purpose of the provisions, namely to "protect workplace rights" (FC [120]; CAB 192–193; see also FC [104]; CAB 187). The fallacy in that reasoning is explained at [58] above. It is another example where the Full Court's reasoning merely begs the question. It assumes the concept of a "workplace right" extends to future and prospective rights when that is the very matter in issue. It also commits the error of making *a priori* assumptions about the purpose of the FW Act, rather than identifying purpose from the text and structure of the Act.[13]

73. **The examples given by the Full Court:** The Full Court also relied upon a more specific form of reasoning from purpose. Their Honours held that Qantas' construction could lead to irrational and unjust consequences which the Parliament could not have intended (FC [133]–[135]; CAB 197–198).

74. Although consequentialist reasoning can be a legitimate tool in statutory interpretation, it must be employed carefully. Assertions of "perversity", as the TWU made

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12 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [81] (McHugh J), [162] (Gummow, Hayne and Heydon JJ).

13 *Lacey v A-G (Qld)* (2011) 242 CLR 573, [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Australian Education Union v Department of Education & Children's Services* (2012) 248 CLR 1, [28] (French CJ, Hayne, Kiefel and Bell JJ).

repeatedly on the special leave application, can often conceal more than they illuminate. In fact, none of the examples identified by the Full Court show any irrational or unjust consequences on Qantas' construction, let alone ones that deny the construction the force it otherwise has.

75. The first example at FC [133] (CAB 197) assumed that on Qantas' construction an employee who has not yet accrued sick leave but gives notice that he or she will take the leave once it is accrued falls outside the scope of s 340. That is not so. As both *Burnie Port*[14] and the relevant Explanatory Memorandum indicate,[15] accruing benefits under a workplace law or instrument are existing workplace rights. An employee has a statutory entitlement under the FW Act to sick leave which accrues day by day: ss 12, 96(1), (2). Put another way, the right already exists, but the ability to enjoy the right depends upon accrual over time.

76. The second example concerning witnesses in a proceeding is addressed in [65] above. Again, there is an existing right which is fully protected.

77. The third example is the suggestion that Qantas' construction would allow an employee to be sacked to prevent them from standing for election as a health and safety representative under s 54 of the *Occupational Health and Safety Act 2004* (Vic). However, yet again the ability to stand for election is an existing entitlement to the benefit of a workplace law. Put another way, it is a right which exists under the statutory scheme, and an employee's enjoyment of that right will depend on their position from time to time.

78. Thus, the first three examples, on analysis, reflect *existing* workplace rights. Adverse action by an employer to prevent the exercise of these types of rights *would* be caught by s 340(1)(b), and rightly so, just as adverse action because of those rights would be caught by s 340(1)(a).

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14 (2000) 104 FCR 440, [30] ("[A] person may be entitled to the benefit of an industrial instrument notwithstanding that the person has only a contingent entitlement to the payment of a *particular* benefit which is payable under the instrument on the occurrence of an event, such as the actual working of overtime hours").

15 "A benefit under a workplace law or workplace instrument is also intended to include benefits that are contingent or accruing (e.g., long service leave)": Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), [1363].

79. The final example relied upon by the Full Court at FC [134] (CAB 197) is the suggestion that it would be incongruous that an employer would *not* contravene s 340(1)(b) if it sacked its workforce the day before the nominal expiry day of an enterprise agreement, having in mind future PIA, but *would* contravene s 340(1)(b) if it sacked them a day later. The example is incomplete. Industrial action is *prohibited* until the nominal expiry date of the enterprise agreement: s 417. Thereafter, while no longer prohibited, it does not acquire the protected status of *lawful* action which has immunity under State or Territory law unless and until the further step of a *successful protected action ballot* is taken: see ss 408, 409(2) and Division 8 of Part 3-3. In the meantime, until it acquires the protected status, it may be restrained: s 418.

80. Yet, even completing the example, there is nothing incongruous in those different outcomes. They reflect a deliberate legislative choice that the employer is to be *free* from PIA during the period up until the nominal expiry of the enterprise agreement and the occurrence of a successful protected action ballot; and, accordingly, is entitled to make its choices whether to permit the employment relationship to continue into a future period in the knowledge of that freedom. On the other hand, once industrial action has escaped prohibition and been given a lawful status with immunity from State or Territory law, the employer is exposed to civil penalty if it takes action to prevent the exercise of that which the FW Act now deems protected.

81. The TWU on special leave asserted that Qantas' construction is perverse because it comes down to "legal minutes". No doubt one can conjure up extreme examples (not the present case) where it might be lawful for an employer to terminate an employee on one day, but literally not the next. An employee might tell their employer, on the day *before* they could lawfully make an application for a protected action ballot that they intend to do so as soon it becomes lawful thereafter. The employee, if terminated for that reason, would not be protected by s 340(1)(a)(iii) or s 340(1)(b). However, the same employee, if terminated on account of that same proposal, but the day *after* it becomes lawful to make such an application, would have protection against termination of their employment under those same provisions. As the examples that appear throughout these submissions demonstrate, this outcome is far from novel. An employee's rights, and the employee's ability to enjoy them, are not static. Likewise, with an employer's duties, and potential exposure to civil contravention and penalties.

Timing is sometimes critical, and this is no less true in respect of the legality of any termination vis-à-vis an employee's proposal to engage in PIA.

Conclusion

82. For these reasons the Full Court erred in construing s 340(1)(b) to extend to adverse action taken to prevent the exercise of future possible workplace rights. In the present case at the time of the outsourcing decision none of the affected employees had an existing right to initiate or participate in PIA. Consequently, the primary judge and Full Court were wrong to find a contravention of s 340(1)(b). In those circumstances, the proceeding ought to have been dismissed, all other bases of the TWU's case having been rejected by the primary judge.

Part VII: Orders sought

83. Qantas seeks the following orders:

1. Appeal allowed.

2. Set aside Order 1 made by the Full Court on 4 May 2022 and in lieu thereof make the following orders:

   (a) The appellants' appeal is allowed.

   (b) Set aside Order 1 made by Lee J on 25 August 2021 and in lieu thereof order the proceeding be dismissed.

84. Having regard to the terms of s 570 of the FW Act, there should be no orders as to the costs of the appeal in this Court irrespective of the outcome.

Part VIII: Estimate of time required

85. Qantas estimates that it will need 2 ¼ hours for oral argument.

Dated: 20 January 2023

J T Gleeson SC
Banco Chambers
T: (02) 8239 0200
clerk@banco.net.au

T O Prince
New Chambers
T: (02) 9151 2051
prince@newchambers.com.au

N D Oreb
Banco Chambers
T: (02) 8239 0273
naomi.oreb@banco.net.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S153 of 2022

BETWEEN:

QANTAS AIRWAYS LIMITED ACN 009 661 901
First Appellant

QANTAS GROUND SERVICES PTY LTD ACN 137 771 692
Second Appellant

and

TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Appellants set out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Acts Interpretation Act 1901* (Cth)	Dated 4 December 2008	s 13
2.	*Commonwealth Conciliation and Arbitration Act 1904* (Cth)	As in force from 11 October 1920	s 9(1A)
3.	*Commonwealth Conciliation and Arbitration Act 1920* (Cth)	Act No. 31 of 1920, dated 11 October 1920	s 5
4.	*Corporations Act 2001* (Cth)	Compilation No. 120, dated 1 October 2022	s 763B
5.	*Fair Work Act 2009* (Cth)	Compilation No. 41, dated 27 November 2020	ss 3, 12, 22, 40A, 47, 52, 59–257, 334–378, 382–383, 390, 408–409, 415, 417–420, 435–469, 545, 570.
6.	*Income Tax Assessment Act 1997* (Cth)	Compilation No. 238, dated 1 January 2023	s 109-5

7.	*Industrial Relations Act 1988* (Cth)	Act No. 86 of 1988, dated 8 November 1988	s 334
8.	*National Consumer Credit Protection Act 2009* (Cth)	Compilation No. 38, dated 19 December 2022	s 6
9.	*Occupational Health and Safety Act 2004* (Vic)	Authorised Version No. 43, dated 26 October 2022	s 54
10.	*Workplace Relations Act 1996* (Cth)	Act No. 86 of 1988, dated 16 December 2005	ss 298K, 298L