The limits of protected industrial action

Natasha Laing reports on *Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54 (6 December 2017)

By majority (Kiefel CJ, Keane, Nettle and Edelman JJ) the High Court held that a contravention of an order in respect of bargaining for a proposed enterprise agreement prevented any further industrial action in respect of that agreement being 'protected' pursuant to s413(5) of the *Fair Work Act 2009* (Cth) (Fair Work Act). This meant that industrial action that the Australian Workers' Union (AWU) had taken in the mistaken belief that it was 'protected' was capable of constituting action contrary to ss 343 and 348 of the Fair Work Act.

The High Court unanimously held that taking unprotected industrial action with the intention of negating another person's choice is unlawful pursuant to ss 343 and 348 of the Fair Work Act regardless of whether it is known or intended that the action be unlawful, illegitimate or unconscionable.

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Factual background

Esso Australia Pty Ltd (Esso) and AWU were bargaining for a new enterprise agreement. In connection with this, the AWU organised various forms of industrial action in 2015. The AWU claimed that all such action was protected industrial action under s 408(a) of the Fair Work Act. Esso maintained that certain aspects of it were not, including bans on the performance of equipment testing, air freeing and leak testing because they were not industrial action as described in a mandatory statutory notice under s 414 of the Fair Work Act.

Esso obtained an order from the Fair Work Commission under s 418(1) of the Fair Work Act that prohibited the AWU from organising certain industrial action, including bans on the performance of equipment testing, air freeing or leak testing between specified times and dates in March 2015. That order was breached by AWU.

Proceedings at first instance and before the Full Court

Esso brought proceedings in the Fair Work Division of the Federal Court seeking, inter alia, declarations that AWU had contravened the March 2015 order and that subsequent action organised by AWU in relation to the agreement was not 'protected industrial action'. Esso asserted that the effect of s 413(5) was that after AWU had contravened the order no further industrial action by AWU in relation to the proposed agreement was able to qualify as protected industrial action.

The primary judge (Jessup J) followed the decision of Barker J in *Australian Mines and Metals Association Inc v Maritime Union of Australia*[1] in finding that the previous contravention of an order that had ceased to apply would not preclude s 413(5) from being satisfied in relation to subsequent industrial action. Accordingly, Esso's claim was dismissed at first instance.[2]

An appeal was dismissed by the Full Court of the Federal Court (Siopis, Buchanan and Bromberg JJ) (FCA Appeal).[3] Justice Buchanan delivered the leading judgment and held (with Siopis J agreeing) that s 413(5) applies only to such orders that are in operation at the time of the proposed protected industrial action.[4]

Before the High Court

Esso appealed to the High Court regarding the Full Court's interpretation of s 413(5). An appeal was also advanced by AWU, asserting that ss 343 and 348 require that there be actual knowledge or intention that the action be unlawful, illegitimate or unconscionable. The majority allowed Esso's appeal. The AWU's appeal was dismissed unanimously.[5]

The court held that a contravention of ss 343 and 348 will occur where there is organising, taking or threatening action against another with the intention of negating that other person's choice. It is unnecessary for the purposes of those sections for the person organising, taking or threatening the action to know or intend that the action be unlawful, illegitimate or unconscionable.

The majority held that s 413(5) of the Act applies to past contraventions of orders, whether or not those orders are still in operation at the time of the proposed protected industrial action. This conclusion was reached after considering the lineage, context and language of the provision. The majority held that it was not open to construe the provision as if it were restricted to orders that continue to operate, or which apply only to the proposed protected industrial action.[6]

In result, the industrial action organised by AWU after its contravention of an order failed to meet the common requirement specified in s 413(5), and so was not 'protected industrial action' which meant that it could constitute action contrary to ss 343 and 348. The matter was remitted to the Federal Court for determination of Esso's claims for pecuniary penalties and compensation.[7]

Justice Gageler agreed with the reasons of the majority in dismissing AWU's appeal. In dissent, his Honour considered that Esso's appeal should also be dismissed. His Honour preferred the construction of s413(5) advanced by AWU and adopted by the Full Court of the Federal Court. His Honour repeated the words of Buchanan J in considering the focus of s 413(5) to be on: 'whether there is, at the relevant point of time, an existing or current order with which it is not complying, rather than whether at some time in the past it has failed to comply with an order'. In coming to his conclusion, Justice Gageler considered that Esso's construction came at the price of linguistic consistency. His Honour considered that the section was otherwise conspicuous in its use of the present tense to refer to the present. Justice Gageler also found such a 'sweeping denial' of the capacity to take protected industrial action in consequence of an earlier breach to be at odds with the context and purposes of the statutory scheme.[8]

END NOTES

1 [2015] FCA 677; (2015) 251 IR 75.
2 *Esso v AWU* [2015] FCA 758.
3 *Esso v AWU* [2016] FCAFC 72; (2016) 245 FCR 39.
4 FCA Appeal at [162] (Siopis J agreeing at [1]).
5 At [2] and [54] to [64].
6 At [29] to [53].
7 At [64].
8 At [65] to [106].