FORM 27E – APPELLANT'S REPLY

(Rule 44.05.5)

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M187 of 2016

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

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AUSTRALIAN WORKERS' UNION
Appellant

and

ESSO AUSTRALIA PTY LTD
Respondent

APPELLANT'S REPLY[1]

The Issue

20 1. Esso's formulation of the issue set out in paragraph 3 of the Respondent's Submissions (**RS**) does not correctly reflect the issue in the appeal. A significant part of the RS is taken up with addressing this erroneous formulation. The real issue in the appeal is as set out in paragraph 2 of the Appellant's Submissions (**AS**). It is no part of the AWU's case that the alleged contravener must know the legal characterisation of action taken. As explained in the AS, the requisite "intent to coerce" under s.343 and s.348 of the FW Act requires that the alleged contravener has actual knowledge or belief of the facts necessary to constitute the intended action as unlawful, illegitimate or unconscionable.

Facts

30 2. At paragraph 7 of the RS, Esso takes issue with the AWU's contention that its witnesses, Messrs Davis, Steed and Tschugguel, were not challenged in cross-examination about their belief that the banned tasks fell within the terms of the industrial action notice. However, no transcript references are provided in support.

3. In response to paragraph 8 of the RS, AWU relies on paragraphs 14 to 18 of the AS.

[1] Terms defined in the Appellant's Submissions dated 27 January 2017 are used with the same meaning in this Reply.

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Argument

4. The submission in paragraph 13 of the RS, is a reflection of Esso's erroneous formulation of the issue in the appeal. Apart from the last sentence, it does not deal with the case being advanced by the AWU. In relation to the last sentence, AWU relies on the AS.

5. In paragraphs 14 and 15 of the RS, Esso refers to the statutory predecessors of s.343 and s.348 of the FW Act. It should be noted that the sections of the *Conciliation and Arbitration Act 1904* (Cth) and the *Industrial Relations Act 1988* (Cth) were offence provisions. The criminal law analysis of intent as part of an offence was applicable to those provisions, and there is no indication that the requirements of those provisions regarding intent were to be treated any differently when they were converted to pecuniary penalty provisions under the later statutes.[2]

6. Contrary to paragraph 34 of the RS, the discussion of the law relating the "intent to coerce" in *Seven Network does* form part of the *ratio decidendi* of that case.[3] Paragraph 59(j) of the judgment makes this clear.

7. In response to paragraphs 35 and 36 of the RS, AWU submits that nothing in *Seven Network* in either paragraph [35] or the first sentence of [44], gainsays the AWU's argument. In paragraph [35], Merkel J distinguishes between knowledge about the circumstances that make conduct coercive and knowledge that such conduct is unlawful. As was explained by Brennan J in *He Kaw Teh,* the former may be exculpatory; the latter will not be.[4] The first sentence of [44] in *Seven Network* is concerned with the application of what was s.170NC(2) of the WR Act and is now s.343(2) of the FW Act. Section 343(2) does not assist in the interpretation of the phrase "intent to coerce" in s.343(1) and s.348. In the fifth sentence of paragraph [44], Merkel J addresses the need for an intent to coerce to be *by unlawful means* to attract the statutory prohibition.

8. As to the correctness of Merkel J's approach to the construction of what are now s.343(1) and s.348, it is merely an application to a statutory penalty provision of orthodox criminal law principles concerning the need for a strict application of the requirement to prove intention and subjective knowledge where intention is identified by the legislature as the applicable mental state. As was the case with both the primary Judge and the Full Court, Esso does not attempt to explain why those well-established principles should not be applied to sections 343 and 348 of the FW Act.

9. The submission at paragraph 38 of the RS is confusing. The discussion in *National Jet,* to which the paragraph refers, is dealing with the objective characterisation of the impugned action of the alleged contravener. As indicated in paragraph 21 of the AS, there is no contest that that is an objective exercise which does not depend on the alleged contravener's knowledge of the law. Neither is the alleged

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2 Cf. *Board of Bendigo Regional Institute of TAFE v Barclay (No 1)* (2012) 248 CLR 500 at [61].

3 Paragraph [53] of *Seven Network* refers to an "issue of fact".

4 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 572 citing *R v Turnbull* (1943) 44 SR (NSW) 108 at 109; see also *Ostrowski v Palmer* (2004) 218 CLR 493 at [10] (Gleeson CJ and Kirby J) and at [41] (McHugh J).

contravener's knowledge or ignorance of the law a requirement of the AWU's argument in relation to the necessary intent to coerce.

10. Paragraph 39 of the RS is another reflection of Esso's erroneous formulation of the issue in the appeal. The AWU accepts that it would not be exculpatory for it to establish that its officers did not know that organizing the impugned industrial action was against the law. However, it would be exculpatory if the court accepted that the relevant officers did not know that the bans actually imposed fell outside the expression "de-isolation of equipment" in the notice served on Esso under s.414 of the FW Act. That is because the relevant officers would, in such circumstances, not know all of the *facts* constituting the ingredients necessary to make the conduct unlawful. The correct question on the AWU's preferred construction of the phrase "intent to coerce" is: "were the officials aware that the bans imposed fell outside the terms of the industrial action notice?" The question is one of fact not one of law.[5]

11. Under sections 343 and 348 of the FW Act, the distinction between knowledge of the circumstances that make the conduct in question coercive on the one hand and belief or knowledge about whether that conduct is lawful on the other was central to the reasoning of Merkel J in *Seven Network*.[6] It is only the former that is relevant. Contrary to paragraph 39 of the RS, no question of a contravener's "moral compass" arises. It is only knowledge of the facts that is relevant.

12. The question posed at paragraph 40 of the RS discloses a failure to properly appreciate the operation of s.343 and s.348. In both cases the sections comprise two elements.[7] The first element is a prohibition on organising or taking, or threatening to organize or take, any action against another person. If no action is organised or taken or threatened, the section is not enlivened. The second element, the intent to coerce, is a qualification of the first element. Thus, the correct question to be asked is whether the alleged contravener organised or took or threatened action which, objectively, is properly characterised as unlawful, illegitimate or unconscionable, and if not, then the state of mind of the alleged contravener is irrelevant. The proposition can be tested by asking whether an alleged contravener who had an intention to coerce by actions which were unlawful, illegitimate or unconscionable, would contravene the sections if no action was organised or taken or threatened. The answer is surely not.

13. Paragraph 41 of the RS again deals with the erroneous issue posed in paragraph 2 of the RS. The AWU relies on its response above.

14. In response to paragraph 43 of the RS the AWU submits that the paragraph does not fairly reflect the reasoning of McHugh J in *Peters* for present purposes. At [79]-[80], McHugh J holds that guilt depends on the accused knowing that the impugned statements were untrue, whether or not the accused believed what was being done was dishonest.

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5 See the discussion of the significance of the difference in this context in *Ostrowski v Palmer* (2004) 218 CLR 493 at [10] (Gleeson CJ and Kirby J) and at [59[(McHugh J).

6 At [35] referring to *Giorgiani v The Queen* (1984) 156 CLR 473 at 506. As noted above, the characterisation of paragraph [35] of *Seven Network* at 36 of RS is wrong.

7 *Electrolux Home Products Pty Ltd v AWU* (2004) 221 CLR 309 at [169].

15. In paragraph 44 of the RS, Esso summarises the reasoning in *Meissner*. That line of reasoning is consistent with the AWU's submissions about "intent to coerce" under s.343 and s.348.

16. The first and third sentences of paragraph 45 of the RS are consistent with the AWU's case. In the present case, in order to be exculpated, it would be necessary for the AWU to prove that it did not know and intend that the industrial action which it was found to have organized, fell outside the meaning of "de-isolation of equipment". This gives effect to the statutory formulation of "intent to coerce". This also provides the answer to the erroneous submission in paragraph 46 of the RS.

10 17. The same error leads Esso to blur the analysis in paragraphs 47 and 48 of the RS. The immunity for protected industrial action attaches to the first element of the sections, namely the taking of action. The terms of s.343(1) and s.348 are to all intents and purposes, the same. The analysis of the issues in this case must apply equally to both cases. For that reason, it does not assist to produce a forensic construct of the kind contained in paragraph 48.

18. What is clear, and has been accepted in the various authorities on s.343 and s.348, and their predecessors, to which Esso has referred, is that they all accept that "intent to coerce" is to be determined subjectively. The debate for this case is what the content of that intent is. Esso does not directly engage with that issue.

20 19. Esso's failure to understand the dichotomy in the section between the action and the intent is again exposed in paragraph 49 of the RS.

20. In response to paragraphs 51 and 52 of the RS, AWU says that Esso has misunderstood the passages referred to in *Electrolux*, and that they all support AWU's argument that the subjective intent of the alleged contravener, even if factually wrong, is decisive.

21. In response to paragraph 53 of the RS, AWU relies on the AS. Esso's analysis is unhelpful because, especially in the present statutory context, the question of why a person took action under section 343 and 348, is equally apposite to expose that person's intent. The reasoning in *Barclay* about s.361 calls for a similar search here
30 for the actual intent of the accused contravener.

Disposition

22. The primary judge has retired as has one of the members of the Full Bench. A remittal of the proceeding for retrial would impose a very considerable burden on the AWU.

23. AWU submits that the findings of the primary judge[8] should be taken as accepting the evidence of the AWU officials as to their intention, though he ruled it irrelevant. Further, the primary judge found the impugned conduct to be "illegitimate" as part of the characterisation of the first element of the sections, namely, the action organised. It does not preclude a different finding under the subjective test to be
40 applied to the element of intent to coerce.

[8] Referred to in paragraphs 14-18 of the AS.

24. The AWU submits that the High Court can find that the subjective intent of the AWU was relevant, that the evidence referred to by the primary judge demonstrates that the AWU did not have the requisite intent to coerce, and accordingly, the orders sought by AWU in paragraphs 48 and 49 of the AS can and should be made.

DATED: 3 March 2017

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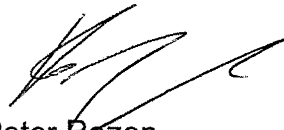

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