[2018] FWC 1017

DECISION

Fair Work (Registered Organisations) Act 2009
s.73 – Action to be taken after amalgamation ballot

Construction, Forestry, Mining and Energy Union; The Maritime Union of Australia and Textile, Clothing and Footwear Union of Australia
(D2017/5)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 6 MARCH 2018

Action to be taken after ballot approval of proposed amalgamation – whether Commission is satisfied of matters in s.73(2) of the RO Act – meaning of "civil proceedings" – whether proceedings for the imposition of pecuniary penalty are "civil proceedings" – whether a proceeding to impose a punishment for breach or disobedience of a court order is a civil proceeding – meaning of "in relation to" considered – date on which amalgamation between CFMEU, MUA and TCFUA fixed.

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ABBREVIATIONS

Cases

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482	*Cth v FWBII*
Barbaro v The Queen (2014) 253 CLR 50	*Barbaro*
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (2015) 256 CLR 137	*FWO v Quest*
CEO of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161	*Labrador*
Australian Building and Construction Commissioner v Hall [2017] FCA 274; (2017) 269 IR 28	*Hall*
BHP Coal Pty Ltd v CFMEU (2013) 239 IR 363	*BHP Coal*
ACCC v Australian Safeway Stores Pty Limited (No 3) [2002] FCA 1294	*Safeway Stores*
R v Federal Court of Australia; Ex parte Pilkington A.C.I (Operations) Pty Limited (1978) 142 CLR 113	*ex Parte Pilkington*
Gapes v Commercial Bank of Australia Ltd (1979) 38 FLR 431	*Gapes*
Construction, Forestry, Mining and Energy Union v Grocon Contractors (Victoria) Pty Ltd & Ors 47 VR 527	*Grocon*
Witham v Holloway (1995) 183 CLR 525	*Witham*
Construction, Forestry, Mining and Energy Union and Others v Director, Fair Work Building Industry Inspectorate (2014) 225 FCR 210	*CFMEU v Director, FWBII*
Construction, Forestry, Mining and Energy Union v Boral Resources (Vic)Pty Ltd and Others (2015) 256 CLR 375	*Boral*

Legislation

Fair Work (Registered Organisations) Act 2009	RO Act
Fair Work Act 2009	FW Act
Building and Construction Industry Improvement Act 2005	BCII Act 2005
Acts Interpretation Act 1901	AI Act
Fair Work (Building Industry) Act 2012	FWBI Act
Building and Construction Industry (Improving Productivity) Act 2016	BCIIP Act
Conciliation and Arbitration Act 1904	C & A Act
Industrial Relations Act 1988	IR Act
Industrial Relations Legislation Amendment Act 1991	IR Amendment Act
Workplace Relations and Other Legislation Amendment Act 1996	WROLA Act
Workplace Relations Act 1996	WR Act
Fair Work (Registered Organisations) Amendment Act 2016	RO Amendment Act

Bills

Industrial Relations Legislation Amendment Bill 1990	IR Amendment Bill

Other Miscellaneous Terms

Construction, Forestry, Mining and Energy Union, The Maritime Union of Australia and Textile, Clothing and Footwear Union of Australia	Applicant organisations
Australian Mines and Metals Association and Master Builders Australia	Objectors
Australian Electoral Commission	AEC
Construction, Forestry, Mining and Energy Union	CFMEU
The Maritime Union of Australia	MUA
Textile, Clothing and Footwear Union of Australia	TCFUA

Australian Mines and Metals Association	AMMA
Master Builders Australia	MBA
Australian Industrial Relations Commission	AIRC
Australian Competition and Consumer Commission	ACCC
Fair Work Commission	Commission or FWC
Victorian International Containers Terminal Ltd	VICT
Supreme Court (General Civil Procedure) Rules 2005	SC Rules

Introduction and Background

[1] Following the completion of ballots approving a proposed amalgamation between the Construction, Forestry, Mining and Energy Union (CFMEU), The Maritime Union of Australia (MUA) and the Textile, Clothing and Footwear Union of Australia (TCFUA) (collectively the "Applicant organisations"), consideration now needs to be given to whether, in accordance with s.73 of the *Fair Work (Registered Organisations) Act 2009* (RO Act), a day should be fixed as the day on which the amalgamation is to take effect.

[2] By an application lodged on 20 June 2017, the Applicant organisations applied under s.44(1) of the RO Act for the approval for submission of a proposed amalgamation to ballot. Applications were also made by the CFMEU for an exemption from the requirement that a ballot be held and by the TCFUA for attendance ballots at a number of work places. On 31 August 2017 I determined the following in relation to the proposed amalgamation:

1. Pursuant to s.55 of the RO Act, to approve the submission of the proposed amalgamation to ballot.

2. Pursuant to s.63 of the RO Act, to exempt the CFMEU from the requirement that a ballot of its members be held in relation to the proposed amalgamation.

3. Pursuant to s.64 of the RO Act, to approve the proposal for submission of the proposed amalgamation to ballot not be conducted under s.65 of the RO Act insofar as there will instead be an attendance ballot to be held of members of the TCFUA employed at the twenty seven (27) workplaces listed in Annexure "MON1" to the statement of Michele O'Neil dated 20 June 2017 lodged in support of the TCFUA's application.

4. Pursuant to s.58 of the RO Act, to fix Thursday, 28 September 2017 as the commencing day of the ballot and 10.00am on Thursday, 23 November 2017 as the closing day of the ballot.[1]

[3] Subsequently, the Australian Electoral Commission (AEC) conducted ballots in accordance with my determination and on 28 November 2017 declared the results of the ballots. On 29 November 2017, the AEC issued amended reports of the ballot results. The reported results are as follows:

Amalgamation Post Ballot Report

Fair Work (Registered Organisations) Act 2009

MARITIME UNION OF AUSTRALIA, THE

BALLOT COVERED IN THIS REPORT

Ballot Number: D2017/5

[1] [2017] FWC 4353 at [62]

RULES

Rules used for this ballot:	[182V: This Rulebook incorporates the alterations of 27/03/2017 in matter R2016/325
Rules difficult to apply/interpret:	Nil (in relation to the amalgamation ballot only)

BALLOT

Total number of persons on the roll of voters:	11,760
Total number of ballot paper issued:	11,848 (includes all ballot papers issued as postal ballot and replacement ballot)
Total number of ballot papers returned undelivered by close of ballot:	166
Total number of ballot papers/envelopes returned for scrutiny:	5,782
Total number of ballot papers/envelopes rejected at preliminary scrutiny:	180
Total number of ballot papers admitted to scrutiny:	5,602

Question for voters: Do you approve the proposed amalgamation of The Maritime Union of Australia (MUA) with the Construction, Forestry, Mining and Energy Union (CFMEU) and the Textile, Clothing and Footwear Union of Australia (TCFUA), in accordance with the scheme for amalgamation, a copy of the outline of which has been sent to you with this ballot paper?

Total number of votes in favour of the question set out on the ballot paper:	4,797
Total number of voters not in favour of the question set out on the ballot paper:	780
Total number of informal ballot papers:	25

Question for voters: If the proposed amalgamation in relation to which you have just recorded your vote does not take place, do you approve of the amalgamation of The Maritime Union of Australia (MUA) with the other organisation (Construction, Forestry, Mining and Energy Union (CFMEU)) involved in the alternative proposal for the amalgamation?

Total number of votes in favour of the question set out on the ballot paper:	4,824
Total number of voters not in favour of the question set out on the ballot paper:	727
Total number of informal ballot papers:	51

ROLL OF VOTERS

Total number of voters on the roll:	11,760

Number of apparent workplace address:	Not provided
Number of non-current addresses:	21 (on the original list only)
Other matters pertaining to the roll:	Nil

IRREGULARITIES

Details of written allegations of irregularities, and action taken by AEC:	Nil
Other irregularities identified, and action taken:	A total of 109 replacement ballot materials were issued for this ballot due to voters declaring they either lost or did not receive their ballot materials. Three of the voters returned both their original and replacement ballot papers. In one instance, both of the voter's replacement and original ballot papers were admitted into the scrutiny in error resulting in one circumstance of multiple voting. This has not affected the result of the ballot for both ballot questions.

Amalgamation Post Ballot Report

Fair Work (Registered Organisations) Act 2009

TEXTILE, CLOTHING AND FOOTWEAR UNION OF AUSTRALIA

BALLOT COVERED IN THIS REPORT

Ballot Number:	D2017/5

RULES

Rules used for this ballot:	125V: Incorporates alterations 20/02/2015 [R2015/11] (replaces rulebook dated 31/7/2014 [R2014/136] version)
Rules difficult to apply/interpret:	Nil (in relation to the amalgamation ballot only)

BALLOT

Total number of persons on the roll of voters:	2,757
Total number of ballot paper issued:	2,770 (includes all ballot papers issued at the attendance ballot, postal ballot, absent ballot

	and replacement ballot)
Total number of ballot papers returned undelivered by close of ballot:	53
Total number of ballot papers/envelopes returned for scrutiny:	1,788
Total number of ballot papers/envelopes rejected at preliminary scrutiny:	78
Total number of ballot papers admitted to scrutiny:	1,710

Question for voters: Do you approve the proposed amalgamation of the Textile, Clothing and Footwear Union of Australia (TCFUA) with the Construction, Forestry, Mining and Energy Union (CFMEU) and The Maritime Union of Australia (MUA), in accordance with the scheme for amalgamation, a copy of the outline of which has been sent to you with this ballot paper?

Total number of votes in favour of the question set out on the ballot paper:	1,659
Total number of voters not in favour of the question set out on the ballot paper:	45
Total number of informal ballot papers:	6

Question for voters: If the proposed amalgamation in relation to which you have just recorded your vote does not take place, do you approve of the amalgamation of the Textile, Clothing and Footwear Union of Australia (TCFUA) with the other organisation (Construction, Forestry, Mining and Energy Union (CFMEU)) involved in the alternative proposal for the amalgamation?

Total number of votes in favour of the question set out on the ballot paper:	1,654
Total number of voters not in favour of the question set out on the ballot paper:	49
Total number of informal ballot papers:	7

ROLL OF VOTERS

Total number of voters on the roll:	2,757
Number of apparent workplace address:	7
Number of non-current addresses:	77 (on the original list only)
Other matters pertaining to the roll:	Nil

IRREGULARITIES

Details of written allegations of irregularities, and action taken by AEC:	Nil

Other irregularities identified, and action taken:	A total of 54 replacement ballot materials were issued for this ballot due to voters declaring they either lost or did not receive their ballot materials. Six voters returned both their original and replacement ballot papers. In four instances, both of the voter's replacement and original ballot papers were admitted into the scrutiny in error resulting in four circumstances of multiple voting. This has not affected the result of the ballot for both ballot questions.

[4] In earlier proceedings for the approval for submission of a proposed amalgamation to ballot, the Australian Mines and Metals Association (AMMA) and Master Builders Australia (MBA) (together the "Objectors") sought and were given leave to make submissions in opposition to the approval for submission of amalgamation to ballot on a number of grounds. The Australian Institute of Marine and Power Engineers (AIMPE) and the Australian Maritime Officers' Union (AMOU) also sought and were given leave pursuant to s.54(3) of the Act to make submissions. I dealt with those grounds in my decision[2] to approve the submission of the proposed amalgamation to ballot. On 6 December 2017, I issued directions requiring any person who had appeared in the earlier proceeding and who wished to make a submission that the Commission is not able to be satisfied of any one or more of the matters outlined in s.73(2) of the RO Act to file and serve an outline of submissions and other materials by the date specified. The directions made allowance for the Applicant organisations to file materials in response. AMMA and MBA filed a joint outline of submissions together with affidavits of Peter John Cooke[3] and Shaun Schmitke.[4] The Applicant organisations also filed an outline of submissions together with a statement of Michael O'Connor.[5] Neither AIMPE nor AMOU filed any material. Further submissions, an affidavit of Mr Michael Coonan[6] and a witness statement of Mr Phillip Pasfield[7] were filed dealing with a discrete matter concerning the MUA which had developed since initially reserving my decision on 2 February 2018. I deal with this matter later in this decision.

[5] The deponents, Mr O'Connor and Mr Pasfield were not required for cross-examination, however objection was taken by the Applicant organisations to the admissibility of much of the material contained in the first two affidavits filed on relevance grounds.[8] I will return to this issue later in these reasons.

[6] For the reasons which follow, I have decided to fix a day on which the amalgamation of the Applicant organisations will take effect. That day will be 21 days from the date of this decision.

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[2] [2017] FWC 4353

[3] Exhibit 19

[4] Exhibit 20

[5] Exhibit 18

[6] Exhibit 21

[7] Exhibit 22

[8] Transcript dated 2 February 2018 at PN246 – PN261

Consideration

[7] Section 73 of RO Act deals with the action that is to be taken after an amalgamation ballot has approved a proposed amalgamation and relevantly provides the following:

> **73 action to be taken after ballot**
>
> (1) The scheme of a proposed amalgamation that is approved for the purposes of this part takes effect in accordance with this section.
>
> (2) If the FWC is satisfied that:
>
> (a) the period, or the latest of the periods, within which application may be made to the federal court under section 69 in relation to the amalgamation has ended; and
>
> (b) any application to the federal court under section 69 has been disposed of, and the result of any fresh ballot ordered by the court has been declared; and
>
> (c) there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to:
>
> (i) contraventions of this act, the fair work act or other commonwealth laws; or
>
> (ii) breaches of modern awards or enterprise agreements; or
>
> (iii) breaches of orders made under this act, the fair work act or other commonwealth laws; and
>
> (d) any obligation that an existing organisation has under a law of the commonwealth that is not fulfilled by the time the amalgamation takes effect will be regarded by the proposed amalgamated organisation as an obligation it is bound to fulfil under the law concerned;
>
> The FWC must, after consultation with the existing organisations, by notice published as prescribed, fix a day (in this division called the ***amalgamation day***) as the day on which the amalgamation is to take effect.

[8] There is no dispute and I am satisfied based on the amended reports of the ballots prepared by the AEC, the proposed amalgamation has been approved for the purposes of Chapter 3, Part 2 of the RO Act. The scheme of the proposed amalgamation[9] therefore takes effect in accordance with s.73.

[9] As the terms of s.73 of the RO Act make clear, if satisfied as to the matters in s.73(2), I must, after consulting with the Applicant organisations, fix a day as the day on which the amalgamation is to take effect.

[10] Section 73(4) of the RO Act contemplates that an undertaking may be given to the Commission for the purposes of s.73(2)(d), that an amalgamated organisation will fulfil an obligation.

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[9] Exhibit 1.

Amalgamation ballot Court inquiry – s.73(2)(a) and (b)

[11] Section 69 of RO Act deals with inquiries into irregularities in relation to an amalgamation approval ballot and allows for an application to be made to the Federal Court for an inquiry by the Court into alleged irregularities in relation to the ballot. Such an application is to be made no later than 30 days after the result of the ballot is declared. It is uncontroversial that there has not been any such application and the time within which such an application might have been made has passed.

[12] I am satisfied that the period within which an application or applications may be made to the Federal Court under s.69 of the RO Act in relation to the amalgamation has ended. No application has been made. The question whether any application to the Federal Court under s.69 has been disposed of, and the result of any fresh ballot ordered by the Court has been declared, does not, in the circumstances, arise. That disposes of the first two matters set out in s.73(2) about which I am required to be satisfied.

Proposed amalgamated organisation to fulfil any unfulfilled obligation of existing organisations – s.73(2(d)

[13] The proposed amalgamated organisation is the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). The matter in s.73(2)(d) was put in issue by the Objectors in their written submission to the extent that, at the time of filing the submission, the Applicant organisations had not filed any evidence identifying their obligations under Commonwealth laws or demonstrating that the amalgamated organisation will regard itself as bound by such obligations. In this respect, the Applicant organisations rely on the statement of Mr O'Connor, which was filed after the Objectors' written submissions. They also proffer an undertaking to the Commission in the following terms:

> "Any obligation that the CFMEU, the MUA or the TCFUA have under a law of the Commonwealth that is not fulfilled by the time the amalgamation takes effect will be regarded by the Proposed Amalgamated Organisation as an obligation it is bound to fulfil under the law concerned"[10]

[14] Mr O'Connor is the prospective National Secretary of the CFMMEU. His evidence, about which he was neither cross-examined nor otherwise challenged, is that any obligation that the CFMEU, the MUA or the TCFUA have under a law of the Commonwealth that is not fulfilled by the time the proposed amalgamation takes effect will be regarded by the proposed amalgamated organisation as an obligation it is bound to fulfil under the law concerned.[11] I accept that evidence. There is no suggestion that the existing relevant obligations of the CFMEU, the MUA or the TCFUA, whether individually or collectively are so great as to create doubt that they will not be fulfilled by the proposed amalgamated organisation. There is no suggestion that any existing organisation has not fulfilled any relevant obligations as and when the obligation became due. Nor is there any suggestion that the financial resources of the proposed amalgamated organisation will be insufficient to fulfil any and all unfulfilled obligations of the existing organisations under the relevant law.

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[10] Exhibit 18 at [12]

[11] Ibid

[15] Further, the Scheme of Amalgamation[12] makes provision as follows:

> "All existing arrangements, understandings and agreements binding on the MUA and TCFUA shall apply in the same terms upon the amalgamation on the proposed Amalgamated Organisation"

While this provision is not as broad as the statutory requirement, it nevertheless contemplates some of the obligations that might arise under a law of the Commonwealth, for example an obligation that the MUA or the TCFUA may have under one or more of the enterprise agreements which cover these organisations. It is not necessary plainly to make provision in the Scheme of Amalgamation for a similar obligation concerning the CFMEU since the CFMEU will continue to exist if an amalgamation date is fixed, albeit by its altered name.

[16] In addition, I will, if a date is fixed, ask that the undertaking proposed in the Applicant organisations' outline of submissions[13] and confirmed by Counsel for the Applicant organisations' during the hearing on 2 February 2018[14] be given in the terms set out within 7 days of the date of this decision. I will do so out of an abundance of caution noting the capacity for orders to be made in the event that the Commission determines at a later date that the amalgamated organisation has not complied with the undertaking. This is set out in s.73(4) of the RO Act.

[17] Accordingly, on the material, I am satisfied that any obligation that an existing organisation has, of the kind and at the time set out in s.73(2)(d), will be regarded by the proposed amalgamated organisation as an obligation that it is bound to fulfil under the law concerned.

Pending proceedings (other than civil proceedings) – s.73(2)(c)

[18] That leaves for consideration s.73(2)(c). Resolving the question whether there are any relevant proceedings pending against any existing organisation concerned in the amalgamation in relation to the laws and instruments therein set out, first involves undertaking an exercise of statutory construction to determine the meaning of the phrase "proceedings (other than civil proceedings)". There is no question that there are a significant number of proceedings pending against two of the existing organisations, namely the CFMEU and the MUA. The vast preponderance of the pending proceedings are applications seeking the imposition of a pecuniary penalty or penalties on these organisations for contraventions of various Commonwealth laws, or appeals relating to such proceedings. These are set out the affidavit of Mr Cook at [15] and the attachment to which reference is made therein.[15] No objection was taken by the Applicant organisations in relation to that paragraph or the attachment and its content.[16] There is also a proceeding pending against the MUA in which it is sought that the MUA be punished for breaching or disobeying an order of the Supreme Court of Victoria.[17]As will become apparent the Applicant organisations maintained that each pending proceeding is a civil proceeding within the meaning of s.73(2)(c) of the RO Act. The

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[12] Exhibit 1

[13] Outline of submissions of CFMEU, MUA and TCFUA, dated 25 January 2018 at [20]

[14] Transcript at PN290

[15] Exhibit 19, PC – 23

[16] Outline of submissions of CFMEU, MUA and TCFUA at [122] and footnote 39

[17] Exhibit 21

Objectors contend that the meaning of "civil proceeding" in s.73(2)(c) construed in context and having regard to the purpose of the provision and the RO Act does not include the pending proceedings because in each case a penalty is sought or some other punishment is sought to be imposed.

1. The construction issue

[19] Put simply, one way of resolving the issue requiring determination is to answer the question whether that phrase "other than civil proceedings" leaves only criminal proceedings that are pending against any of the Applicant organisations in relation to the enumerated matters, as the kind of pending proceedings the absence of which I must be satisfied. As the cases were argued, neither the Applicant organisations nor the Objectors suggested that, excepting the proceedings identified above, there is any other proceeding pending against any of the Applicant organisations, which is relevant, nor am I aware of any other relevant proceeding. It is therefore only necessary to determine whether the various pending proceedings identified and which are not in dispute are "civil proceedings" within the meaning of s.73(2)(c) of the RO Act. Save for the discrete matter against the MUA, there is also no contest that the extant proceedings identified are "in relation to" one or more of the matters in s.72(2)(c)(i)-(iii). However as the issues were fully ventilated I will nevertheless express a view about both issues.

[20] The Objectors argue the reference to "proceedings" in s.73(2)(c) is more nuanced, so as to require more than the application of an imprecise dichotomy between "civil proceedings" on the one hand and "criminal proceedings" on the other. The more nuanced construction would have the result that proceedings pending against any of the Applicant organisations which involved the imposition of a pecuniary penalty for a contravention of, for example, the RO Act, the *Fair Work Act 2009* (FW Act) or other Commonwealth laws, would fall outside the description "civil proceedings". The existence of such proceedings would be relevant for the purposes of attaining the requisite satisfaction of the matters in s.73(2)(c). For convenience, I will refer to this type of proceeding as "civil penalty proceedings" later in the decision. The Applicant organisations contend that, properly construed, the words "proceedings (other than civil proceedings)" in s.73(2)(c) do not include civil penalty proceedings. Indeed the Objectors contend that properly construed, the words "civil proceedings" in s.73(2)(c) do not include any proceeding in which a penalty is sought or some other punishment is sought to be imposed.[18]

[21] As is apparent from the above there is no factual dispute about the types of proceedings pending against two of the Applicant organisations. There are a number of civil penalty proceedings pending against each of the CFMEU and the MUA in relation to contraventions of relevant laws.[19] There are no such proceedings pending against the TCFUA,[20] nor are there any relevant criminal proceedings pending against any of the Applicant organisations.[21] There is also a contempt proceeding pending against the MUA, the significance of which I will later deal.[22]

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[18] Transcript dated 28 February 2018 at PN718-PN719

[19] Exhibit 18 at [6] - [7]; Exhibit 19 at [15], PC-23

[20] Ibid at [8]

[21] Ibid at [5]

[22] Exhibit 14 and Exhibit 22

2. Statutory construction principles

[22] The task of ascribing meaning to the words of the statute is concerned with interpreting the relevant statutory provision(s) consistently with the intended purpose or objects of the legislature as disclosed by the text of the statute and begins with an examination of the ordinary grammatical meaning of the words used in the context of the statute as a whole in which they appear. This point was made clear in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky v Australian Broadcasting Authority* [23] wherein their Honours said:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."[24] [Footnotes omitted]

[23] The point was also made long ago, as is clear from the following passage of the judgment of Dixon J (as he was then) in *R v Wilson; Ex parte Kisch*:[25]

> "The rules of interpretation require us to take expressions in their context, and to construe them with proper regard the subject matter with which instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them."[26]

[24] Section 15AA of the *Acts Interpretation Act 1901* (AI Act) also makes it clear in interpreting a statute, regard must be had to the purpose or object underlying the statute (whether that purpose or object is expressly stated in the statute or not) and that a construction that would promote its underlying purpose or object is to be preferred to a construction that would not promote that purpose or object.

[25] The AI Act also deals, in s.15AB, with the extent and purpose to which extrinsic material may be called upon to aid the interpretation of a statute. In their joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[27] Brennan CJ and Dawson, Toohey and Gummow JJ observed:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901 (Cth)*, the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*,

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[23] (1998) 194 CLR 355

[24] Ibid at [69]

[25] (1934) 52 CLR 234

[26] Ibid at 244

[27] (1997) 187 CLR 384

> if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."[28] [Footnotes omitted]

[26] A summary of the relevant principles is contained in the joint judgment of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[29] as follows:

> "This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[30] [Footnotes omitted]

[27] Most recently the High Court has set out the approach to be applied to issues of statutory construction in *SZTAL v Minister for Immigration and Border Protection*.[31] In their joint judgment Kiefel CJ, Nettle and Gordon JJ said:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[32] [Footnotes omitted]

[28] In the same case Gageler J observed:

> "Mason J said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* ((1985) 157 CLR 309 at 315):
>
> > "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."
>
> Drawing on that statement, and its antecedents, Brennan CJ, Dawson, Toohey and Gummow JJ said in *CIC Insurance Ltd v Bankstown Football Club Ltd* (CLR 384 at 408):
>
> > "[t]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the

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[28] Ibid at 408

[29] [2009] HCA 41; (2009) 239 CLR 27

[30] Ibid at [47]; 46 – 47

[31] [2017] HCA 34; (2017) 347 ALR 405

[32] Ibid at [14]

mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."

Both of those passages have been "cited too often to be doubted". Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text. The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text".”[33] [Footnotes omitted]

[29] For the reasons which follow, I consider that both textual and contextual considerations lead clearly to a conclusion that the exclusionary words “other than civil proceedings” in s.73(2)(c) of the RO Act capture or include ‘civil penalty proceedings’ in relation to contraventions of the various laws in s.73(2)(c)(i) and breaches of the instruments and orders in ss. 73(2)(c)(ii) and (iii).

3. Section 73(2)(a) in the context of the RO Act and judicial consideration of civil penalty proceedings as “civil proceedings”

[30] Section 5 of the RO Act sets out that which is described as Parliament’s intention in enacting the RO Act as follows:

5 Parliament’s intention in enacting this act

(1) It is Parliament’s intention in enacting this act to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation.

(2) Parliament considers that those relations will be enhanced and those adverse effects will be reduced, if associations of employers and employees are required to meet the standards set out in this act in order to gain the rights and privileges accorded to associations under this Act and the Fair Work Act.

(3) The standards set out in this Act:

(a) Ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(b) Encourage members to participate in the affairs of organisations to which they belong; and

(c) Encourage the efficient management of organisations and high standards of accountability of organisations to their members; and

(d) Provide for the democratic functioning and control of organisations; and

(e) Facilitate the registration of a diverse range of employer and employee organisations.

(4) It is also Parliament’s intention in enacting this Act to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.

(5) Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system.

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[33] Ibid at [35]-[37]

> Note: The Fair Work Act contains many provisions that affect the operation of this Act. For example, provisions of the Fair Work Act deal with some powers and functions of the Fair Work Commission and of the General Manager. Decisions made under this Act may be subject to procedures and rules (for example, about appeals) that are set out in the Fair Work Act.

[31] It appears to me that the reference to "associations of employers and employees" in s.5(2) is not a reference to organisations registered under the RO Act. It refers to "associations" before they become registered as organisations under the RO Act. Rather, the subsection is concerned with expressing the desirability of a scheme of regulation, registration and standards established by the RO Act operating as a condition precedent to obtaining the rights and privileges accorded by relevant federal industrial law, as a means by which to enhance the relations described and the reduction of the adverse effects of industrial disputation. This distinction between "associations" on the one hand, and "organisations" on the other, is apparent in s. 5(4) and as well is the scheme for registration of employer and employee associations found Chapter 2 of the RO Act .

[32] Associations of employers and employees once registered are required to meet such standards as are set out in the RO Act. Section 5(3) does not set these "standards". Rather, the matters enumerated therein are concerned with describing that which the standards elsewhere in the RO Act ensure, encourage, provide or facilitate. It seems apparent from s.5(3) that apart from facilitating the registration of a diverse range of organisations, the standards set out in the RO Act are concerned with ensuring that organisations, once registered, are accountable to and representative of members, encourage member participation in the organisation's affairs, are efficiently managed, have high standards of accountability to members, function and are controlled democratically.

[33] The furtherance of the Parliament's intention *vis-a-vis* "associations" is reflected in the criteria for registration of an association in s.19 of the RO Act. Specifically, the Commission must only grant an application for registration made by an association, *inter alia*, if the registration of the association would further Parliament's intention in enacting the RO Act as set out in s.5.[34]

[34] The Objectors contended that the provisions to which reference is made above give a contextual clue to the purpose underlining s.73 of the RO Act. They contended that these provisions suggest that the purpose of s.73 is normative rather than remedial and that it is designed to encourage the setting and enforcement of standards.[35] I do not accept this contention. As the Applicant organisations point out[36] s.5(2) is concerned with Parliament's consideration that relations between federal system employers and federal system employees will be enhanced and that adverse effects of industrial disputation will be reduced if "associations of employers and employees" are required to meet the standards set out in the RO Act in order to gain the rights and privileges accorded under the RO Act and the FW Act. As I have already made it clear, I consider that this subsection is directed to the desirability of associations of employers and employees seeking to be registered as organisations and the

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[34] *Fair Work (Registered Organisations) Act* 2009 (Cth) s 19(1)(i)

[35] Transcript dated 2 February 2018 at PN405

[36] Ibid at PN479 – PN482

reference to the rights and privileges in that subsection is to the rights and privileges that come with that registration under the RO Act.

[35] True it is that rights and privileges conferred by registration can be removed. But the mechanism for this is through the cancellation of an organisation's registration under the RO Act.

[36] Chapter 2 of the RO Act contains provision for registration of a relevant association as an organisation (Part 2) and for cancellation of registration (Part 3).

[37] By s.19(1)(e), in addition to the matter to which reference has already been made, the Commission must only grant an application for registration made by an association if it is satisfied that the association would conduct its affairs in a way that meets the obligations of an organisation under RO Act and the FW Act . In this connection s.19(4) provides:

> (4) In applying paragraph (1)(e), the FWC must have regard to whether any recent conduct by the association or its members would have provided grounds for an application under section 28 had the association been registered when the conduct occurred.

[38] Section 28 of the RO Act sets out the grounds on which an application may be made to the Federal Court for an order cancelling the registration of an organisation. Relevantly the grounds are:

> (a) the conduct of:
>
> (i) the organisation (in relation to its continued breach of a modern award, an order of the FWC or an enterprise agreement, or its continued failure to ensure that its members comply with and observe a modern award, an order of the FWC or an enterprise agreement, or in any other respect); or
>
> (ii) a substantial number of the members of the organisation (in relation to their continued breach of a modern award, an order of the FWC or an enterprise agreement, or in any other respect);
>
> has prevented or hindered the achievement of parliament's intention in enacting this Act (see section 5) or of an object of this Act or the Fair Work Act; or
>
> (b) the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has engaged in industrial action (other than protected industrial action) that has prevented, hindered or interfered with:
>
> (i) the activities of a federal system employer; or
>
> (ii) the provision of any public service by the Commonwealth or a State or Territory or an authority of the Commonwealth or a State or Territory; or
>
> (c) the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has or have been, or is or are, engaged in industrial action (other than protected industrial action) that has had, is having or is likely to have a substantial adverse effect on the safety, health or welfare of the community or a part of the community; or
>
> (d) the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has or have failed to comply with:
>
> (i) an injunction granted under subsection 421(3) of the Fair Work Act (which deals with orders to stop industrial action); or

(ii) an order made under the Fair Work Act in relation to a contravention of Part 3-1 of that Act (which deals with general protections); or

(iii) [Repealed]

(iv) an interim injunction granted under section 545 of the Fair Work Act so far as it relates to conduct or proposed conduct that could be the subject of an injunction or order under a provision of the Fair Work Act mentioned in subparagraphs (i) to (iii); or

(v) an order made under section 23 (which deals with contraventions of the employee associations provisions); or

(vi) an order made under subsection 131(2) (which deals with contraventions of the withdrawal from amalgamation provisions).

[39] It is apparent from these provisions that conduct of an association seeking registration which raises questions about its capacity to meet the obligations of an organisation under RO Act and the FW Act. Conduct that would provide grounds for an application for the cancellation of the registration of the association, if it were an organisation, are matters that are expressly relevant in assessing whether or not an application for registration as an organisation by an association should be granted. Arising from the consideration required by s.19(4) is the link to whether particular conduct has (or would have if the association were an organisation) prevented or hindered the achievement of Parliament's intention in enacting the RO Act (s.5) or of an object of that Act or the FW Act.[37]

[40] These issues similarly arise in connection with the grounds on which an application for the cancellation of the registration of an organisation may be made to the Court.

[41] It is to be noted that the scheme regulating the amalgamation of organisations contained in Chapter 3 of the RO Act does not contain any elaborate description of impugned conduct. Nor do the provisions expressly link, such matters as require consideration under s.73 to the Parliament's intention as expressed in s.5. This stands in contradistinction to the registration and cancellation provisions of the RO Act. This points away from the normative purpose of the provisions as suggested by the Objectors.

[42] Section 73 is, as already noted, part of the scheme regulating the amalgamation of organisations registered under the RO Act. Part 1 of Chapter 3 contains a simplified outline of the chapter. There are no separate or additional objects or statements of parliamentary intent contained in the chapter. Part 2 of Chapter 3 contains the procedure for the amalgamation of organisations. The amalgamation procedure commences with the preparation of a scheme of amalgamation, or in the case of three or more organisations being concerned in a proposed amalgamation, a scheme and an alternative scheme of amalgamation.[38] The scheme and each alternative scheme must be approved by a resolution by the respective committees of management of the organisations concerned in the amalgamation.[39]

[43] Relevantly, organisations concerned in a proposed amalgamation must jointly lodge an application with the Commission for the approval for submission of the amalgamation to

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[37] *Fair Work (Registered Organisations) Act* 2009 (Cth) s 28(1) (a)

[38] Ibid ss 40 – 41

[39] Ibid s 42

ballot.[40] Provision is also made for an application by the proposed amalgamated organisation to be made for exemption from the requirement that a ballot of its members be held in relation to an amalgamation.[41] The "proposed amalgamated organisation" in relation to a proposed amalgamation is, relevantly, the organisation of which members of the proposed deregistering organisations are proposed to become members under Part 2 of Chapter 3.[42] In the instant case, the CFMEU is the proposed amalgamated organisation and each of the MUA and the TCFUA is a proposed deregistering organisation[43]. I had in earlier proceedings considered and granted an application for exemption from ballot application made by the CFMEU.[44]

[44] Provision is also made for an organisation concerned in a proposed amalgamation, to apply to the Commission for the approval of a proposal for the submission of an amalgamation to a ballot of its members that is not conducted in accordance with the provisions for the conduct of secret postal ballots set out in s.65 of the RO Act.[45] Such an application was made by the TCFUA and I approved the proposal.[46]

[45] Organisations concerned in a proposed amalgamation may lodge a written statement in support of the proposed amalgamation and each proposed alternative amalgamation.[47] Sections 49 to 52 set out the role of the AEC in respect of the conduct of ballots for a proposed amalgamation.[48]

[46] Sections 53 to 72 deal with the procedure for the approval of a proposed amalgamation. Section 53 is concerned with the fixing of a time and place for hearing submissions, relevantly, in relation to the granting of an approval for submission of the amalgamation to ballot, the granting of an exemption application made under s.46 and the approval that a ballot in relation to an amalgamation not be conducted under s.65 in respect of an application lodged under s.47. Section 54 contains certain limits on submissions that may be made at amalgamation hearing. Section 55 contains provisions concerning the matters about which the Commission must be satisfied, and if satisfied, requires the Commission to approve the submission of the amalgamation to ballot. There is then provision concerning how the Commission is to deal with an amalgamation which involves an extension of eligibility rules.[49]

[47] Provision is also made for the fixing of commencing and closing days of the ballot, the composition of the role of voters for a ballot and provision of "yes" and "no" cases.[50] Sections 61 to 62 make provision for the Commission to allow the organisations concerned in the amalgamation to alter the scheme of amalgamation at any time before commencing day of the

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[40] Ibid s 44

[41] Ibid ss 46, 63

[42] Ibid s 36

[43] Exhibit 1

[44] [2017] FWC 4353

[45] *Fair Work (Registered Organisations) Act* 2009 (Cth) ss 47, 64

[46] [2017] FWC 4353

[47] *Fair Work (Registered Organisations) Act* 2009 (Cth) s 48

[48] Ibid ss 49 – 52

[49] Ibid ss 56 – 57

[50] Ibid ss 58 – 60

ballot and allows for the Commission to approve an outline of the scheme for the proposed amalgamation.

[48] Sections 63 - 68 are concerned with exemptions from and the form and conduct of, the ballot and the reporting requirements of the AEC relation to the conduct of the ballot. Section 69 deals with inquiries into irregularities in relation to the ballot and provides that an application may be made to the Federal Court for an inquiry into alleged irregularities may be made no later than 30 days after the result of a ballot is declared. Section 70 is concerned with member approval of a proposed amalgamation, while s.71 provides that expenses of a ballot are to be borne by the Commonwealth.

[49] Offences in relation to a ballot are dealt with in s.72.

[50] It seems to me that these provisions are a manifestation of some of the standards noted in s.5(3) of the RO Act. Specifically, I consider that the aforementioned provisions are designed to ensure organisations participating in a proposed amalgamation are accountable to their members,[51] to encourage members of an organisation that is participating in the proposed amalgamation to participate in the affairs of that organisation[52] and to provide for the democratic functioning and control of the organisations participating in a proposed amalgamation.[53]

[51] It is to be observed from the amalgamation provisions of the RO Act thus far discussed, that neither the existence of extant proceedings of any kind nor a history of contravening conduct involving an organisation that is participating in the proposed amalgamation present as a bar to an application in relation to a proposed amalgamation being made. Nor do such matters warrant any express consideration by the Commission before approval may be given for the submission of an amalgamation to ballot. The absence of any such bar or precondition also weighs against the normative purpose of the provisions suggested by the Objectors.

[52] Sections 73 to 87 are concerned with that which is to occur for the amalgamation that has been approved by ballot to take effect. As earlier noted, s.73 requires the Commission after consultation with the organisations concerned in the amalgamation, to fix an amalgamation day if satisfied of certain matters.

[53] Before turning to consider the contextual significance of the remainder of the provisions to which I have referred in the preceding paragraph, it is convenient to deal with some judicial observations made about the meaning of "civil proceedings" particularly as that description concerns civil penalty proceedings and the submissions relating to such observations.

[54] The nature of civil penalty proceedings was recently considered by the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (Cth v FWBII)*.[54] The issue before the Court concerned the fixing of civil penalties and whether the

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[51] Ibid s 5(3)(a)

[52] Ibid s 5(3)(b)

[53] Ibid s 5(3)(d)

[54] (2015) 258 CLR 482

application of the decision in *Barbaro v The Queen (Barbaro)*[55] should properly be applied to civil penalty proceedings.

[55] As to the nature of a proceeding involving the recovery of a civil penalty under an enactment, French CJ, Kiefel, Bell, Nettle and Gordon JJ observed:

> "In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator") with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or, as in the BCII Act, without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings."[56]

[56] In the same case, Justice Keane agreed with the plurality, but added the following observations concerning the nature of civil penalty proceedings:

> "I agree that these appeals should be allowed for the reasons given by French CJ, Kiefel, Bell, Nettle and Gordon JJ. I seek only to make some additional observations upon the nature of proceedings for the recovery of a civil penalty under s 49 of the BCII Act and the reasons why this court's decision in *Barbaro v The Queen* does not affect the conduct of such proceedings.
>
> . . .
>
> The Full Court declined to ascribe any significance to the legislative descriptor "civil" in relation to penalty, save to accept a suggestion that it is apt to mislead by concealing or misrepresenting the punitive purpose for which a civil penalty may be imposed. But it is well settled that proceedings for the recovery of a civil penalty are civil proceedings even though "[t]he purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing." the legislative choice to designate proceedings for the recovery of a civil penalty may not be ignored by a court. The legislature has explicitly decided that a claim by an eligible person for the recovery of a pecuniary penalty for the contravention of a civil penalty provision is to be brought as a civil proceeding; and within the paradigm of civil proceedings, a regulator who brings such proceedings is to be viewed (like any other eligible person) not as a prosecutor but as a plaintiff.
>
> In proceedings under s 49 of the BCII Act, as indeed in any civil proceedings, it is the right and duty of the plaintiff to mark out the extent of its claim against the defendant. The plaintiff's claim establishes the scope of the controversy to be resolved by the judgment of the court. When a plaintiff asserts a claim to the grant of a particular remedy, it is not proffering an opinion on a matter of fact or law; it is stating the basis on which a controversy between it and the defendant may be quelled by the exercise of judicial power. When a defendant agrees to a civil penalty in a particular amount, it is assenting to the grant of relief to that extent. And an agreement of the parties as to the basis on which they seek to resolve the controversy between them is not merely an opinion proffered by either or both of them as to how the proceedings should justly be resolved: it is a resolution of the controversy between them insofar as the quelling of that controversy is in their power.
>
> In addition, as the Full Court rightly appreciated, a defendant's agreement to meet a plaintiff's claim for a penalty is relevant as an indication of the defendant's acceptance of responsibility, in a way which is meaningful to the fixing of a proper penalty, for its departure from legal norms which gave rise to the

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[55] (2014) 253 CLR 58

[56] (2015) 258 CLR 482 at [24]

> claim. It has significance, of such weight as the court considers appropriate, as an assurance that the defendant may be relied upon not to transgress in that way again. It is relevant to the court's assessment of what is required by way of specific deterrence to prevent departures by the defendant from those standards in the future. To accept that this is so, as the Full Court did, is to acknowledge a point of difference between this case and *Barbaro*. To acknowledge this difference is to acknowledge an indication that the considerations of principle which underpin the reasons in *Barbaro* do not apply to proceedings under s 49 of the BCII Act. That indication should have been heeded.
>
> There are further points of contrast which may be noted between the considerations discussed in the passages cited from *Barbaro* and the considerations which arise under the BCII Act that are material to proceedings for the recovery of a civil penalty under that act. First, whether the plaintiff in proceedings for the recovery of a civil penalty is an agent of the state or not, a plaintiff in civil proceedings, unlike a prosecutor in a criminal trial, is not expected to be dispassionate in its submissions. Generally speaking, a plaintiff in a civil proceeding has an obvious interest in the outcome of proceedings. More particularly, under the BCII Act it is the Commissioner's direct, immediate and manifestly partisan interest which drives the proceeding as an aspect of the commissioner's role in relation to the enforcement of the BCII Act in accordance with the objective in s 3(2)(e).
>
> Secondly, a plaintiff in proceedings for the recovery of a penalty under the BCII Act may or may not be an agent of the State. Any "eligible person" may make an application under s 49. No distinction is drawn by the BCII Act between "eligible persons" in relation to any constraints to which they might be subjected, in terms of their participation in proceedings under s 49. It would be a distinctly odd state of affairs if the Commissioner were not permitted to make submissions as to penalty but other eligible persons might do so. That state of affairs seems even more odd when one recalls that the Commissioner's role in the enforcement of the BCII Act includes an entitlement of the Commissioner to intervene, in the public interest, in civil proceedings commenced by others. An obvious, perhaps the most obvious, reason for an intervention by the Commissioner in the public interest in proceedings commenced by another eligible person would be to make submissions as to the appropriate penalty for a contravention of the Act. It would make little sense to hold that the Commissioner may intervene in proceedings to make submissions which the court is obliged steadfastly to ignore.
>
> In addition, recovery of a penalty for breach of a civil penalty provision is only one aspect of the relief which may be granted under s 49 in relation to a contravention of a civil penalty provision. Submissions as to the various forms of relief sought by a plaintiff are a familiar part of civil proceedings. Nothing in the statute reveals an intention to preclude submissions as to civil penalty orders but not as to other forms of relief."[57] [Footnotes omitted]

[57] It is plain that both the plurality and Keane J regarded civil penalty proceedings as "civil proceedings", at the very least as concerns or concerned the *Building and Construction Industry Improvement Act 2005* (BCII Act 2005).

[58] The Objectors contend that when read in isolation, the words "other than civil proceedings", do not necessarily exclude or include penalty proceedings. They could be read broadly (to include such proceedings) or narrowly (to exclude them). They say that the proper scope of the phrase is a question of statutory construction, which can only be answered by close consideration of the relevant statutory text and context and the question cannot be answered by plucking general observations from other cases that have been decided under different statutory schemes.

[59] This is undoubtedly correct. However, it is to be borne in mind that a proceeding pending against an existing organisation concerned in the amalgamation in relation to a contravention of the BCII Act 2005 (if it is not a civil proceeding), would fall within the description in s.73(2)(c)(i) of the RO Act. The observations of the High Court in *Cth v FWBII*

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[57] Ibid [79], [102]-[107]

describing the nature of proceedings involving the recovery of a civil penalty under the BCII Act 2005 as civil proceedings, therefore inform the meaning that is to be ascribed for the scope of proceedings that fall within the exclusionary words "other than civil proceedings" in s.73(2)(c)(i) of the RO Act. Moreover it is also relevant to observe that when the BCII Act 2005 was amended by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), the BCII Act 2005 became the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act), the civil penalty provisions were repealed, and most of the kinds of contravening conduct that would have attracted a civil penalty under the BCII Act 2005 in respect of a building industry participant became regulated by the FW Act and subject to a civil penalty under that Act, albeit at significantly reduced amounts.

[60] There is nothing to suppose that the analysis of the High Court in *Cth v FWBII* of the nature of proceedings involving recovery of a civil penalty under the BCII Act 2005 would not apply with equal force to proceedings involving recovery of a civil penalty under the FW Act. In this regard, the High Court in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (*FWO v Quest*)[58] observed in connection with a matter concerning the proper construction of s.357 of the FW Act that:

> "As a civil remedy provision within the meaning of Pt 4-1 of the Act, contravention of s 357(1) is not an offence, but can give rise to civil proceedings for pecuniary penalty orders and other orders. Those proceedings can be brought in the Federal Court of Australia or the Federal Circuit Court of Australia by a person affected by the contravention, by an industrial association or by a Fair Work Inspector."[59]

[61] I therefore consider that the analysis in *Cth v FWBII* informs the meaning of "civil proceedings" and therefore the types of proceedings that fall within the exclusionary words "other than civil proceedings" in s.73(2)(c)(i) of the RO Act.

[62] For completeness, the FWBI Act was repealed by the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Cth) on 2 December 2016. In its place, the Parliament enacted the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (BCIIP Act) which contains a range of provisions, a contravention of which attract various levels of civil penalties. There is nothing in the various provisions of the BCIIP Act to indicate that a different view should be taken about the nature of proceedings involving recovery of a civil penalty under that Act than that discussed by the High Court in *Cth v FWBII*. I will later deal with some relevant comparisons between provision of the RO Act, the FW Act and the BCIIP Act.

[63] Although the Bill which ultimately became the BCIIP Act was introduced into the Parliament before the judgment in *Cth v FWBII* in December 2015, the Bill was passed by both houses of the Parliament on 30 November 2016, it received royal assent on 1 December 2016 and its operative provisions came into effect on 2 December 2016. From this I infer that had the Parliament intended proceedings involving civil penalty provisions of the BCIIP Act to be of a different character to that discussed in *Cth v FWBII*, it had ample opportunity to give effect to that intention before enacting the BCIIP Act, but on my reading it did not do so. It follows on my analysis, that as the BCIIP Act is a Commonwealth law, the analysis in *Cth v FWBII* also informs the meaning that is to be ascribed for the scope of proceedings that fall

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[58] (2015) 256 CLR 137

[59] Ibid at [4]

within the exclusionary words “other than civil proceedings” in s.73(2)(c)(i) of the RO Act so far as it concerns proceedings involving a contravention of the BCIIP Act. I will return to *Cth v FWBII* later in this decision.

[64] The Objectors contend that the phrase "other than civil proceedings" is elastic, with no settled pre-determined meaning. They refer to the judgment of Gummow J in *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (*Labrador*)[60] in which his Honour said that "there are dangers in enforcing a classification containing but two classes, civil and criminal".[61] In *Labrador,* Hayne J explained that such a classification is, "at best, unstable" and "seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges" and observed that proceedings for a pecuniary penalty have "both criminal and civil characteristics".[62] Also in *Labrador,* Kirby J observed that "a strict dichotomy between 'criminal' and 'civil' proceedings is not always observed in Australian legislation".[63]

[65] The Objectors contend that this is reflected in the RO Act itself, and in particular the definition of "proceedings" in s.6 of the RO Act.

[66] Section 6 of the RO Act contains definitions and relevantly provides that in “this Act, unless the contrary intention appears:

> . . .
>
> ***Proceeding*** means:
>
> (a) a proceeding in a court; or
>
> (b) a proceeding or hearing before, or an examination by or before, a tribunal;
>
> Whether the proceeding, hearing or examination is of a civil, administrative, criminal, disciplinary or other nature.

[67] The Objectors therefore contend that not only is the distinction between civil and criminal proceeding "at best, unstable", but under the RO Act there are at least three other different ways in which a proceeding may be classified beyond that simple dichotomy.

[68] The Objectors contend that proceedings for the recovery of a pecuniary penalty are also for a public purpose, rather than for the vindication of any private right. They point out that the distinction between proceedings for the vindication of a private right and proceedings for the benefit of the public has been decisive of a question whether a proceeding ought to be characterised as a "civil or mixed matter".[64] They contend similarly that, disciplinary proceedings are also for the 'good of the public' and for that reason are sometimes regarded as neither civil nor criminal.[65] That may be so, but that a proceeding may be characterised as for

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[60] (2003) 216 CLR 161

[61] Ibid at [29]

[62] Ibid at [114]

[63] Ibid at [52]

[64] *Re Medley* (1902) 28 VLR 475

[65] *Attorney-General v Riach* [1978] VR 301 at 309; *Wentworth v New South Wales Bar Association* (1992)176 CLR 239 at 250-1

the “good of the public” and a “civil or mixed matter” does not have the result, for that reason alone, that the proceeding ceases to be a civil proceeding. .

[69] Although proceedings for a pecuniary penalty are not treated as criminal proceedings for the purposes of the *'Barbaro* principle', and a breach of a pecuniary penalty provision is not a "criminal offence",[66] the Objectors contend that in some contexts, penalty proceedings have been regarded as 'quasi-criminal' in nature.[67] They contend that this dual character distinguishes penalty proceedings from 'purely' civil proceedings, which have no quasi-criminal or protective purpose and that are simply *inter partes* litigation for the vindication of a private right.[68]

[70] The Objectors referred to *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors (Grocon); Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd & Ors* [69] in which the Court of Appeal concluded that contempt proceedings are 'criminal' for some purposes but 'civil' for others and said:

> “Putting authority to one side, it is clear that contempt proceedings are brought within the civil jurisdiction of the Court. At the very least, a number of the rules contained within ch 1 apply to such proceedings. Justice Hayne's observations in *Labrador* are particularly apposite in this regard. Contempt proceedings, like those for pecuniary penalties in *Customs Act* matters, have a certain chameleon-like quality. They take their character from their surrounding circumstances, and the context within which the analysis proceeds”.[70]

[71] According to the Objectors, the foregoing demonstrates, that the classification of a proceeding, whether it be as "civil", "quasi-criminal", "mixed", "criminal", "disciplinary", "administrative" or of "some other nature" depends on the particular purpose for which that classification is undertaken and the terms of the relevant statutory scheme. Indeed, the same proceeding may be regarded "civil" for some purposes and not "civil" for others.

[72] The Objectors contend that in any given case, the answer must turn on careful analysis of the relevant statutory text and context.

[73] There can be no quarrel with this proposition. Indeed, this seems to me to be the very essence of the caution given in *Ogden Industries Pty Ltd v Lucas,*[71] which was as follows:

> “. . . Their Lordships must examine some of the cases. They desire to reiterate however what has so often been said before that in a common-law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even

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[66] *Gapes v Commercial Bank of Australia* (1979) 27 ALR 87 at 97 per JB Sweeney J (with whom Evatt Deane and Fisher JJ agreed) (his Honour concluded that such proceedings were not "criminal" but expressly left open the question whether the proceedings "can properly be characterised as civil or belong in a separate category of penal proceedings which are not criminal"

[67] *BHP Coal Pty Ltd v CFMEU* (2013) 239 IR 363; *ACCC v Australian Safeway Stores Pty Limited (No 3)* [2002] FCA 1294 [53] per Goldberg J; *Australian Building and Construction Commissioner v Hall* [2017] FCA 274 at [18] per Flick J; *R v Federal Court of Australia; ex parte Pilkington* (1978) 142 CLR 113 at 138

[68] See, for example, Isaacs J in *National Mutual Life Association of Australasia v Godrich* (1910) 10 CLR 1 at 33-34 that distinguishes between proceedings involving the "interests of the public at large" and proceedings where individual rights only are in controversy" in "setting private obligation against private obligation".

[69] (2014) 47 VR 527; [2014] VSCA 261

[70] Ibid at [498]

[71] (1968) 118 CLR 32

> though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
>
> These general principles are particularly important when questions of construction of statutes are in issue.
>
> It is quite clear that judicial statements as to the construction and intention of an act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the act rather than found in the words of the act itself."[72]

[74] However, the following may be observed about the remainder of the Objectors' submissions summarised above.

[75] First, although *Cth v FWBII* was concerned with the application of the *Barbaro* principle to proceedings involving a recovery of a civil penalty under the BCII Act 2005, the observations in the judgment of the plurality and of Keane J, were not so confine. It is clear that when the plurality made observations about the various enforcement mechanisms available to the regulator, the considerations about the most conducive of those mechanisms to securing compliance faced by the regulator, the balancing of the competing considerations of compensation, prevention and deterrence, and "having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings",[73] their Honours were speaking at a level of generality as to the nature of such proceedings. Further, the plurality, in considering the civil penalty scheme established by the BCII Act 2005 observed that:

> "By providing for civil penalty proceedings, it implicitly assumes the application of the general practice and procedure regarding civil proceedings and eschews the application of criminal practice and procedure."[74]

[76] This observation seems to me, to apply with equal force to other Commonwealth enactments in which provision for civil penalties is made.

[77] Justice Keane was also dealing with the characterisation of such proceedings at a level of generality when his Honour observed that it "is well settled that proceedings for the recovery of a civil penalty are civil proceedings even though "[t]he purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing."[75]

[78] Secondly, as I have already noted, that a proceeding may be characterised as for the "good of the public" and a "civil or mixed matter" does not have the result that the proceeding ceases to be a civil proceeding by that reason alone. Moreover, such descriptions are no answer to the observations made in *Cth v FWBII.*

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[72] Ibid at 39

[73] (2015) 258 CLR 482 at [24]

[74] Ibid

[75] Ibid at [102]

[79] Thirdly, and as the Applicant organisations point out, the judgment in *Labrador* was concerned with the standard of proof applicable to proceedings under the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth). The various passages of the judgments in *Labrador* are to be understood in that context. Strict adherence to the various observations without regard to the context in which those observations are made is misplaced. That this was the context in *Labrador* is illustrated in the judgment of Kirby J, in which his Honour said:

> "In the end, what is necessary is a conclusion about the requirements of the statutes principally in question and how they are intended to operate. As Hayne J has demonstrated, the history of revenue statutes (of which the *Customs Act* and the *Excise Act* are modern examples) indicates that sometimes proceedings under them take on features normal to the general rules governing criminal and sometimes civil trials."[76]

[80] Similarly, the observations in the separate judgments of Gummow J and Hayne J were made in the context of considering the applicable standard of proof in proceedings brought pursuant to the under the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth).

[81] One cannot quarrel with the proposition that some proceedings will have both civil and criminal characteristics, but to my mind it must also be accepted that the presence these overlapping characteristics in a proceeding, does not for that reason alone, result in a proceeding ceasing to be a civil proceeding.

[82] A similar observation may be made about the Objectors' reference to *R v Marine Board; Exrel Medley,*[77] a that case concerned the operation of the *Marine Act 1890* (Vic). The observations made therein were made under a very different statutory scheme. To that extent, the Objectors appear to be adopting an approach that in their submissions they caution against, namely "plucking general observations from other cases that have been decided under different statutory schemes" to answer statutory construction questions, which as the Objectors point out, should be answered by close consideration of the relevant statutory text and context.[78] The observations in both *Cth v FWBII* and in *FWC v Quest* concerned proceedings which (putting the exception to one side) are "in relation to" the matters in s.73(2)(c)(i). It would be a strange result if the civil penalty proceedings were "civil proceedings" when pursued pursuant to the Statue under which the proceedings are commenced, but ceased to be "civil proceedings" in relation to contraventions of those statutes in the context of s.73(2)(c)(i) of the RO Act

[83] Fourthly, in *Cth v FWBII* Keane J gave consideration to *Labrador* and said the following:

> "It must be acknowledged immediately that the distinction between criminal and civil cases does not hold for all purposes. As Hayne J, with whom Gleeson CJ and McHugh J agreed, said in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*, the classification of proceedings as "civil" or "criminal" is:
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> > "…at best, unstable. It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil

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[76] [2003] 216 CLR 161, 52

[77] (1902) 28 VLR 475

[78] Outline of Submissions of AMMA & MBA, dated 12 January 2018 at [66]-[67]

> penalty under companies and trade practices legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing."
>
> But distinctions are regularly drawn for particular purposes between criminal proceedings and civil proceedings; and these distinctions have proved to be sufficiently stable to serve the purposes for which they have been drawn. For example, it is now well understood that the various procedural protections of the position of an accused, developed as aspects of "the accusatorial nature of a criminal trial in our system of criminal justice", are not equally applicable in civil proceedings. Further, it is not suggested that either the availability or the exercise of the power to award exemplary damages in proceedings for tort for the purpose of punishing the tortfeasor rather than compensating the victim alters the civil character of the proceedings. And, more importantly, for a court to ignore the legislature's designation of statutory proscriptions as civil penalty provisions on the basis of the court's view that it is a misleading label is distinctly inconsistent with the deference due by the judicial branch of government to the legislative branch under constitutional arrangements whereby the respective powers of those branches are separated."[79]

[84] Fifthly, the observation in the judgment of Flick J in *Australian Building and Construction Commissioner v Hall*[80](Hall) that civil remedy provisions of the FW Act are "properly to be regarded as "quasi-criminal"[81] was made in the context of a consideration of which party bears the onus of proof in such proceeding. So much is clear when the observation made is read in context which is as follows:

> "At least four matters need to be borne in mind when considering the question of who bears the onus of proof when contraventions of the *Fair* Work *Act* are alleged.
>
> First, when making findings of fact, due regard must be had to the gravity of the matters alleged: *Evidence Act*, s 140(2). Section 140 provides as follows:
>
> Civil proceedings - standard of proof
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
> (a) the nature of the cause of action or defence; and
> (b) the nature of the subject-matter of the proceeding; and
> (c) the gravity of the matters alleged.
>
> The contraventions alleged by the Director have to take into account the fact that the contraventions alleged are contraventions of civil remedy provisions of the *Fair Work Act*. They are, accordingly, properly to be regarded as "quasi-criminal": *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 3)* [2002] ATPR 41-901 at [53] per Goldberg J; *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 239 IR 363 at [68]-[69] per Collier J.
>
> The standard of proof referred to in s 140(2) is a re-statement of the standard of proof referred to by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336: *Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd* (2010) 188 FCR 221; 198 IR 143 at [13] per Logan J. When commenting upon the evidence required in a petition for divorce on the ground of adultery under the *Marriage Act 1928* (Vic), Dixon J in *Briginshaw* observed (at 362):

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[79] (2015) 258 CLR 482 at [89]-[90]

[80] [2017] FCA 274; (2017) 269 IR 28

[81] Ibid at [18]

> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

See also: at 347 per Latham CJ. See also: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [29]-[32] per Weinberg, Bennett and Rares JJ; *Darlaston v Parker* (2010) 189 FCR 1; 196 IR 307 at [17] per Flick J.

All such findings of fact as have been made in respect to the Director's allegations as to contraventions have been made against the standard imposed by s 140(2) of the *Evidence Act*. Findings as to a contravention of the *Fair Work Act* are not findings lightly to be made.

Second, ss 360 and 361 of the *Fair Work Act* are directed to those contraventions which require proof that a person takes action "for a particular reason" or "with a particular intent" — as is the case in respect to contraventions of ss 340, 343 and 355. Section 360 provides as follows:

Multiple reasons for action

> For the purposes of this part, a person takes action for a particular reason if the reasons for the action include that reason.

Section 361 is the "reverse onus of proof" provision and is as follows:

Reason for action to be presumed unless proved otherwise

> (1) If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
> (b) taking that action for that reason or with that intent would constitute a contravention of this Part;
>
> it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.
> (2) Subsection (1) does not apply in relation to orders for an interim injunction.

When addressing s 346 of the *Fair Work Act* and the prohibition there contained against the taking of "adverse action" because (*inter alia*) a person was not a member of an industrial association, in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 220 IR 445 French CJ and Crennan J observed in respect to that provision and s 361:

> [5] The task of a court in a proceeding alleging a contravention of s 346 is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason …

Their Honours later continued:

> [44] There is no warrant to be derived from the text of the relevant provisions of the *Fair Work Act* for treating the statutory expression "because" in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?"

> [45] This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.

(References omitted)

See also: *Victoria (Office of Public Prosecutions) v Grant* (2014) 246 IR 441 at [32] per Tracey and Buchanan JJ. Upon proof (for example) that an employee has exercised a "workplace right" and upon proof that "adverse action" has been taken, it is then presumed that the action was taken for the reason alleged unless the employer proves to the contrary: *Kennewell v MG & CG Atkins (t/as Cardinia Waste & Recyclers)* [2015] FCA 716 at [52] per Tracey J; *Tsilibakis v Transfield Services (Aust) Pty Ltd* [2015] FCA 740 at [14]-[15]. The rationale for s 361 casting the onus in this way is that the facts lie peculiarly within the knowledge of the employer: *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J; *RailPro Services Pty Ltd v Flavel* (2015) 242 FCR 424 at [23] per Perry J.

Whether a respondent has discharged the "reverse onus of proof" is a question to be resolved at the end of a proceeding and upon consideration of the entirety of the evidence adduced: *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273 at [27]. Jessup J there observed in respect to an alleged contravention of s 340:

> [27] In the context of a provision such as ss 340 and 352, the effect of s 361 is to reverse the legal onus in relation to the reason or reasons for which the adverse action was taken. That is to say, at the end of the trial of fact, the question will be whether the respondent has established, on the civil standard, that the action taken was not taken for a reason, or for reasons which included a reason, proscribed by the legislation. That question is to be answered by reference to all of the evidence which bears upon it. Section 361 does not impose upon the respondent concerned the onus of calling any and every piece of evidence that might arguably influence the answer to the question of reasons or intent. The section is not, in other words, concerned to impose upon the respondent a continuing, unchanging, evidentiary onus with respect to that question.

The need to consider the entirety of the evidence, with respect, is hardly surprising. See also: *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526; 205 IR 392 at [372] per Barker J.

With respect to the separate question as to the standard of proof to be applied when seeking to rebut the presumption, it was common ground between the parties to the present litigation that the standard at that point in the analysis is the balance of probabilities. This approach is consistent with the following observations of Gray J in *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139 at [20]:

> [20] … Further, s 360 of the *Fair Work Act* recognises expressly that action may be taken for more than one reason. What the party seeking to rebut the presumption must do is to establish on the balance of probabilities that the alleged improper reason was not a reason for the taking of action. Generally (although as a matter of logic, not necessarily) the evidence as to the state of mind of the decision-maker or decision-makers will include evidence as to what are claimed to be the actual reasons for the decision. Even if the reasons advanced as actual reasons for the decision are accepted as such, the absence of evidence that there were no additional reasons, or that the actual reasons did not include the alleged proscribed reasons, will usually result in a failure to rebut the presumption.

Third, in order to invoke the reverse onus of proof, an applicant need only establish that "the evidence is consistent with the hypothesis" that a respondent was actuated by a proscribed reason: *Bowling* at 241. When addressing a predecessor provision to s 361 (namely s 5(4) of the *Conciliation and Arbitration Act 1904* (Cth)), Mason J there concluded:

> Section 5(4) imposed the onus on the appellant of establishing affirmatively that it was not actuated by the reason alleged in the charge. The consequence was that the respondent, in order to succeed, was not bound to adduce evidence that the appellant was actuated by that reason, a matter peculiarly within the knowledge of the appellant. The respondent was entitled to succeed if the evidence was consistent with the hypothesis that the appellant was so actuated and that hypothesis was not displaced by the appellant. To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the defendant the onus of proving that which lies peculiarly within his own knowledge.

See also: *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139 at [22]-[23] per Gray J; *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Ltd* (2015) 253 IR 166 at [80]-[81] per Reeves J.

Fourthly, the reverse onus of proof provisions found in s 361 do not apply to claims for accessorial liability under s 550 of the *Fair Work Act*: *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18; 263 IR 344 at [448] per Rangiah J. See also: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* (2013) 216 FCR 70 at [241] per Murphy J."[82]

[85] Similarly, the reference made in the judgment of Collier J in *BHP Coal Pty Ltd v CFMEU* (*BHP Coal*)[83] to proceedings that relate to contraventions of the FW Act which lead to the imposition of civil penalties as being "quasi-criminal in nature"[84] were made in the context of a discussion about the appropriate standard of proof to be applied in such cases. This is clear from the following extract:

> "The respondents submit that the appropriate standard of proof in this case is that explained in *Briginshaw*. Materially, at 361-362 Dixon J said:
>
> > The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.* In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (Emphasis added.)

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[82] Ibid at [17] – [26]

[83] (2013) 239 IR 363

[84] Ibid at [69]

> This contention is not disputed by the applicant.
>
> In this respect I also note s 140 of the *Evidence Act 1995* (Cth) which provides:
>
> **Civil proceedings: standard of proof**
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
> (b) the nature of the subject-matter of the proceeding; and
> (c) the gravity of the matters alleged.
>
> Relevantly in *Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Limited* [2010] FCA 770; (2010) 188 FCR 221 at [15] Logan J explained:
>
> > ... the Union carries the burden of proving the alleged contraventions. While the proceedings are civil in character, they are nonetheless penal. Thus, though the Union must prove the contraventions on the balance of probabilities, s 140(2) of the *Evidence Act 1995* (Cth) (Evidence Act) requires that; due regard be given to the nature of the cause of action or defence; the nature of the subject matter of the proceeding; and the gravity of the matters alleged. That sub-section of the *Evidence Act* is a restatement of a well known passage in the judgment of Dixon J (as his Honour then was) in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362 in relation to considerations which intrude in deciding whether the standard of proof in civil proceedings has been met ...
>
> In the case before me the claims of the applicant relate to contraventions of the Fair Work Act which lead to the imposition of civil penalties. Such proceedings are quasi-criminal in nature (cf comments of Aickin J in *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* [1978] HCA 60; (1978) 142 CLR 113 at 138, *Trade Practices Commission v Abbco Ice Works Pty Limited* [1994] FCA 1279; (1994) 52 FCR 96, *Mercedes Holdings Pty Limited v Waters (No 2)* [2010] FCA 472; (2010) 186 FCR 450 at [22], *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited (No 3)* [2002] FCA 1294 at [53]). In assessing the case of the applicant, in response to which the respondents have adduced no evidence, it is important to do so in light of the gravity of the matters alleged and the potential consequences facing the respondents, including individuals."[85]

[86] In my respectful opinion, neither the observations made in *Hall* nor those in *BHP Coal* read respectively in the context of each judgment support a proposition that because a proceeding is or may be quasi-criminal in nature that it ceases to be or is taken outside of the description "civil proceeding".

[87] In *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited (No 3)* (*Safeway Stores*)[86], another judgment on which the Objectors rely, Goldberg J opined that "on one view the proceeding" which were brought seeking the imposition of penalties for contraventions of various provisions of the *Trade Practices Act 1974* (Cth), "may be appropriately characterised as quasi-criminal".[87] It is self-evident that his Honour was expressing only one view of the characterisation that might be given to such proceeding. Moreover his Honour's articulation of that view occurred in the context of a

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[85] Ibid at [65] – [69]

[86] [2002] FCA 1294

[87] Ibid at [53]

consideration of a submission by the Australian Competition and Consumer Commission (ACCC) that it should not be ordered to pay all of Safeway's and the third respondent's party/party costs. The full context appears in the judgment as follows:

> "I turn to the Commission's submission that it should not be ordered to pay all of Safeway's and Mr Jones' party/party costs. As I have noted in par [22] above, ordinarily costs follow the event and a successful party would obtain an order for its costs in the absence of special circumstances justifying some other order. However, in some circumstances a successful party who has failed on certain issues may be deprived of its costs in relation to those issues. The relevant principles in this context were set out by Toohey J in *Hughes v Western Australian Cricket Association (Inc)* [1986] FCA 382; (1986) ATPR 40-748 at 48,136 ("*Hughes*") in the following terms:
>
> > *"1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order.* Ritter v. Godfrey *(1920) 2 K.B. 47.*
> > 2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. Forster v. Farquhar (1893) 1 Q.B. 564
> >
> > 3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, `issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. Cretazzo v. Lombardi (1975) 13 S.A.S.R. 4 at p.12."
>
> These principles were accepted by a majority of the Full Federal Court (Black CJ and French J) in *Ruddock v Vadarlis* (supra) at 147.
>
> It is true that in respect of a number of issues Safeway's and Mr Jones' submissions were not accepted. Most of those issues may be conveniently described as a "disputed question of fact or of law" as referred to by Toohey J in *Hughes.* But there are other factors to be taken into account.
>
> I consider there to be a factor not in existence in *Hughes* which must be taken into account in considering any issue as to the apportionment or a reduction of costs. *Hughes* was a case, as was *Ruddock v Vadarlis* (supra), in which civil remedies were sought. In the present case, the proceeding was brought seeking the imposition of penalties for contraventions of various provisions of the Act. Although the proceeding was not a criminal proceeding, it was certainly a proceeding which had a public law component and which exposed Safeway and Mr Jones to the possibility of the imposition of substantial penalties. On one view the proceeding may be appropriately characterised as quasi-criminal. The consequence of the Commission succeeding would have been that there appeared substantial adverse findings against Safeway and Mr Jones.
>
> In such a case it is not unreasonable to expect a respondent to raise whatever defences it considers are fairly open to it having regard to the relevant facts in order to respond to the serious allegations that have been made. I adopt with respect the observations of Heerey J in *Australian Competition and Consumer Commission v Boral Limited (No 2)* (2002) ATPR 41-738 ("*Boral*") at 40,560:
>
> > *"Whether or not a proceeding under Pt IV is properly characterised as quasi-criminal, the fact remains that such cases are at a level of seriousness beyond ordinary civil contractual and tortious disputes (and the quasi-tort of s 52). The greatly increased penalties imposed by Parliament reflect a view that contravention of Pt IV can go beyond the immediate parties and seriously affect the economic well-being of the nation. Today a finding of substantial contravention of Pt IV would rightly be seen as carrying a stigma, especially for a major corporate group. That being so, I do not think the respondents can be criticised for contesting the case at every point. Put another way, it is somewhat unrealistic to expect companies in the position of the respondents to make formal admissions that they intended to eliminate or substantially damage competitors, or to deter or prevent persons from engaging in competitive conduct, especially when they have provided detailed submissions to the Commission as to why the matter should not proceed at all, the grounds for such submissions having been eventually vindicated in the Court's judgment."*

> In summary I consider, in the context of a submission for apportionment or reduction of costs where a respondent to a proceeding brought by the Commission has failed on certain issues, that a court should be less disposed to apportion costs on failed issues than in civil litigation between private parties where there is no potential consequences, as a result of the proceeding, of the imposition of a substantial penalty for contravention of a statute. I also consider, like Heerey J in *Boral*, that a court should be less ready to apportion costs where a respondent in a proceeding has been successful in the outcome but has been unsuccessful on some issues than where a successful applicant has raised some issues on which it has failed. I consider that a court should look more benignly on the question of costs of a respondent who has been compelled to come to court and defend itself on a ground not of its own choosing than on an applicant who chooses to raise issues on a ground of its choosing.
> 56 I turn to the specific issues in respect of which the Commission submitted there should be a reduction in the costs awarded to the respondents." [88]

[88] When read in context and noting that his Honour did no more than to set out one view of a characterisation of civil penalty proceedings, there is nothing in the judgment in *Safeway Stores* to support a proposition that because a proceeding is or may be *quasi-criminal* in nature it thereby ceases to be or is taken outside of the description "civil proceeding".

[89] *R v Federal Court of Australia; Ex parte Pilkington A.C.I (Operations) Pty Limited* (*ex Parte Pilkington*)[89] concerned an application by Pilkington A.C.I (Operations) Pty Limited and another corporation, Sole Pattinson (Laboratories) Pty Limited to the High Court for prohibition directed to the Federal Court on the ground that the plaintiffs in the proceeding before the Federal Court did not have standing to commence the proceeding and so the Federal Court did not have jurisdiction to determine the matter. The ultimate result in *ex Parte Pilkington* was that as the Federal Court had jurisdiction to decide questions concerning standing in connection to the proceedings before it, prohibition did not lie. In the course of his judgment Aickin J said:

> "It appears from those sections that the Federal Court of Australia is the only court of first instance which is concerned with the enforcement of the Act and the punishment of offences against it. Both civil and criminal proceedings as well as quasi-criminal proceedings for penalties must be instituted in that Court and that Court alone."[90]

[90] No more analysis than that is to be found in the judgment and no other Justice of the Court saw a need to make any such reference. The passage provides little assistance in construing the words at issue in this proceeding and if it be authority for the proposition advanced by the Objectors, in my opinion, it is directly inconsistent with the clear statements made by the High Court in *Cth v FWBII*.

[91] Sixthly, the reference to civil penalty proceedings as "quasi-criminal" in nature in some of the authorities discussed above do not, in my view, stand for the proposition that there is a third "quasi-criminal" category standing somewhere in between civil and criminal proceedings. At least not in the context of s.73(2)(c) of the RO Act.[91] In *Safeway Stores* Goldberg J explained that as the case had a public law element to it in which penalties were

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[88] Ibid at [51]-[55]

[89] (1978) 142 CLR 113

[90] Ibid at 138

[91] Noting that legislation in operation in some States appears to delineate between a civil proceeding on the one hand and a criminal proceeding or *quasi* criminal proceeding on the other: see e.g definition of "civil proceeding" in s.3 of the *Civil Proceeding Act* 2010 (Vic)

sought, it could on one view be described as quasi-criminal.[92] Both *Hall* and *BHP Coal,* in which civil penalty proceedings are described as quasi-criminal, were concerned with questions of the standard of proof and the need to apply s.140 of the *Evidence Act* as that section is expressed to apply to civil proceedings. Similarly, in *Visy Industries Holdings Pty Ltd v ACCC*[93] the reference is made in the context of a claim that in civil penalty proceedings the ACCC was subject to prosecutorial duties of fairness to the respondent.[94] It appears to me, from a review of the judgments in these cases, that the term or descriptor "quasi-criminal" is used to describe the seriousness of civil proceedings in which civil penalties are sought. However serious such proceedings might be, they nevertheless remain civil proceedings and none of these judgments state a contrary proposition.

[92] Seventhly, none of the authorities to which the Objectors have referred are as recent, authoritative or as subject matter relevant, in determining whether civil penalty proceedings are properly described as "civil proceedings" as *Cth v FWBII* and *FWO v Quest.* The observations made by the Court concerned the classification of civil penalty proceedings brought under the BCII Act 2005 and the FW Act prospectively as "civil proceedings". The proceedings considered by the Court in each case are the very kind of proceedings in contemplation under (putting the exclusionary words to one side) s.73(2)(c)(i) of the RO Act. I therefore consider the observations made in the recent High Court decisions inform the scope and proper meaning to be ascribed to the exclusionary words "other than civil proceedings" in that subsection.

[93] Eighthly, as to the definition of "proceeding" in s.6 of the RO Act, it is to be observed that the definition is not expressed to operate in absolute terms so that on any occasion in the Act when the word "proceeding" is used it carries a meaning to capture all or every kind of proceeding described in the definition. The structure of the definition itself makes good this point. Moreover, the opening words in s.6 make clear that the variously defined words or phrases carry the meanings set out therein when used in the RO Act "unless the contrary intention appears". A contrary intention may appear expressly or from the context in which the word is used in the various provisions or parts of the RO Act.

[94] "Proceeding" when used in the RO Act may, depending on the context, mean a proceeding in a court or it may mean a proceeding or hearing before, or an examination by or before, a tribunal, or if the context permits it may mean both kinds of proceeding therein described. The words "whether the proceeding, hearing or examination is of a civil, administrative, criminal, disciplinary or other nature" are in my opinion to be assigned to the type of proceeding, hearing or examination that is described as occurring on the one hand in a court and only other in a tribunal.

[95] I consider that the word "proceedings" when used in s.73(2)(c), is a reference to proceedings in a court. Given the nature of the proceedings "against" any relevant organisation about which s.73(2)(c) is concerned (contravention of Commonwealth laws and breaches of instruments and orders), it is difficult to see how such proceeding could be described as administrative or disciplinary in nature. That leaves only "civil" or "criminal" to describe the nature of the proceeding with which s.73(2)(c) is concerned. As to the reference

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[92] [2002] FCA 1294 at [53]

[93] (2007) 161 FCR 122

[94] Ibid at [95] - [96], [98] and [101]

to "other nature" in the definition, I am unable to identify, nor was I referred to a kind of proceeding that might be extant against an organisation in relation to the matters in s.73(2)(c)(i) - (iii) which would not properly describe as civil or criminal proceeding so as to fall within the descriptor "other nature". To the extent that it might be said to capture "*quasi*-criminal" that is rejected. As will later be seen, there is no support for such a conclusion in the extrinsic material as relates to this definition and had this been intended, simple express words in the definition could have been used by the Parliament as have been used by at least one state Parliament.[95]

[96] Consequently, to the extent that the Objectors rely on the definition of "proceeding" in s.6 of the RO Act to support a contention that s.73(2)(c) of the RO Act does not maintain a dichotomy between civil and criminal proceedings, that contention is rejected.

[97] The definition of "proceeding" was included in the RO Act only recently, and I say more about this later in this decision.

[98] I return then to the statutory context in which s.73 of the RO Act operates.

[99] There is some merit to the Applicant organisations' submission that when s.73(2)(c) of the RO Act is read in the context of other provisions which work together in Division 6, Part 2 of Chapter 3, which deal with the amalgamation taking effect, does not disclose any evident purpose to construe "proceedings" where first appearing in s.73(2)(c) as including civil penalty proceedings. The Applicant organisations point to the matters set out below:

> "Firstly, regard should be given to s 74 which provides that the assets and liabilities of a de-registered organisation become assets and liabilities of the amalgamated organisation. The term "liabilities" is defined broadly in s. 35. It is apt to include contingent liability under a civil penalty proceeding. It would be totally inapt to be applied to an exposure to a criminal penalty. This offers a rationale and explanation for s 73(2)((c) by preventing an organisation from escaping criminal liability as a result of an amalgamation. The provision does not need to protect against this in civil penalty provisions because the liability is preserved by being transferred under s 74.
>
> Secondly, attention should be given to s 79 which provides that in any proceedings that are pending against an organisation that is to be de-registered (due to being amalgamated), the amalgamated organisation will be substituted for the deregistered organisation and the proceeding will continue as if the amalgamated organisation "were, and had always been, the de-registered organisation".
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> The reference in the definition of "proceeding"[96] to a "party" is an indicator that the proceedings are civil and not criminal. In criminal proceedings, it is more common to refer to a prosecutor and defendant."[97]

[100] I accept that when s.73(2)(c) is read in the context of ss. 74 and 79, no evident purpose to construe "proceedings" in s.73(2)(c) as including civil penalty proceedings is disclosed. This is because on the Applicant organisations' reading, the amalgamation scheme appears to provide that any pending civil penalty proceedings or related liabilities would continue as against the amalgamated organisation, that is, the amalgamation would be approved with that result.

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[95] See definition of "civil proceeding" in s.6 of the *Civil Procedure Act* 2010 (Vic)

[96] I gather this is a reference to the definition of "proceeding to which this Part applies" found in s 35 of the RO Act

[97] Outline of submissions of CFMEU, MUA and TCFUA, dated 25 January 2018 at [90] and [92]

[101] However, against this, it must first be said that, although it is more common to describe a party to a criminal proceeding as a defendant, it is not unusual for a defendant to be described as a "party" to a criminal proceeding. Moreover, a party involved in a civil proceeding might be described as "applicant" and "respondent" or as "plaintiff" and "defendant" and the difference is often based on whether the civil proceeding is commenced in furtherance of a statutory cause or remedy or of a common law cause of action. For example, a person who is said to have contravened a civil remedy provision and against whom an order imposing a pecuniary penalty may be directed, is described in s. 81 of the BCIIP Act as "the defendant". Understood in this way, the use of the descriptor "party" in s.79 of the RO Act and in the definition of "proceeding to which this part applies" found in s.35, which is called up by s.79, is capable of applying to a defendant in a criminal proceeding.

[102] Secondly, it is to be observed that s.79 is intended to capture the particularly described and defined proceedings to which an organisation that becomes a deregistered organisation on amalgamation day was a party immediately before amalgamation day. The section therefore operates upon all relevantly described proceedings that are pending to which a deregistered organisation was a party, not just those pending "against" the deregistered organisation. The deployment of the word "party" as a descriptor of an organisation's involvement in a proceeding is the most efficient way of describing that involvement. This has the effect of capturing an organisation's involvement as an applicant, respondent, plaintiff, defendant, appellant and so forth. A deregistered organisation might also become a party to a relevant proceeding because it has intervened in a relevant proceeding.

[103] Thirdly, s.73 is concerned with relevant proceedings pending against any of the "existing organisations concerned in the amalgamation", whereas s.79 is concerned only with relevant proceedings pending to which "a de-registered organisation was a party immediately before the amalgamation day".[98] In the instant case, while s.73 has application to each Applicant organisation, s.79 has effect upon any relevant proceedings to which the MUA or the TCFUA was a party immediately before amalgamation day. On amalgamation day, the amalgamated body, the CFMMEU will be substituted as a party in those proceeding. This is because it is only the MUA and the TCFUA that will be deregistered as set out in the scheme for amalgamation.

[104] Ultimately, I consider that these provisions provide only equivocal contextual assistance.

[105] Perhaps a more persuasive contextual consideration is, as contended by the Applicant organisations, the fact that the Commission is required to undertake the task required by s.73(2)(c) at the end of the amalgamation process when considering whether to fix the amalgamation date as opposed to earlier in the process and before the vote of members. It is contended the later stage of the amalgamation process at which this issue is given consideration supports the proposition that s.73(2)(c) is designed to deal with proceedings that are not transferrable to the amalgamated entity. Thus, the provision is not intended to punish an organisation for its previous behaviour. Moreover, one would expect such a purpose to be

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[98] *Fair Work (Registered Organisations) Act* 2009 (Cth) s 35

manifested in the section. I accept the contention in the last two sentences, but that contained in the sentence proceeding them is not apt to apply in respect of each Applicant organisation.

[106] Dealing with that proposition first, it is to be observed that there is no need in an amalgamation of organisations that all participating organisations be deregistered. That is plainly the case as between the CFMEU, the MUA and the TCFUA. Only the latter named organisations will become deregistered on amalgamation day. There is no need for a provision dealing with the transfer of such proceedings involving an organisation which on amalgamation day will continue to exist, albeit in an amalgamated form and with the changed name. The legal entity that existed before amalgamation day will continue to exist after amalgamation day. This is the case in respect of the CFMEU. The legal entity that is now the CFMEU will, on amalgamation day, continue to exist, but will be named the CFMMEU with altered rules to take account of its amalgamation with the MUA and the TCFUA. Thus, while this holds true for the MUA and the TCFUA, it does not explain the operative purpose of s.73(2)(c) on the CFMEU in circumstances of this amalgamation.

[107] However, as I have already observed, neither the existence of extant proceedings of any kind nor a history of contravening conduct involving an organisation that is participating in the proposed amalgamation provide a bar to an application in relation to a proposed amalgamation being made or constitute a matter about which the Commission must be satisfied before approving the submission of an amalgamation to ballot. If the existence of such proceedings was intended to be punitive or a bar to amalgamation, one would expect that intention to disclose that at a much earlier stage of the amalgamation process.

[108] Additionally, it seems to me a very odd approach to establishing a "normative" regime for the Parliament to have intended to prevent the fixing of an amalgamation date because of pending proceedings against an organisation, but no account need be taken of actual concluded proceedings in respect of which an organisation has been found to have contravene one or more relevant laws. A "normative" purpose would, it seems to me, not allow the fixing of an amalgamation date, in the event of both pending and concluded proceedings, at least if the quantum of concluded proceedings showed a pattern of disregard for established industrial or workplace law. In the instant case, assume the existence of pending criminal proceedings against the CFMEU. This would, today, prevent the fixing of an amalgamation day. But if tomorrow those proceedings were to be concluded, an amalgamation date could be fixed assuming satisfaction as to the other matters. This would be so whether the CFMEU was convicted of the offence charged or not. Such a legislative scheme is wholly inconsistent with a "normative purpose for which the Objector's contend. In addition were criminal proceedings to be commenced on the day after an amalgamation dated is fixed under s.73 there does not appear to be any bar on the amalgamation proceeding on the day fixed. This also tells against a "normative" purpose.

[109] I therefore consider that the context provided by the various provisions of the RO Act and the judicial consideration of the nature of the civil penalty proceedings to which I have referred lends support for a conclusion that the reference to "civil proceedings" in s.73(2)(c) includes civil penalty proceedings.

[110] I turn next to other contextual considerations.

4. Context provided by the legislation regulating industrial or workplace relations

[111] The RO Act does not operate in a vacuum. It operates alongside other Commonwealth laws which collectively provide for a scheme of national industrial or workplace relations regulation. The FW Act and the BCIIP Act, also form part of that scheme of regulation. They therefore, in my view, also provide context.

[112] There appears to be a distinction drawn between civil and criminal proceedings in each of the FW Act, the BCIIP Act and the RO Act with civil penalty proceedings (or proceedings for a civil penalty order in the case of the BCIIP Act) falling within the scope of "civil proceedings." The analysis of the various provisions below makes good this point.

[113] Chapter 4 of the FW Act deals with compliance and enforcement. Part 4 – 1 of that chapter is concerned with civil remedies and Division 4 thereof sets out general provisions relating to civil remedies. Section 549 provides that contravening a "civil remedy provision is not an offence". Offences, which give rise to a criminal proceeding, are elsewhere dealt with in the FW Act. For example, s.674 provides that it is an offence if a person engages in conduct that insults or disturbs a member of the Commission, or uses insulting language to a Commission member, or interrupts matters before the Commission, or disturbs proceedings in the Commission, or uses words intended to improperly influence the Commission or a person attending before the Commission. The commission of such an offence is punishable by imprisonment for up to 12 months.

[114] Section 678 of the FW Act provides that it is an offence for a person to give false or misleading evidence before the Commission or to induce, threaten or intimidate a witness to give false or misleading evidence in a matter before the Commission and is punishable by imprisonment for 12 months.

[115] The distinction drawn in the FW Act between civil and criminal proceedings is also evident in a number of other provisions of that Act.

[116] Section 551 of the FW Act provides that a court is obliged to apply the rules of evidence and procedure for "civil matters" when hearing proceedings relating to a contravention or proposed contravention of a civil remedy provision. Section 552 provides that a court must not make a pecuniary penalty order against a person for contravention of a civil remedy provision if the person has already been convicted of an offence constituted by conduct substantially the same as the conduct constituting the contravention of the civil remedy provision. There is a heading to s.552 which provides: "civil proceedings after criminal proceedings".

[117] The relevant iteration of the AI Act[99] relevant to the FW Act provides that no heading to a section of an Act shall be taken to be part of the Act.[100] I consider however, that a heading might be considered as provided for in s.15AB of the AI Act to confirm the ordinary meaning conveyed by the text of the provision or determine the meaning of a provision when the provision is ambiguous or obscure. The heading has a tendency to confirm that the FW Act draws a distinction between civil and criminal proceedings, with "civil penalty

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[99] *Acts Interpretation Act* 1901(Cth) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A

[100] Ibid s 13(3)

proceedings" falling within the ambit of "civil proceedings". This is all the more so the case as the text of the section underneath the heading deals with only the subject of a "pecuniary penalty order" as the subject matter of the proceeding that is capable of falling within the description "civil proceedings" contained in the heading. The foregoing applies also in respect of the other headings to sections in the FW Act, to which reference is made below.

[118] Section 553(1) of the FW Act is headed "criminal proceedings during civil proceedings" and provides that proceedings for a pecuniary penalty order against a person for contravening a civil remedy provision are stayed if criminal proceedings are started or have already been started against the person and the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention. Section 553(2) permits a proceeding for a pecuniary penalty order to be resumed if the person is not convicted of the offence, but otherwise the proceeding for the order is dismissed.

[119] Section 554 of the FW Act, is headed "criminal proceedings after civil proceedings" and permits criminal proceedings to be commenced against a person for conduct substantially the same as conduct constituting a contravention of a civil remedy provision regardless of whether an order has been made against the person under Division 2 of Part 4 – 1.

[120] Section 555(1) of the FW Act provides that evidence of information given, or evidence of production of documents, by an individual is not admissible in a criminal proceeding against an individual if the individual previously gave the information or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil remedy provision (whether or not the order was made) and the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the order was sought.

[121] Chapter 10 of the RO Act deals with the subject of civil penalties. Section 304 contains a simplified outline which sets out that the chapter:

> ". . . Provides for civil penalties where specified provisions are contravened.
>
> It sets out the orders that may be made where a contravention has occurred.
>
> It also sets out the relationship with criminal proceedings arising out of the same conduct."

[122] Section 305(2) of the RO Act defines a "civil penalty provision" as a section or subsection of the RO Act that has, at its foot, a pecuniary penalty or penalties indicated by the words "civil penalty". Section 305(4) provides that the Federal Court must apply the rules of evidence and procedure for "civil matters" when hearing and determining an application for an order under Part 2 of Chapter 10 the RO Act. This is comparable to s.551 of the FW Act.

[123] Section 311 carries a heading "civil proceedings after criminal proceedings" and provides that the Federal Court must not make a pecuniary penalty order against a person for contravention of a civil remedy provision if the person has already been convicted of an offence constituted by conduct substantially the same as the conduct constituting the contravention of the civil remedy provision. The prohibition is substantially to the same effect as s.552 of the FW Act and s.87 of the BCIIP Act (to which reference will be made further below), although their reach extends beyond the Federal Court and applies to "a court" in the case of the FW Act and to "a relevant court" in the case of the BCIIP Act.

[124] As to the treatment of headings, the AI Act as currently in force is applicable to the construction of the RO Act and the BCIIP Act but not the FW Act. The AI Act as currently in force no longer contains a provision stating that a heading to a section of an Act is not part of the Act. The learned authors of "Statutory Interpretation in Australia"[101] have suggested that the "change made by the Commonwealth to s 13 of the Acts Interpretation Act 1901 that all material in an Act forms part of the Act would seem to mean that marginal notes and headings to sections in all Commonwealth legislation are part of the legislation no matter when made.[102] In any event, for the avoidance of doubt, the relevant headings in both the RO Act and the BCIIP Act may be considered, as provided for in s 15AB of the AI Act, to confirm the ordinary meaning conveyed by the text of the provision or determine the meaning of a provision when the provision is ambiguous or obscure. The use to which I put the headings in the FW Act earlier discussed, applies with equal force to the relevant headings in the RO Act and the BCIIP Act (to which reference will be shortly made).

[125] Section 312 of the RO Act is to the same effect as s.553 of the FW Act and is accompanied by a heading which provides "criminal proceedings during civil proceedings". Section 313 of the RO Act is to the same effect of s.554 of the FW Act, and is accompanied by a heading which provides "criminal proceedings after civil proceedings".

[126] As with the corresponding provisions of the FW Act, the only kind of proceeding that is the subject matter of the provisions capable of falling within the description "civil proceedings" identified in the heading, is a proceeding concerning a "pecuniary penalty order".

[127] Section 314 of the RO Act is to the same effect as to s.555 of the FW Act.

[128] As with the FW Act, the RO Act contains provisions dealing with "offences" which give rise to criminal liability. For example, there are offences in relation to ballots and ballot papers for which provision is made in ss. 72 and 105. A person who interferes with an investigation by the Registered Organisations Commissioner in the circumstances set out in s.337 is guilty of an offence punishable by imprisonment for up to 2 years or 100 penalty units or both. A person who interferes with a register of members commits an offence under s.232, punishable by 20 penalty units. This offence is one of strict liability for the purposes of s.6.1 of the *Criminal Code 1995* (Cth). Other offences are to be found in ss. 337 – 337AA of the RO Act.

[129] It appears to me, therefore, that the RO Act draws substantially the same distinction drawn by the FW Act between civil and criminal proceedings.

[130] Turning then to the BCIIP Act, s. 5 makes provision for definitions of "civil penalty order"[103] and "civil remedy provision". Chapter 8 makes provision for enforcement. Part 2 of that chapter is concerned with orders concerning contraventions of civil remedy provisions.

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[101] Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014),

[102] Ibid at [4.56], 202

[103] Which by s. 81 (1) (a) means an order of a relevant court imposing a pecuniary penalty on a a person who has contravened a civil remedy provision.

[131] Section 86 of the BCIIP Act deals with the applicable rules of evidence and provides that a relevant court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a contravention of a civil remedy provision. This corresponds with s. 305(4) of the RO Act and s.551 of the FW Act.

[132] Section 87 of the BCIIP Act is headed "civil proceedings after criminal proceedings" and is to the same effect as s.311 of the RO Act and s.552 of the FW Act. Section 88 is headed "criminal proceedings during civil proceedings" and is to the same effect as s.312 of the RO Act and s.553 of the FW Act. Section 89 is headed "criminal proceedings after civil proceedings" and is to the same effect as s.313 of the RO Act and s.554 of the FW Act.

[133] As with the corresponding provisions of the RO Act and the FW Act, the only kind of proceedings that is the subject matter of the identified provisions of the BCIIP Act capable of falling within the description "civil proceedings" identified in the heading, is a proceeding concerning a "pecuniary penalty order".

[134] Section 90 of the BCIIP Act deals with the admissibility of evidence given in civil proceedings in criminal proceedings and is to the same effect as s.314 of the RO Act and s.555 of the FW Act.

[135] The BCIIP Act also contains provisions for offences carrying criminal liability, for example in s.62 a person commits an offence if a person is given an examination notice and the person fails to give the requisite information, attend to answer questions in accordance with the notice, fails to take an oath or make an affirmation when required, or to answer questions relevant to the investigation while attending as required by the notice. The commission of an offence under that section is punishable by imprisonment for 6 months.

[136] It therefore appears to me that the BCIIP Act draws substantially the same distinctions drawn by the RO Act and the FW Act between civil and criminal proceedings. The distinction reflects an established lexicon in the three statutes which constitute the scheme of national industrial or workplace relations regulation in relation to the position of civil penalty provisions and their classification as "civil proceedings".

[137] The various provisions of the RO Act, the FW Act and the BCIIP Act are, in my view, important contextual matters which support the conclusion that civil penalty proceedings are properly described as "civil proceedings" within the meaning of s.73(2)(c) of the RO Act.

5. Legislative history of s.73 and related matters

[138] The legislative history of s.73 of the RO Act also provides relevant context. Its legislative history is lengthy.

[139] Section 158Q of the *Conciliation and Arbitration Act 1904* (Cth) (C&A Act), which came into operation on 2 June 1972 appears to be the first iteration of s.73. Subsection(1) provided that if a ballot for amalgamation had been approved and any application to a Court concerning irregularities with the ballot disposed of, the Industrial Registrar was, after consultation with the organisations concerned, to notify in the Gazette the day on which the amalgamation was to take effect.

[140] By s.158Q(2) of the C&A Act, the Registrar was not permitted to fix a day on which the amalgamation was to take effect unless:

> "(a) there are no proceedings pending against any of the organisations concerned in respect of a contravention of this Act, the regulations or any law of the Commonwealth or in respect of a breach or non observance of an award or order under this Act or another law of the Commonwealth;
>
> (b) no penalty imposed on any of those organizations under this Act or the regulations or in respect of any such breach or non-observance is unpaid; and
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> (c) the Industrial Registrar is satisfied as to the arrangements made for property of the de-registering organization or organizations to become the property of, and for liabilities of the de- registering organization or organizations to be satisfied by, the amalgamated organization."

[141] The decision in *Gapes v Commercial Bank of Australia Ltd* (*Gapes*)[104] is helpful in understanding the import of this provision. *Gapes* was a case concerning s.119 of the C&A Act. That section made provision for proceedings by which a penalty could be sought to be imposed upon a person for breaching an award. On appeal to the full Federal Court an objection was taken to the competency of the appeal on the ground that the proceedings under s. 119 were criminal in nature and consequently s.24(1)(a) of the *Federal Court of Australia Act 1976* (Cth) did not confer a right of appeal. Justice Sweeney delivered the leading judgment with which the other members of the Court concurred. The decision of the Court was that a proceeding under s.119 of the C&A Act for the recovery of penalties in connection with a breach of an award is not a criminal proceeding and consequently an appeal lies under s.24 (1) (a).

[142] In his concurring judgment Smithers ACJ added some additional observations as follows:

> "On the particular question whether s. 119 is to be understood as enacting that a breach of a term of an award or an order is a criminal offence the features of the Act referred to above appear to me to provide strong grounds for answering that question in the negative.
>
> That it is sound to use these statutory features in this way appears from the reasoning and decision of the majority of the High Court in The King v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section [1951] HCA 3; (1949) 82 CLR 208 . In that case the Court of Conciliation and Arbitration had made an order pursuant to what was then s. 29(c) of the Act enjoining the union from committing or continuing any contravention of the Act, namely from being a party to any ban, limitation or restriction on the working of overtime pursuant to a particular award. For the union to be a party to any such ban would have been a breach of a term of the award. Section 29(c) empowered the court to enjoin an organization from committing a contravention of the Act but had nothing to say about breaches or contraventions of terms of an award. It was held that within the meaning of the Act a mere breach of a term of an award was not a contravention of the Act and that as the order against the union was in substance an order enjoining the union from committing a breach of the term of the award it was not authorized by s. 29(c). Dixon J. (as he then was) stated: " . . . as I read it, the Conciliation and Arbitration Act maintains a distinction between infringements of the Act and infringements of awards and when it speaks of contraventions of the Act it is not referring to breaches of or failures to observe awards, even if such breaches or non-observances are contrary to the statute and expose the persons offending against the awards to penal consequences. The distinction is made in the terms in which the following provisions are expressed, viz.: ss. 31(1)(a) and (b), 33 (1)(a), 61, 64(1) and (6) and (80)(1)(c). Indeed it is indicated by s. 29(b) and (c) when they are considered together. The form of s. 65, which treats proceedings for an offence against the Act as not including the recovery of a penalty under s. 59 for breach or non-observance of an award, follows the distinction and

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[104] (1979) 38 FLR 431

> appears to me to confirm the inference that an infringement of an award is not to be treated as included under the expression contravention of the Act. When s. 40(c) empowers the Arbitration Court in relation to an industrial dispute to fix maximum penalties for any breach or non-observance of a term of an award it marks the difference in the manner in which the statute regards non-compliance with the Act and non-compliance with awards under the Act. The provisions relating to State industrial regulation observe the same distinction when they speak of a 'State law dealing with an industrial matter' and 'an order, award, decision or determination of a State Industrial Authority': s. 28(1) and s. 51. Finally the importance attached by the framers of the Act to the enforcement of orders and awards and its treatment of their enforcement as a separate legislative subject tends to make it unlikely that the power to grant an injunction against contraventions of the Act was intended to compose injunctions against breaches and non-observance of awards: see s. 2(e) and the heading to Part V" (1949) 82 CLR, at pp 251-252 . Reference may also be made to the remarks of Kitto J. (1949) 82 CLR, at p 264.
>
> The reference in the above to the significance of the form of words used in s. 65 confirms the approach adopted earlier in these reasons concerning the form of words now appearing in s. 121 of the Act. Section 65 (now s. 126) referred to by Dixon J. was in the following terms: "The Registrar or an Inspector appointed under the last preceding section shall, whenever so directed by a Judge or a Conciliation Commissioner, and such an Inspector shall, whenever so directed by the Registrar, institute proceedings for an offence against this Act or for the recovery of a penalty under section fifty-nine of this Act."
>
> It is to be observed that consequent upon the decision in the case last mentioned the legislature amended s. 29 by adding a provision enabling the court to make an order enjoining the committing or continuing of "a breach or non-observance of an award" (see Act No. 18 of 1951). But by Act No. 53 of 1970 these words were deleted and the earlier situation restored namely that under s. 109 (the successor to s. 29) although the court has power to enjoin a contravention of the Act, it is not empowered to enjoin a mere breach of an award. It is clear that an offence against the Act is, within the meaning of the Act, a contravention against the Act. It appears to follow that a mere breach of an award is not an offence. And this conclusion is agreeable with many indications in the Act and in conflict with none."[105]

[143] It is apparent from the above that a breach of an award was not an offence against the C&A Act and so not criminal, but that contravention of the C&A Act attracted criminal liability. However, the C&A Act contained an offence provision if a person wilfully defaulted in complying with an award.[106]

[144] Having regard to the distinction between "contraventions" and "breaches of awards" as discussed in *Gapes*, it seems to me that that the legislature sought by s.158Q of the C&A Act to capture both types of proceedings. On this view, s.158Q therefore had the effect that pending "criminal proceedings" and "civil proceedings" against an organisation would preclude the Registrar from fixing a day on which the amalgamation was to take effect.

[145] The C&A Act was repealed when the *Industrial Relations Act 1988* (Cth) (IR Act) was enacted. Section 249(2)(c) of the IR Act provided that a designated Presidential Member of the Australian Industrial Relations Commission (AIRC) shall, after consultation with the organisations, fix a day as the day on which amalgamation is to take effect if, *inter alia*, the Presidential Member was satisfied:

> … that there are no proceedings pending against any of the existing organisations concerned in the amalgamation in relation to:
>
> (i) contraventions of this Act, the previous Act or other laws of the Commonwealth; or

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[105] Ibid at 438-439

[106] *Conciliation and Arbitration Act 1904* (Cth) s 122

(ii) breaches of:

(A) awards; or

(B) orders made under this Act, the previous Act or other laws of the Commonwealth.

[146] It is noted that s.249(2)(c) adopts the connection phrase "in relation to" whereas s.158Q(2)(a) used "in respect of". I will deal with the submissions on the significance of the alteration later in this decision.

[147] Sections 249(2)(d) and (e) of the IR Act, which in substance replicated s.158Q(2)(b) and (c) of the C&A Act, required the Presidential Member to be satisfied of the following matters before an amalgamation day could be fixed:

> (d) that all penalties imposed on any of the organisations under this Act or the previous Act, or in relation to any such breaches, have been paid; and
>
> (e) that proper arrangements have been made for property of the deregistering organisation or organisations to become the property of and for liabilities of the de-registering organisation or organisations to be satisfied by, the amalgamated organisation;
>
> the Presidential Member shall, after consultation with the organisations, by notice published in the Gazette, fix a day as the day on which the amalgamation is to take effect.

[148] A material alteration to the provision was made by the *Industrial Relations Legislation Amendment Act 1991* (Cth) (IR Amendment Act). The IR Amendment Act had the effect of repealing the then existing amalgamation scheme. Section 249 of the IR Act was replaced with s.253Q. The revision of the amalgamation scheme was said to be aimed at "encouraging and facilitating the amalgamation of organisations" and "avoiding and minimising" difficulties in the amalgamation process by providing a "speedier and more flexible process".[107]

[149] Relevantly, s.253Q(2) provided:

> If a designated Presidential Member is satisfied:
> …
>
> (a) that there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to:
>
> (i) contraventions of this Act, the previous Act or other Commonwealth laws; or
>
> (ii) breaches of:
>
> (A) awards; or
>
> (B) orders made under this Act, the previous Act or other Commonwealth laws
>
> the Presidential Member must, after consultation with the existing organisations, by notice published as prescribed, fix a day (in this Subdivision called the "amalgamation day") as the day on which the amalgamation is to take effect.

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[107] Explanatory Memorandum, Industrial Relations Legislation Amendment Bill 1990, 1-2

[150] For the most part s.253Q(2)(c) replicated s.249(2)(c) save that it introduced an exception to the kinds of proceedings caught by the provision by adding after the words "there are no proceedings" the words "(other than civil proceedings)". The connecting phrase "in relation to" was retained.

[151] The Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 1990* (IR Amendment Bill) contained the following in respect of s.253Q(2):

> "Before fixing the amalgamation day, the Presidential Member must be satisfied that:
>
> - the time for applying under proposed section 253M for an inquiry into ballot irregularities has expired (30 days after the declaration of the result of the ballot), or there are no matters relating to such an enquiry outstanding; and
>
> - there are no unresolved criminal proceedings against any organisation concerned in the amalgamation."[108]

[152] I consider that this suggests that the intended effect of s.253Q(2)(c) by including the exclusionary phrase "other than civil proceedings" was that the provision was confined to pending proceedings against any organisation concerned in the amalgamation that were criminal proceedings related relevantly to contraventions of the Act and breaches of awards or orders and that civil penalty proceedings were included as a species of "civil proceeding".

[153] The IR Amendment Act also repealed ss. 249(2)(d) and (e), which were replaced by the enactment of s.253R. That section provided:

> (1) On the amalgamation day, all assets and liabilities of a de-registered organisation cease to be assets and liabilities of that organisation and become assets and liabilities of the amalgamated organisation.
>
> (2) For all purposes and in all proceedings, an asset or liability of a de-registered organisation existing immediately before the amalgamation day is taken to have become an asset or liability of the amalgamated organisation on that day.

[154] Prior iterations of legislation regulating the amalgamation of organisations did not appear to make provision that the assets and liabilities of the deregistered organisation would, by operation of the statute, become the assets and liabilities of the amalgamated organisation.

[155] Section 249(2)(d) and (e), which were repealed by the IR Amendment Act, made the approval of an amalgamation conditional on certain penalties that had been imposed on an organisation having been paid and the amalgamation scheme making provision for arrangements for assets and liabilities of the deregistering organisation to become the assets and liabilities of the amalgamated organisation.

[156] Section 253R is in identical terms to s.74 of the RO Act while s.253Q(2) is substantially the same and the introductory words including the exclusionary words, are the same.

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[108] Ibid, 28

[157] As to s.253R the Explanatory Memorandum to the IR Amendment Bill provides the following:

> "On the amalgamation day, all assets and liabilities of an organisation which was deregistered for the purposes of the amalgamation thereupon become the assets and liabilities of the amalgamated organization. The terms "asset" and "liability" are widely defined in proposed subsection 234."[109]

[158] The IR Amendment Act also enacted s.253V which provided:

> Where, immediately before the amalgamation day, a proceeding to which this Division applies was pending in a court or before the Commission:
>
> (a) the amalgamated organisation is, on that day, substituted for each de-registered organisation as a party; and
>
> (b) the proceeding is to continue as if the amalgamated organisation were, and had always been, the de-registered organisation.

[159] Prior to the enactment of s.253V there does not appear to have been provision in connection with the amalgamation of organisations providing for the substitution of the amalgamated organisation as a party to relevant proceedings to which a de-registered organisation was a party immediately before the amalgamation day.

[160] Section 253V is very similar to s.79 of the RO Act.

[161] The IR Act was amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLA Act). The IR Act was renamed the *Workplace Relations Act 1996* (Cth) (WR Act) and s.253Q(2) was amended so as to provide, relevantly, the following:

> If a designated Presidential Member is satisfied:
> …
>
> (b) that there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to:
>
> (i) contraventions of this Act, the previous Act or other Commonwealth laws; or
> (ii) breaches of:
>
> (A) awards or certified agreements; or
>
> (B) orders made under this Act, the previous Act or other Commonwealth laws
>
> the Presidential Member must, after consultation with the existing organisations, by notice published as prescribed, fix a day (in this Subdivision called the "amalgamation day") as the day on which the amalgamation is to take effect.

[162] The only substantive amendment to s.253Q(2) brought about by the WROLA Act was the inclusion of the words "or certified agreements" in s.253Q(2)(ii)(A).

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[109] Ibid

[163] By the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth), the WR Act was amended so that provisions concerning registered organisations were contained in Schedule 1B to the WR Act. Parts IX and X of the WR Act, which contained provisions concerning registered organisations, were repealed by the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002* (Cth). Section 73(2) of Schedule 1B provided:

> "(2) If the Commission is satisfied that:
>
> (a) the period, or the latest of the periods, within which application may be made to the Federal Court under section 69 in relation to the amalgamation has ended; and
>
> (b) any application to the Federal Court under section 69 has been disposed of, and the result of any fresh ballot ordered by the Court has been declared; and
>
> (c) there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation in relation to:
>
> (i) contraventions of this Schedule, the Workplace Relations Act or other Commonwealth laws; or
>
> (ii) breaches of:
>
> (A) awards or certified agreements or old IR agreements; or
>
> (B) orders made under this Schedule, the Workplace Relations Act or other Commonwealth laws; and
>
> (d) any obligation that an existing organisation has under a law of the Commonwealth that is not fulfilled by the time the amalgamation takes effect will be regarded by the proposed amalgamated organisation as an obligation it is bound to fulfil under the law concerned;
>
> the Commission must, after consultation with the existing organisations, by notice published as prescribed, fix a day (in this Division called the ***amalgamation day***) as the day on which the amalgamation is to take effect."

[164] Apart from the inclusion of references to the Schedule and the WR Act, s.73(2) of Schedule 1B is in the same terms as s.253Q(3) of the WR Act.

[165] The Explanatory Memorandum to the *Workplace Relations (Registration and Accountability of Organisations) Bill 2002* provided in respect of the provision that became s. 73 of Schedule 1B of the WR Act the following:

> **"Clause 73 - Action to be taken after ballot**
>
> 3.151 A proposed amalgamation which is approved takes effect under this clause.
>
> 3.152 Subclause (2) requires the Commission, after consulting the organisations concerned, to fix an `amalgamation day' on which the amalgamation is to take effect. `Amalgamation day' is defined in clause 35. Notice of the day is to be published as prescribed.
>
> 3.153 Under subclause (2), before fixing the amalgamation day, the Commission must be satisfied that:

* the time for applying under clause 69 for an inquiry into alleged ballot irregularities has expired (30 days after declaration of the result of the ballot), or that there are no matters relating to such an inquiry outstanding;

* there are no unresolved criminal proceedings against any organisation concerned in the amalgamation; and

* the proposed amalgamated organisation will regard itself bound by any outstanding obligations under Commonwealth law by an existing organisation."[110]

[166] By amendment to the WR Act brought about by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), s.73(2)(c) became part of Schedule 1 of the WR Act but was not otherwise amended.

[167] A number of provisions of the WR Act made provision for offences that attached criminal liability, including a number of provisions of Schedule 1B and subsequently Schedule 1 to the WR Act.[111] A breach of an award or of a certified agreement was a "civil remedy provisions" and not an "offence" under the WR Act.[112]

[168] Provisions regulating civil proceedings and criminal proceedings that were constituted by substantially the same conduct, evidentiary rules applicable to civil remedy provisions and the admissibility of evidence in criminal proceedings, in terms essentially the same as those discussed earlier in this decision, were to be found in s.729 and ss. 731 – 734 of the WR Act.

[169] The WR Act was repealed by Schedule 1 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). The enactment of the RO Act resulted in Schedule 1 to the WR Act essentially being replicated in the RO Act. Section 73 of the RO Act retained the essential features of its antecedent provision in the WR Act, save for necessary nomenclature changes to take account of changes in institutions and industrial instruments. Section 73(2) has been in its current terms since the RO Act commenced.

[170] Part 1 of Schedule 2 of *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) (RO Amendment Act) amended the RO Act, by including in s. 6 the definition of "proceeding" to which earlier reference has been made. The RO Act did not contain such a definition previously, although s.35 contains a definition of "proceeding to which this Part applies". The WR Act, before its repeal contained in s. 4 a non-exhaustive definition of "proceeding" as including "a proceeding relating to an award modernisation process, while s.35 of Schedule 1 to the WR Act contained a definition of "proceeding to which this part applies" which provided that "in relation to a completed amalgamation, means a proceeding to which a the registered organisation was a party immediately before the amalgamation day".

[171] Section 73(2)(c) was not amended by the RO Amendment Act. The Explanatory memorandum to the *Fair Work (Registered Organisations) Amendment Bill 2014* provides the following in relation to the introduction of the definition of "proceeding":

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[110] Explanatory Memorandum, Workplace Relations (Registration and Accountability of Organisations) Bill 20023.151 – 3.153

[111] For example see *Workplace Relations Act 1996* (Cth) ss 453(6), 486, 491 and 814-823

[112] See *Workplace Relations Act 1996* (Cth) Part 14

> "These items repeal the definition of 'disclosure period' which is no longer required because of the amendments in the Bill and includes definitions for new terms used in the Bill. In particular, item 3 introduces the definition of a 'proceeding' which includes a proceeding in a court or a proceeding or hearing before, or an examination by or before, a tribunal. For the purposes of this definition such a proceeding, hearing or examination may be civil, administrative, criminal, disciplinary or other nature."[113]

[172] I accept that there is nothing elsewhere in the RO Amendment Act or Explanatory Memorandum to suggest that there was any legislative intention to amend, by this indirect route, the meaning and effect which s.73(2)(c) had prior to the inclusion of the definition. Indeed, the Explanatory Memorandum suggests that the relevant definitions which are to be included, are to be introduced "for new terms used in the Bill". The word "proceeding" is used on at least 60 occasions in the RO Amendment Act provisions which are now included in the RO Act, not counting its use in the definition itself. I also accept that there is no evident purpose disclosed that the new definition was intended to derogate that which appears to be a clear distinction that is drawn between civil and criminal proceedings under the RO Act as seems evident from the earlier analysis.

[173] Moreover as McHugh J observed in *Kelly v R*:[114]

> "As I earlier pointed out, the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better - I think the only proper - course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment."[115]

[174] I do not consider that the recently included definition of "proceeding", without clear indications of a parliamentary intention to the contrary, should be applied in a way that sets aside that which appears to be a an established, understood, and historically consistent dichotomy between criminal and civil proceedings. Indeed, there are strong indications in the RO Amendment Act of a continuation of the dichotomy. For example, the RO Amendment Act inserted, *inter alia*, the following provision in the RO Act which appears to continue the established dichotomy:

> "**337AD Self-incrimination**
>
> (1) For the purposes of this Part, it is not a reasonable excuse for a person to refuse or fail:
>
> (a) to give information; or
>
> (b) to produce a document; or
>
> (c) to sign a record;

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[113] Explanatory memorandum to the *Fair Work (Registered Organisations) Amendment Bill 2014* ,134

[114] (2004) 218 CLR 216

[115] Ibid at [103]

in accordance with a requirement made of the person, that the information, producing the document or signing the record might tend to incriminate the person or make the person liable to a penalty.

(2) Subsection (3) applies if:

(a) before:

(i) giving information; or

(ii) producing a document; or

(iii) signing a record;

pursuant to a requirement made under this Part, a person (other than a body corporate) claims that the information, producing the document or signing the record might tend to incriminate the person or make the person liable to a penalty; and

(b) the information, producing the document or signing the record might in fact tend to incriminate the person or make the person so liable.

(3) The information, or the fact that the person has produced the document or signed the record, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty;

other than a proceeding in respect of:

(c) in the case of giving information or producing a document—whether the information or document is false or misleading; or

(d) in the case of signing a record—whether any statement contained in the record is false or misleading."

[175] As I have earlier stated, in construing a statutory provision, regard should be had to the legislative purpose underpinning it. As s.15AA of the AI Act makes clear:

> "In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."

[176] Regard may also be had to extrinsic material when interpreting provisions of a statute,[116] to confirm a meaning that the ordinary meaning of the text conveys taking into account its context in the Act and the purpose or object of the underlying Act, or to determine the meaning of a provision when the provision is ambiguous or obscure or when the ordinary meaning conveyed by the text taking into account its context in the Act and the purpose or object underlying in the Act leads to a result that is manifestly absurd or is unreasonable. The long legislative history of s.73(2)(c) discussed herein seems clearly to show that the bar to fixing a date on which an amalgamation of organisations will take effect, so far as extant proceedings are concerned, was confined to criminal proceedings and that civil penalty proceedings fell within the categorisation of proceedings as civil proceedings.

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[116] *Acts Interpretation Act* 1901(Cth) s 15AB

[177] It is to be remembered that under the IR Act as amended by the IR Amendment Act, contraventions of the IR Act remained criminal matters, punishable by imprisonment or fine or both.[117] The IR Act as amended by the IR Amendment Act also provided that breaches of awards or orders of the Commission could give rise to either a civil proceeding or if wilfully contravened were offence under part XI of the IR Act[118] and so would be the subject of a criminal proceeding. Under that Act it was also an offence to incite a person to boycott an award.[119]

[178] It appears to me based on the review of the legislative history of the provision, that purpose of the amendments to the IR Act made by the IR Amendment Act through the addition of the phrase "other than civil proceedings" was to make clear that the section was concerned only with pending criminal proceedings against organisations participating in the amalgamation that related to, relevantly, contraventions of the Act its predecessor, other Commonwealth laws and breaches of awards or relevant orders.

[179] That the amendments made by IR Amendment Act appear to have been part of a suite of measures that were designed, on the whole, to assist and encourage the amalgamation of organisations, and combined with the repeal of restrictions contained in the former s.249 which may have delayed or frustrated the amalgamation of organisations, also provides support for concluding that the purpose of the legislature in amending the RO Act through the IR Amendment Act was to encourage and streamline amalgamations of organisations. This is because the Scheme established by the IR Amendment Act, has been re-enacted by successive Parliaments in, relevantly, substantially the same terms

[180] That this is the case is, in my opinion, clear from the Explanatory Memorandum to the IR Amendment Bill which relevantly provided:

> "Major amendments made to the Act concern:
>
> …
>
> (e) a new Division dealing with the amalgamation of organisations, and providing speedier and more flexible procedures:
>
> - difficulties in the amalgamation process will be avoided or minimised;
>
> - federations of organisations proposing to amalgamate will be able to seek recognition under the Act and thereby be entitled to represent their constituent organisations for the purposes of the Act.
>
> (f) the insertion of two new objects of the Act:
>
> - to encourage and facilitate the amalgamation of organisations; and
>
> - to encourage and facilitate the development of organisations, particularly by a reduction in the number of organisations that are in an industry or enterprise."[120]

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[117] *Industrial Relations Act 1988* (Cth) ss 314(2), 316, 319 -320

[118] Ibid s 311

[119] Ibid s 312

[120] Explanatory Memorandum, *Industrial Relations Legislation Amendment Bill 1990,* 1-2

[181] The various passages from explanatory memoranda as extrinsic material to which I have referred in this decision provide that requisite satisfaction is as to the absence of any unresolved "criminal proceedings" before fixing the amalgamation date. The passages support a conclusion that Parliament intended the reference to "other than civil proceedings" to include civil penalty proceedings as they are not criminal proceedings. The extrinsic materials also suggest that the amendments, or at least some of them, to the IR Act made by the IR Amendment Act were directed at encouraging and facilitating union amalgamations by avoiding or minimising impediments to amalgamation. Limiting the kinds of proceedings which would prevent the Commission from fixing an amalgamation date may be regarded as consistent with such encouragement or facilitation.

[182] There is nothing in the material which would suggest that successive Parliaments in amending, repealing and re-enacting provisions which since at least 1991 have been to the same effect, intended a different outcome or that the evident purpose of the provisions had altered.

[183] Discerning a legislative intent or purpose of a provision also requires that attention be given to the entirety of the amalgamation scheme introduced by the IR Amendment Act and the way in which each of the discrete provisions operate harmoniously to comprise the amalgamation scheme. When the words "other than civil proceedings" were introduced, the requirements (which had been in ss. 249(2) (d) and (e) of the IR Act) that the amalgamation scheme had made arrangements for assets and liabilities of the deregistering organisation to become the assets and liabilities of the amalgamated organisation and that there were no penalties imposed on the deregistering organisation remaining unpaid were removed.

[184] Sections 253R of the IR Act (now s.74 of the RO Act) and s.253V (now s.79 of the RO Act) were introduced. The enactment of ss. 253R and 253Q together with the removal of the pre-conditions that had been in ss. 249(2) (d) and (e) suggests that the legislature's purpose was that there was no longer a need to impede organisation amalgamations because of outstanding civil proceedings as any civil liabilities would now transfer to the amalgamated organisation by operation of the statute.

[185] I therefore consider that the legislature history, as context, also supports a conclusion that "civil proceedings" in s.73(2)(c) of the RO Act, includes "civil penalty proceedings". It also supports a conclusion that "proceedings" where first appearing in s.73(2)(c) is confined to "criminal proceedings".

[186] I now deal briefly with the amendment earlier noted in the connecting phrase of the operative provision from "in respect of" to "in relation to". The Applicant organisations contend that the amendment was one of importance. They contend that the phrase "in relation to" is of greater width than "in respect of", with the result that a wider range of unlawful conduct would be caught. They say that the words "in relation to" are of broad import and require "*no more than a relationship, whether direct or indirect, between two subject matters*."[121]

[187] The Applicant organisations contend that as a result of the amendment, the proceedings would not necessarily have to be for direct contraventions or breaches of the kind

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[121] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 per McHugh J at 376

described. Rather, the impugned conduct need not itself be a breach of the relevant laws or instruments identified in the provision, but may derive from or encourage such a breach. They contended, for example, that a threat of an assault made to force a breach of an award or agreement (which breach would in itself sound in a civil penalty proceedings) may be criminal conduct in relation to such a breach, within the meaning in s.73(2)(c) though not a breach in itself (though I suspect this would amount also to a contravention, as the person making the threat would be involved in the breach).[122] In this scenario, the organisation's official making the threat could be charged with the crime of assault and the organisation employing the official, pursuant to the doctrine of vicarious liability, could also be held liable for the criminal offence.[123] The Applicant organisations provide a further example in relation to orders under (iii). They say that an organisation's official may threaten assault to force a breach of an order made under s.164 (order to perform and observe rules), or order under s.167 (order that a union accept a person as a member). They contend that the same analysis would apply – a criminal offence in relation to such a breach. They contend that these examples provide an explanation of the type of proceeding that s.73(2)(c) is intended to capture if civil penalty proceedings are to be excluded from s.73(2)(c) and it gives parts (ii) and (iii) "work to do".

[188] The Objectors contend that if s.73(2) of the RO Act is confined in its operation to criminal proceedings then ss.73(2)(c)(ii) and (iii) would have no practical operation. They contended that consistent with authority, the Commission should strive to give every word in s.73(2)(c) effect and so there must be a consideration of whether any other construction would give the words, that the Objectors say would have no effect, some practical effect. They say that this is all the more the case because when the RO Act was enacted, the provisions were updated to reflect instruments under the FW Act, namely a "modern award" and an "enterprise agreement".

[189] I consider that there are two answers to this contention. The first is contained in the summary of the Applicant organisations contentions appearing above. The second is that, whilst the approach to the construction of words in a section of the statute contained in the Objector's submissions is undoubtedly correct, the more accurate position is, as the Applicant organisations point out, more nuanced.

[190] Whilst it is trite that the Courts should strive to give all provisions in a statute purpose and meaning as a general principle of construction, departure from it in some instances will be appropriate. The authorities recognise that the principle is subject to an overriding consideration that it may not be possible to give a full and accurate meaning to every word in a statute.[124] Where this is the case, the task of a court is to construe the words in a manner that produces the greatest harmony and the least inconsistency.[125]

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[122] *Fair Work Act* 2009, s 550

[123] The Applicant organisations point to the fact that the common law principle of vicarious liability and how a Union can be vicariously liable were considered in *Hanley v AFMEP&KIU* (2000) 100 FCR 530. They also cite *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2000] QCA 108

[124] See for example *Brisbane City Council v Attorney-General (Qld)* (1908) 5 CLR 695 at 720 per O'Connor J; *Secretary, Department of Social Security v Rurak* (1990) 26 FCR 1 at 12; *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales* (2004) 60 NSWLR 558 at [74] – [75]; *T v T* (2008) 216 FLR 365 at [82]; *Ajinomoto Co Inc v Nutrasweet Australia Pty Ltd* (2008) 166 FCR 530 at [114]; *Hughes v Hughes* [2013] FamCAFA 146 at [35]

[125] *Australian Alliance Assurance Co Ltd v Attorney-General (Qld)* [1916] St R Qd 135 at 161 per Cooper CJ and *T v T* (2008) 216 FLR 365 at [82]

[191] In appropriate circumstances a court may be prepared to adopt a purposive approach to statutory construction and will "read down" or "read out" words if satisfied that the words appear in a statute inadvertently due to a drafting oversight and must be omitted to avoid absurdity or an irrational result.[126]

[192] I consider that the provisions have some continuing practical utility if the words "civil proceedings" in s.73(a)(c) include "civil remedy" proceedings.

[193] In reliance on the preparedness of the court to adopt a purposive approach to statutory construction and to "read down" or "read out" words in a statute the Applicant organisations also contended that the words in ss. 73(2)(c)(ii) and (iii) can be "read out" out on the basis that they appear in the statute inadvertently. The Applicant organisations rely on the fact that in 1991 when the words "other than civil proceedings" were inserted into the predecessor provision, the statute provided that breaches of awards or order of the Commission could give rise to both civil and criminal proceedings.

[194] As earlier indicated, under the IR Act particular types of breaches of awards or orders of the Commission would give rise to criminal offences. Section 311 of the IR Act provided that a wilful contravention of an award or an order of the Commission was an offence and s.312 provided that inciting a person to boycott an award was an offence.

[195] The Applicant organisations contend that this provides a cogent explanation as to why in 1991, the legislature retained the references to breaches of awards and orders if civil penalty proceedings were intended to fall within the exclusion. They also contended that the legislature retained the reference to awards and orders in the WR Act (and the subsequent statutes) under which breaches of awards no longer could give rise to criminal sanctions, due to an inadvertent drafting oversight.

[196] Whilst there is some attraction to this explanation, it seems to me that I would also need to accept that the inclusion of a "modern award" and an "enterprise agreement" in the provision when the RO Act was enacted was also inadvertent drafting. This may be so, but it seems to me that if words are to be read down or out of the statute, then that is a matter best left to a court. That said, it seems to me that s.73(2)(c)(ii) or (iii) of the RO Act have little if any work to do even if I were to accept that the word "proceedings" where first appearing in s.73(2)(c) includes civil penalty proceedings. This is because a breach of a modern award or enterprise agreement is unlawful conduct because it is a contravention of s.45 of the FW Act in the case of a modern award and s.50 of the FW Act in the case of an enterprise agreement. Provision for these contraventions is already made in s.73(2)(c)(i) of the RO Act. Section 73(2)(c)(ii) therefore appears to have little work to do at all. A similar analysis may be made in respect of breaches of orders made under the RO Act and the FW Act in respect of s.73(2)(c)(iii). Such breaches are contraventions of the RO Act and the FW Act for which provision is already made in s.73(2)(c)(i).

[197] As I have already indicated, I consider that there is some continuing practical utility, as earlier set out, in the provisions if s.73(2) is confined in its operation to criminal proceedings. But even if this be wrong, that is not reason enough to read into the words of the

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[126] See *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 at [37] to [39] per French CJ, Crennan and Bell JJ and at [60] per Gageler and Keane JJ

statute a meaning which is against the weight of judicial authority as to the nature of civil penalty proceedings, and contrary to the meaning of "civil proceedings", the text read in the context of the statute as a whole and the other contextual considerations to which I have earlier referred. One would also need to ignore the entire legislative history of the provision.

[198] In light of the above I consider that the ordinary meaning of the words "civil proceedings" in s.73(2) of the RO Act taking into account the purpose or objects of the legislature as disclosed by the text of the statute, and the context of the statute as a whole in which they appear, include "civil penalty proceedings". This conclusion is also consistent with High Court authority which, as early stated, appears to have settled that such proceedings are civil proceedings. The extrinsic material to which I have referred and given consideration confirms that meaning. To conclude otherwise would require reading into the text words that are not there. Consequently, in my respectful opinion, the scope of inquiry required by s.73(2)(c) is likely to be confined to criminal proceedings of the described kind that are pending against an organisation participating in the amalgamation. However to resolve the issue before me I need not go further than to conclude as I do that "civil proceedings" in s.73(2)(c) includes civil penalty proceedings.

The Contempt Proceeding

1. Background

[199] On 2 February 2018 I reserved my decision on whether to fix an amalgamation day in accordance with s. 73 of the RO Act. By email correspondence to my chambers on 18 February 2018 solicitors for the Objectors alerted me to proceedings that had been commenced or were to be commenced against the MUA in the Supreme Court of Victoria in which Victorian International Containers Terminal Ltd (VICT) an operator of a cargo terminal business located primarily at 78 Webb Dock Drive Port Melbourne in the State of Victoria (the Site) seeking orders that the MUA be punished for its contempt in breaching an order made by Justice McDonald on 12 December 2017 (Contempt Proceeding). The Objectors sought an opportunity to be heard in relation to the proceeding and the implications of the proceeding on my capacity to fix an amalgamation day.

[200] After seeking the views of the Applicant organisations, I determined that it would be appropriate to hear the Objectors and I made directions for the filing of written submissions and fixed a further date to hear oral submissions.

[201] On 1 December 2017 VICT commenced proceedings in the Supreme Court of Victoria by way of writ and indorsement of claim and in which it sought damages, injunctions and costs. The conduct about which complaint is made in the indorsement of claim can be briefly described as the organising, establishment, maintenance and participation in a continuous picket at or in the vicinity of the Site; related watching and besetting, obstructing together constituting the tort of nuisance; the tort of unlawful interference with contractual relations; and unlawful interference with the trade or business of VICT.

[202] Also on 1 December 2017 it appears that VICT succeeded in obtaining an interlocutory order directed to the MUA restraining it, whether by itself, its officials, employees or agents, from preventing or hindering or interfering with the free passage of persons and/or vehicles to and from the Site and from advising, causing, inducing, or

procuring or inciting any person from preventing or hindering or interfering with that free passage.

[203] Further, the MUA, whether by itself, its officials, employees or agents, was restrained by the order from advising, causing, inducing, procuring or inciting any person to attempt to be present within 100 metres of any access point to the Site, subject to some enumerated circumstances in which such presence is permitted or authorised.

[204] On 12 December 2017, Justice McDonald made further orders restraining relevantly the MUA whether by itself, its officials, employees or agents from being present within 100 metres of the Site (described in the order as the "Safe Space") subject to some enumerated circumstances in which such presence was permitted or authorised. Reasons for making the further orders were also published.[127]

[205] In furtherance of the proceeding commenced on 1 December 2017, VICT filed a statement of claim on 27 January 2018 in which it alleges that a consequence of the unlawful picket, nuisance and unlawful interference with its contract, trade and business, it has suffered loss and damage and it seeks substantial damages from, *inter alia* the MUA.

[206] The Contempt Proceeding was initiated by summons filed in the Supreme Court of Victoria on 16 February 2018. The schedule to the summons contains a statement of charges (although it contains only one charge) as follows:

STATEMENT OF CHARGES

> Orders are sought that the first defendant be punished for its contempt in breaching the order of the Honourable Justice McDonald made on Tuesday, 12 December 2017 (the **Order),** as alleged in the charge below.
>
> 1. The first defendant:
>
> (a) acting through its employees or officials, Mr Will Tracey, Mr Christopher Cain and Mr Joseph Italia;
>
> (b) in breach of paragraph 2(i) of the Order; and
>
> (c) at approximately 3:15pm on Thursday, 14 December 2017,
>
> was present within 100 metres of the entrance known as the 11Truck Gate11 to the Victoria International Container Terminal premises at 78 Webb Dock Drive, Port Melbourne, in the State of Victoria.
>
> 2. Summary of contentions

[207] The Objectors contend that as a consequence of the Contempt Proceeding the Commission cannot be satisfied that there are no proceedings pending against any of the existing organisations of the kind prescribed by s.73(2)(c). According to the Objectors, the

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[127] [2017] VSC 762

Contempt Proceeding is not a "civil proceeding" because it is either *sui generis*, or alternatively, because it is a criminal proceeding. The Objectors contended that the Contempt Proceeding, is a proceeding "in relation to" one or more of the matters listed in s.73(2)(c)(i)-(iii) of the RO Act.

[208] The Applicant organisations contend that the issue whether a Contempt Proceeding is a civil proceeding within the meaning of s.73(2)(c) of the RO Act has been authoritatively determined by the High Court with the result that the Court has made it abundantly clear that contempt proceedings are civil proceedings. The Applicant organisations also contended, without conceding that the contempt proceeding at issue is not a civil proceeding, that there is not the requisite connection between the contempt proceeding and the matters set out in s.73(2)(c)(i) – (iii). This is because there is no apparent or obvious connection of the requisite kind between the contempt charge and any one or more of the relevant matters identified in s.73(2)(c)(i)-(iii).

3. The issues requiring determination

[209] As the Court of Appeal in *Grocon*[128] observed, the discourse in the authorities concerning contempt[129] is littered with language which is imprecise and potentially confusing and the application of that language to a particular statutory context is a fraught task, made all the more difficult "where the available statutory choice is between "civil proceedings" and "criminal proceedings" . . . for an offence".[130]

[210] There are two issues that require determination in respect of the Contempt Proceeding and its impact upon my satisfaction as to the absence of any proceeding against an organisation participating in the amalgamation of the kind for which provision is made in s.73(2)(c) of the RO Act. The first is whether the Contempt Proceeding is a "civil proceeding" caught by the exception in s.73(2)(c). Secondly, if the Contempt Proceeding is a "proceeding" is it one that is "in relation to" one or more of the matters enumerated in s.73(2)(c)(i)-(iii)? There is no dispute that the Contempt Proceeding is "pending against" one of the Applicant organisations, namely the MUA.

4. Is the Contempt Proceeding a "civil proceeding" within the meaning of s 73(2)(c)?

[211] The distinction between a civil contempt and a criminal contempt was canvassed at length by the High Court in *Witham v Holloway*[131] (*Witham*). There the High Court said the differences upon which the distinction is based are, in significant respects, illusory.[132] *Witham* was concerned with a finding of contempt in the Supreme Court of New South Wales arrived at by applying the civil standard of proof. On appeal, the New South Wales Court of Appeal accepted that as the contempt was a civil contempt it was sufficient that there be proof of the contempt on the balance of probabilities. The High Court in *Witham* reversed that decision and held that all proceedings for contempt, whether they involve civil or criminal contempt,

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[128] [2014] 47 VR 527

[129] Variously described as an 'offence', 'Fence of a criminal character', 'criminal proceeding', 'criminal prosecution', 'criminal proceedings for an offence' and 'prosecution of an offence'; see CFMEU v Grocon 47 VR 527 at [126]

[130] [2014] 47 VR 527 at [222]

[131] (1995) 183 CLR 525

[132] Ibid at 534

must realistically be seen as criminal in nature and so the contempt had to be proved beyond reasonable doubt.[133]

[212] The plurality (Brennan, Dean, Toohey and Gaudron JJ) discuss the differences as follows:

> "The distinction between civil and criminal contempt is longstanding. It is a distinction that has been recognised in this Court. However, it does seem that the term "civil contempt" has not always been used with enthusiasm.
>
> . . .
>
> The basis of the distinction between civil and criminal contempt is said to lie in the difference between proceedings which are remedial or coercive in the interest of the private individual and proceedings in the public interest to vindicate judicial authority or maintain the integrity of the judicial process.
>
> . . .
>
> The distinction between proceedings in the public interest and those that are coercive or remedial in the interest of the private individual is not, in our view, a satisfactory basis for the distinction usually made between civil and criminal contempt. Even allowing for those orders which, if breached, involve criminal contempt and for contumacious breach, the distinction does not support the general proposition that breach of an order in civil proceedings is a civil contempt. That is because there are some circumstances in which the breach simply cannot be remedied. That can be illustrated by reference to the orders in this case. The order that the appellant not deal with his assets in a way that reduced their value below $200,000 could not be remedied once his assets were reduced in such a way that he was in no position to raise that, or any lesser sum of money, to satisfy the judgment debt. And when the contempt proceedings were commenced, ie after judgment had been entered and the appellant's total inability to satisfy the judgment ascertained, the purpose of the disclosure order could no longer be achieved.
>
> At best, the distinction between proceedings in the public interest and proceedings which are coercive or remedial in the interest of the private individual supports a separate category of civil contempt to the extent that it clearly appears that the proceedings are remedial or coercive in nature. If that approach were to be adopted, it would follow that the contempt alleged in this case should have been classified as criminal, not civil, with the consequence the criminal standard of proof should have been applied. However, in our view, there are fundamental problems even with that approach.
>
> One problem is that there is not a true dichotomy between proceedings in the public interest and proceedings in the interest of the individual. Even when proceedings are taken by the individual to secure the benefit of an order or undertaking that has not been complied with, there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests.
>
> Nor can the dichotomy between proceedings in the public interest and proceedings in the interest of the individual be maintained on the basis that some cases involve an interference with the administration of justice and others merely involve an interference with individual rights. All orders, whether they be Mareva injunctions, injunctions relating to the subject matter of the suit, or, simply, procedural orders, are made in the interests of justice. Non-compliance necessarily constitutes an interference with the administration of justice even if the position can be remedied as between the parties.
>
> Moreover, there is considerable difficulty with the notion that, in some cases, the purpose or object of the proceedings is punitive and, in others, the purpose or object is remedial or coercive. It should at once be noted that the purpose of the proceedings is not the same as the purpose or object of the

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[133] Ibid

> individual bringing the proceedings and it is well recognised that, notwithstanding that proceedings are brought by an individual to secure the benefit of an order or undertaking, a "penal or disciplinary jurisdiction" may also be called into play. It has been held that the "penal or disciplinary" jurisdiction may be exercised even when the parties have settled their differences and do not wish to proceed further.
>
> And as already indicated, proceedings for breach of an order or undertaking have the effect of vindicating judicial authority as well as a remedial or coercive effect. Indeed, if the person in breach refuses to remedy the position, as is not unknown, their only effect will be the vindication of judicial authority. Given that purpose or object cannot readily be disentangled from effect and given, also, that a penal or disciplinary jurisdiction may be called into play in proceedings alleging breach of an order or undertaking, it is necessary to acknowledge, as it was in *Mudginberri*, that punitive and remedial objects are, in the words of Salmon LJ "inextricably intermixed".
>
> Moreover and, perhaps, of more importance, nothing is achieved by describing some proceedings as "punitive" and others as "remedial or coercive". Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines, the usual sanctions for contempt, constitute punishment. And the same is true of a sequestration made in consequence of a company's failure to comply with an order or undertaking."[134] [Footnotes omitted]

[213] The plurality concludes that:

> "The differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory. They certainly do not justify the allocation of different standards of proof for civil and criminal contempt. Rather, the illusory nature of those differences and the fact that the usual outcome of successful proceedings is punishment, no matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch*, that all proceedings for contempt "must realistically be seen as criminal in nature". The consequence is that all charges of contempt must be proved beyond reasonable doubt. The Court of Appeal erred in holding otherwise."[135] [Footnotes omitted]

[214] Significantly however, although proceedings for contempt were criminal in nature, the plurality did not conclude that such proceedings were criminal proceedings. This much I think is clear from the following extract from the judgment:

> "However, to say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge. There are clear procedural differences, the most obvious being that criminal charges ordinarily involve trial by jury, whereas charges of contempt do not. There is no basis, in our view, for importing into the law of contempt the 19th century rules which allowed a verdict of guilty, given in a jury trial, to be quashed on appeal, but did not permit of an order for retrial. Moreover, the issue, so far as contempt is concerned, is not whether there should be a retrial, but whether there should be a rehearing."[136]

[215] In a separate judgment delivered in *Witham* McHugh J said that the case for "abolishing the distinction between civil and criminal contempt's is a strong one".[137] But like the plurarity, McHugh J said that although the principal if not the sole objective of the instant proceedings was to punish the contemnor, "the proceedings were and remain civil and not criminal proceedings for contempt".[138]

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[134] Ibid at 531 – 534

[135] Ibid at 534

[136] Ibid

[137] Ibid at 549

[138] Ibid at 549

[216] In *Louis Vuitton Malletier SA v Design Elegance Pty Ltd*[139] Merkel J summarised the state of the law concerning a contempt of court as follows:

> "Deliberate conduct which is in breach of a court order will constitute wilful disobedience of the order, and therefore a civil contempt, unless the conduct be casual, accidental or unintentional: see *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* [1986] HCA 46; (1986) 161 CLR 98 at 106-107 and 112-113. However, the disobedience will amount to a criminal contempt if it involves "deliberate defiance or, as it is sometimes said, if it is contumacious": see *Witham v Holloway* (1995) 183 CLR 525 at 530. As is apparent from the Statement of Charge, Louis Vuitton is alleging both civil and criminal contempt. However, as all proceedings for contempt are now regarded as criminal in nature, all of the charges must be proved beyond reasonable doubt: see *Witham* at 534."[140]

[217] A Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union and Others v Director, Fair Work Building Industry Inspectorate*[141] (*CFMEU v Director, FWBII*) dealt with an appeal against a refusal by the primary judge to grant an interlocutory application to vacate hearing dates that had been set aside to determine an application by the Director of the Fair Work Building Industry Inspectorate seeking the imposition of pecuniary penalties and related orders against the CFMEU. In separate proceedings in the Supreme Court of Victoria the CFMEU had been convicted of five criminal contempts for conduct between 28 and 31 August 2012 at the Myer Emporium site located at Lonsdale Street, Melbourne. A fine of $1.05 million for the criminal contempts was imposed by the Supreme Court on the CFMEU. At the time of the proceeding before the Full Court, the CFMEU had appealed against the conviction to the Court of Appeal, which had reserved its judgment.

[218] The interlocutory application made by the CFMEU was on the ground that s.553(1) of the FW Act, to which earlier reference has been made and which provides that proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision was stayed if criminal proceedings were commenced or had already commenced against the person for an offence and the offence was constituted by conduct that was substantially the same as the conduct in relation to which the order would be made. Section 553(2) of the FW Act to which earlier reference has also been made, provides that a proceeding for a pecuniary penalty order could be resumed if the person was not convicted of the offence but otherwise the proceedings for pecuniary penalty order were dismissed.

[219] The Full Court held that the contempt charges brought against the CFMEU in the Supreme Court for which it had been convicted were or are criminal proceedings for an offence.[142] Therefore the proceedings against the CFMEU stood dismissed by reason of s.553(2) of the FW Act (pecuniary penalty orders in relation to the conduct that is substantially the same as the conduct the subject of the contempt charges).[143] The Full Court also held that if the CFMEU is subsequently "not convicted" by reason that its appeal to the

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[139] [2006] FCA 83; (2006) 149 FCR 494

[140] Ibid at [6]; 497 – 498

[141] (2014) 225 FCR 210

[142] Ibid at [7]

[143] Ibid

Court of Appeal is upheld and the convictions quashed, the Director may resume that aspect of the proceedings to seek a pecuniary penalty order.[144]

[220] The Full Court said the following about the nature of contempt proceedings:

> "Consistent with what the High Court said in *Witham v Holloway*, the CFMEU was charged with contempt in the SCV: see [12]-[13] above. The Attorney-General was joined as a plaintiff. At least from the time of the joinder of the Attorney-General, the "proceedings [were] in the public interest to vindicate judicial authority or maintain the integrity of the judicial process": *Witham v Holloway* at 531. The proceedings were instituted to punish the CFMEU for failing to obey Court orders. The relief sought was that the CFMEU "be punished for contempt": see [12]-[13] above. Under the *Evidence Act 2008* (Vic), proceedings are civil or criminal. A criminal proceeding is defined in that Act relevantly to mean the prosecution for an offence: sch 2 to the *Evidence Act 2008* (Vic). In the SCV, the CFMEU was prosecuted for an offence (that of contempt) and the SCV proceedings were conducted to the criminal standard: see [15] above and s 141 of the *Evidence Act 2008* (Vic). The CFMEU was convicted of five criminal contempts and was punished for that disobedience by the imposition of fines: see [16] above. The fact that contempt proceedings are, for reasons explained in the authorities, tried summarily and not before a jury is immaterial. So too is the fact that the proceedings were commenced in the civil jurisdiction of the SCV. The fact that different procedures have been adopted for trying contempt charges does not alter the essential characteristic of the proceedings as criminal proceedings. The Director's submission that the contempt proceedings were civil proceedings when commenced because the charge did not plead that the conduct of the CFMEU was deliberate or contumacious should also be rejected. The proceedings were criminal because Grocon and the Attorney-General were seeking convictions and punishment for offences."[145]

[221] It will shortly be seen that the reasoning of the Full Court is no longer likely sustainable in light of the decision in *Construction, Forestry, Mining and Energy Union v Boral resources (Vic) Pty Ltd and Others*[146] (*Boral*).[147]

[222] In the *Grocon* litigation, Grocon had applied in the trial division of the Supreme Court pursuant to rule 75.06(2) of the Supreme Court (General Civil Procedure) Rules 2005 (SC Rules) that the CFMEU had acted in contempt by breaching orders restraining it from preventing, hindering or interfering with free access to, and three axis from the Myer Emporium construction site and another site in Footscray. The trial judge had concluded that all five contempts had been contumacious, thus also determining that the CFMEU was in criminal contempt. This was so even though the charges did not disclose any allegation that the breach of the orders alleged had been contumacious.

[223] In the Court of Appeal one of the issues that required determination was whether contumacy must be pleaded in a charge seeking punishment for contempt, that is, whether the contumacy is an element of a criminal contempt constituted by a breach of court orders and if so whether it must be pleaded in a charge. After an extensive review of relevant authorities,[148] the Court of Appeal held that contumacy is not an element of the offence of criminal contempt when constituted by a breach of court orders and that the usual practice is that contumacy is a circumstance of aggravation which is relevant only to penalty. When

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[144] Ibid

[145] Ibid at [39]

[146] (2015) 256 CLR 375

[147] See also *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA1213, particularly at [30] – [33]

[148] (2014) 47 VR 527 at 584 – 598, [232] – [298]

contumacy is treated in this way it is not necessary for it to be pleaded within the statement of charge.[149]

[224] Relevantly however, the Court of Appeal appears to have accepted that a contempt proceeding is not a criminal proceeding, at least in relation to the *Boral* matter before it, and that the actual status of such proceedings is more complex. So much is clear from the following passages of the judgment:

> "500 As a matter of stare decisis, although not strictly bound by the decision of this Court in CFMEU v Boral Resources (Vic) Pty Ltd, we should, of course, as a matter of comity, accord appropriate weight to the reasoning in that case. There, as we have said, the Court concluded that the Boral proceedings, though capable of being described as 'criminal' in relation to the contempt alleged, did not attract the criminal jurisdiction of the Court. Rather, they were governed by the civil jurisdiction, and the rules ordinarily applicable in that jurisdiction.
>
> 501 Justice Digby accepted that a party charged with criminal contempt might properly be granted dispensation from some parts of the Rules to ensure that that party's rights were adequately protected. In his Honour's view, the appropriate mechanism for safeguarding those rights was the sound exercise of judicial discretion.
>
> 502 It must be remembered, however, that the Boral matter does not concern the rights of an individual. It concerns, instead, allegations of contempt against a legal entity that cannot, in law, claim any privilege in answer to an order for discovery. It is not for this Court to question what the High Court has said in that regard, still less, what the Legislature has, as a matter of policy, chosen to enact.
>
> 503 It does not follow that companies, and other like entities charged with having committed criminal offences are to be treated less fairly, in other respects, than individual accused. Nor does it follow, however, that such bodies have the same entitlement to immunity from discovery that individuals traditionally have had, that entitlement being in part at least based upon the right to invoke the privilege against self-incrimination. In the end, the most potent safeguard against abuse in such cases may well lie in the sound exercise of judicial discretion.
>
> 504 We see no error in Digby J's conclusion that the Associate Justice against whose decision the appeal was brought, was wrong to refuse specific discovery simply on the basis that this was a criminal proceeding, and therefore the Rules had no application. The Boral matter should not have been so characterised. Its actual status was more complex than that. Once her Honour had characterised the matter as she did, it was not at all surprising that she did not go on to consider whether, in the proper exercise of discretion, specific discovery should be ordered. Nonetheless, her failure to have done so meant that the discretion had to be exercised afresh, whether by Digby J, or on remitter. [150] [Footnotes omitted]

[225] In *Boral* proceedings were commenced by summons pursuant to r 75.06 (2) of the SC Rules in the Supreme Court of Victoria against the CFMEU in which it was sought that the CFMEU be punished for contempt. The contempt proceeding alleged that the CFMEU had disobeyed orders made by the Supreme Court on 5 April 2013 by establishing a blockade of a construction site to which Boral supplied concrete. Order 29 of the SC rules made provision in relation to discovery and relevantly provided that the Court may at any stage order any party to make discovery of documents. Boral applied for discovery and an Associate Justice of the Supreme Court dismissed an application by Boral for discovery on the ground that the contempt proceeding was a criminal proceeding to which the SC rules did not apply. A judge of the Supreme Court allowed an appeal against that decision and made an order directed to

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[149] Ibid at 598, [299]

[150] ibid at [500] – [504]

the CFMEU to make discovery of the documents. As is evident from the passages earlier extracted in this decision, the Court of Appeal did not find any error in that decision and refused the CFMEU leave to appeal. In affirming the decision of the Court of Appeal the High Court gave consideration to the nature of a contempt proceeding. In so doing French CJ, Kiefel, Bell, Gageler and Keane JJ observed:

> "To describe the contempt proceeding as "accusatory", in the sense that it charged the appellant with conduct warranting punishment, is not to take the proceedings out of the civil jurisdiction and the purview of the Rules. As Hayne J observed in *Re Colina; Ex parte Torney*, in *Hinch* Mason CJ, Wilson, Deane, Toohey and Gaudron JJ said:
>
> > "Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction".
>
> In *Re Colina; Ex parte Torney*, Hayne J described "the cardinal feature of the power to punish for contempt" as being that it "is an exercise of judicial power *by the courts*, to protect the due administration of justice." In this case, the contempt proceeding arose in the course of the civil proceeding between the Boral parties and the appellant.
>
> The contempt proceeding was commenced and pursued under the Rules, which apply according to their tenor in relation to proceedings in the civil jurisdiction. In *Witham v Holloway*, Brennan, Deane, Toohey and Gaudron JJ considered the distinction made in the authorities between civil and criminal contempt, and concluded that the punitive effect of the usual sanctions for contempt meant the "differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory", and an insufficient justification for the allocation of different standards of proof for civil and criminal contempt. Their Honours went on to say:
>
> > "[T]he illusory nature of those differences and the fact that the usual outcome of successful proceedings is punishment, no matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch*, that all proceedings for contempt 'must realistically be seen as criminal in nature'. The consequence is that all charges of contempt must be proved beyond reasonable doubt."
>
> Their Honours were at pains to make it clear that this statement did not include the proposition that proceedings on a charge of contempt are, or are to be regarded as the equivalent of, a criminal trial. As their Honours said:
>
> > "[T]o say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge. There are clear procedural differences, the most obvious being that criminal charges ordinarily involve trial by jury, whereas charges of contempt do not."
>
> There are other differences in addition to those referred to by their Honours, not the least important of which is that contempt proceedings are initiated, not by the executive government, but by private parties to an indisputably civil proceeding. A party to a civil proceeding who wishes to complain that the other party has breached an order of the court is not in the same position as a prosecuting authority, which can gather evidence by compulsory processes of search and seizure before making a decision to charge the defaulting party with contempt. Further, in the contempt proceeding, the spectre of oppression by the executive government in requiring the accused to assist it in the prosecution of a criminal charge against the accused, especially one launched without adequate investigation by the agents of the state, does not arise. In any case, where an application for discovery in contempt proceedings did give rise to such a concern, the more fundamental concern for the liberty of the subject would be a powerful consideration in the exercise of the discretion whether or not to make an order for discovery.

In *Witham v Holloway*, the plurality expressly noted that the process whereby a contempt proceeding is resolved is a civil "hearing" not a criminal "trial". McHugh J also expressed the view that proceedings for contempt of court to punish a respondent are "civil and not criminal proceedings".

These observations point to a significant deficit in the arguments advanced for the appellant: those arguments do not explain how the contempt proceeding has proceeded as a criminal proceeding without the engagement of any rules of criminal procedure. The progression of the matter through the various levels in the hierarchy of courts was at all times regulated by the laws relating to the civil jurisdiction including the Rules. The companion principle cannot be applied to usurp the authority of the Rules in this regard.

In summary then, it may be accepted that the companion principle is a fundamental aspect of a criminal trial, which is not to be "whittled down" by an expansive interpretation of legislation that is not clear in its intention. But no criminal trial is in prospect here, and so there is no reason why the language of r 29.07(2) should not be applied according to its tenor in the contempt proceeding."[151] [Footnotes omitted]

[226] In a separate but concurring judgment Nettle J observed as follows:

"A proceeding for punishment for contempt constituted by disobedience of an injunction granted in a civil proceeding is not part of the criminal justice system in the sense essayed in *Caltex*, *X7* or *Lee v The Queen*. Although "all proceedings for contempt 'must [now] realistically be seen as criminal in nature'", not all contempts are criminal. Failure to obey an injunction is not a criminal offence unless the failure to comply is defiant or contumacious. A proceeding for contempt is not a proceeding for criminal contempt if the proceeding appears clearly to be remedial or coercive in nature as opposed to punitive. A criminal contempt is a common law offence, albeit not part of the ordinary common law. But even a proceeding for criminal contempt is not a criminal proceeding.

The contempt alleged in this case is a criminal contempt. It is alleged that CFMEU is guilty of wilful and contumacious disobedience of an injunction. The relief which is sought is thus punitive, not coercive or remedial; and, therefore, the proceeding is a penal proceeding. Even so, it is a civil proceeding. It is tried by judge alone and, subject to the qualification explained below, the applicable rules of procedure are the rules of procedure which apply to other civil proceedings.

The qualification is that some of the safeguards applicable to criminal proceedings also apply to a civil proceeding for criminal contempt; including, in the case of a defendant who is a natural person, the privilege against self-incrimination and the privilege against self-exposure to penalty. Their application rests on "accepted notions of elementary justice" and reflects the fact that a proceeding for committal may result in "very serious interference with the liberty of the subject". But they do not prevent CFMEU being ordered to make discovery and give production of particular documents."[152] [Footnotes omitted]

[227] It is to be observed that the contempt proceeding at issue in *Boral* were commenced in the same way as the Contempt Proceeding at issue here. It may be that the Contempt Proceeding results in an ultimate conclusion that the contempt was contumacious, thus a criminal contempt.

[228] It seems to me that the following summary propositions may be discerned from the authorities discussed above. First, although the differences upon which the distinction between civil and criminal contempt are based are in significant respects illusory, the distinction remains. Secondly, all contempt proceedings whether civil or criminal contempt are criminal in nature and the contempt alleged is to be proved beyond reasonable doubt.

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[151] (2015) 256 CLR 375 at [40] – [47]

[152] Ibid at [65] – [67]

Thirdly, a proceeding seeking punishment for contempt by breach or disobedience of a Court order may result in the contemnor being convicted of a criminal offence if the breach or disobedience is contumacious. Fourthly, the question whether to record a criminal conviction for a contempt committed by breach or disobedience of a court order is determined after a breach or disobedience has been established, that is at the "penalty" stage of the proceeding at which time, a criminal conviction may be recorded if the Court concludes that the breach or disobedience was contumacious.

[229] All that said, although proceedings for contempt have variously been described as *sui generis*, quasi criminal, or criminal in nature, having regard to the weight of authority it cannot be said that a contempt proceeding for a breach or disobedience of a Court order, as is the case here, can properly be described as a criminal proceeding. In light of the analysis in *Boral* it must now be accepted that proceedings for contempt brought for breach or disobedience of a Court order whether the disobedience will later be determined as wilful and contumacious or otherwise, is a civil proceeding. Given my earlier rejection of the contention that the purpose or a purpose of s.73(2)(c) of the RO Act is normative and is designed to encourage the setting enforcement of standards, I see no good reason why I should construe the words "civil proceedings" in s.73(2)(c) as excluding the Contempt Proceedings in circumstances where the High Court in *Boral* has described relevantly the same kind of proceeding involving the CFMEU, though for criminal contempt, as nonetheless a civil proceeding. It follows that I am satisfied that the Contempt Proceeding is a civil proceeding and is caught by the exclusionary words "other than civil proceeding" in s.73(2)(c).

[230] Given my conclusion it is unnecessary for me to consider the second aspect of the argument, that is, if the Contempt Proceeding are not civil proceedings caught by the exclusion, whether there is the necessary connection between that proceeding and the contraventions and breaches enumerated in s.73(2)(c)(i) – (iii) of the RO Act. However since the issue was fully ventilated before me I will make the following observations. I consider that it is unlikely to be the case that the Contempt Proceeding will be in relation to one or more of the matters s.73(2)(c)(i) – (iii) unless in the Contempt Proceeding or in the substantive proceeding that gave rise to the order which is said to have been breached or disobeyed, it is alleged as part of the substratum of facts that particular conduct about which complaint is made in one or other of those proceedings is a contravention of an identified Commonwealth law s.73(2)(c)(i) or a breach of a relevant industrial instrument or a relevant order identified in s.73(2)(c)(ii) or (iii). In my opinion it would be insufficient to establish the relevant requisite connection to assert that particular conduct, identified in a writ or statement of claim about which complaint is made might also, for example, constitute a breach of a provision in a Commonwealth law even though no allegation of that kind is actually made. No such allegation that particular conduct is or was a contravention of any Commonwealth law or a breach of a relevant instrument or order of the kind is contained in the summons, the writ or the statement of claim. It is in my respectful opinion not to the point to suggest that some of the identified conduct is capable of constituting a relevant contravention without expressly making that allegation.

[231] Were it necessary for me to do so, I would conclude that if the Contempt Proceeding is not a "civil proceeding" within the meaning of s.73(2)(c) I am not persuaded that the Contempt Proceeding, though pending against the MUA, is "in relation to" any of the matters set out in s.73(2)(c)(i)(iii) of the RO Act.

7. Are there any relevant proceedings (other than civil proceedings) pending against any of the Applicant organisations?

[232] It is uncontroversial and I am satisfied that there are no criminal proceedings (noting the Objector's contention as to the possible character of the Contempt Proceeding – which I have rejected) pending against any of the CFMEU, the MUA or the TCFUA in relation to contraventions of the RO Act, the FW Act, or other Commonwealth laws; or breaches of modern awards or enterprise agreements; or breaches of orders made under the RO Act, the FW Act, or other Commonwealth laws.

[233] As I had earlier noted, the Objectors sought to rely on certain material contained in the first two affidavits.[153] Objection was taken by the Applicant organisations to much of the affidavit material on relevance grounds. Dealing first with the affidavit material to which objection was not taken, having regard to my conclusion as to the proper construction of s.73(2)(c), I do not propose to take that material into account. It is material that goes to pending civil penalty proceedings against the Applicant organisations and is not relevant to any issue about which I must be satisfied under s.73 of the RO Act. The same must be said of the affidavit of Mr Coonan which deals with the Contempt Proceeding.

[234] As to the material to which objection was taken, it deals with the conduct of officials of the Applicant organisations, public statements made by them, and the conduct the Applicant organisations' (and that of various officials), which has been found to have been contravening conduct attracting civil penalties in various civil penalty proceedings, is not relevant to any matter I must determine. I do not take it into account.

[235] That affidavit material does not disclose any criminal proceedings or any other relevant proceedings pending against any of the Applicant organisations.

[236] Therefore, for the reasons stated, I am satisfied that there are no proceedings (other than civil proceedings) pending against the CFMEU, the MUA or the TCFUA in relation to any matter identified in s.73(2)(c)(i)(ii) or (iii) of the RO Act.

What day should be fixed as amalgamation day?

[237] As to the fixing of an amalgamation day, after consulting the Applicant organisations,[154] I intend to fix an amalgamation day by causing to be published a notice as prescribed. The amalgamation day, that is the day on which the amalgamation will take effect, will be 21 days from the date of this decision, namely Tuesday 27 March 2018.

[238] Lest it be said that, by discharging my duties under statute which I am bound to do by my oath of office and by law, I condone any of the conduct for which any of the Applicant organisations or various of their officials have been held to account by the courts, nothing could be further from the truth. On no view can it be said that the conduct is acceptable and judicial officers have, particularly over recent years, been unanimous in the strong and unequivocal language used to describe and condemn some of the conduct.

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[153] Exhibit 19 and 20

[154] Transcript dated 2 February 2018 at PN376 – PN380

[239] But if that is to be a bar to the fixing of an amalgamation day in connection with the amalgamation of organisations under the RO Act, then it is a matter for the Parliament to decide and legislate accordingly. On my reading of the statute it has not thus far done so.

Costs

[240] As foreshadowed in the Applicant organisations' submissions dated 27 February 2018,[155] the Applicant organisations apply for costs in respect of the matters raised by the Objectors in connection with the Contempt Proceeding. If the Applicant organisations propose to press the application foreshadowed they should file and serve an application in accordance with form F6 and confer with the Objectors with a view to reaching agreement on directions for the filing of materials to ensure the efficient and expeditious determination of the application. This should be undertaken within the next 14 days. Absent such an agreement, each party should file with my chambers a proposal for directions within the next 14 days.

Conclusion

[241] For the reasons given above I am satisfied that:

1. The period, or the latest of the periods, within which an application may be made to the Federal Court under s.69 of the RO Act in relation to the amalgamation has ended;

2. There has been no application to the Federal Court under s.69 and so the consideration in s.73(2)(b) does not arise;

3. There are no proceedings (other than civil proceedings) pending against any of the CFMEU, MUA or TCFUA in relation to contraventions of the RO Act, the FW Act, or other Commonwealth laws; or breaches of modern awards or enterprise agreements; or breaches of orders made under the RO Act, the FW Act, or other Commonwealth laws; and

4. Any obligation that the CFMEU, MUA or TCFUA has under a law of the Commonwealth that is not fulfilled by the time the amalgamation takes effect will be regarded by the proposed amalgamated organisation, the CFMMEU, as an obligation it is bound to fulfil under the law concerned.

[242] In furtherance of 4 above the undertaking set out in [20] of the Applicant organisations' outline of submissions dated 25 January 2018 is to be given in writing by 13 March 2018.

[155] Further Outline of Submissions of CFMEU, MUA and TCFUA dated 27 February 2018

[243] I will cause a notice be published as prescribed in which I will fix a day on which the amalgamation is to take effect. That day will be 21 days from the date of this decision, namely Tuesday, 27 March 2018.

DEPUTY PRESIDENT

Appearances:

Mr H Borenstein QC with *Mr Y Bakri* of Counsel for the Construction, Forestry, Mining and Energy Union, The Maritime Union of Australia and the Textile, Clothing and Footwear Union of Australia

Mr S Wood QC with *Mr B Jellis* of Counsel for the Australian Mines and Metals Association and Master Builders Australia

Hearing details:

Melbourne.
2, 28 February.
2018.

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