FEDERAL COURT OF AUSTRALIA

Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union [2018] FCAFC 223

Review of:	*Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWCFB 3710
File number:	QUD 500 of 2018
Judges:	**ALLSOP CJ, GRIFFITHS AND O'CALLAGHAN JJ**
Date of judgment:	14 December 2018
Catchwords:	**INDUSTRIAL LAW** – amalgamation between the Maritime Union of Australia (**MUA**), the Textile, Clothing and Footwear Union of Australia and the Construction, Forestry, Mining and Energy Union (**CFMEU**) to form the Construction, Forestry, Maritime, Mining and Energy Union – where s 73(2) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (***RO Act***) required the Fair Work Commission (**Commission**) to fix an amalgamation day if it is satisfied about each of the matters specified in s 73(2), including that there are no proceedings "other than civil proceedings" pending against any of the existing organisations concerned in the amalgamation (s 73(2)(c)) – where at all relevant times, civil penalty proceedings were pending against the CFMEU and MUA in respect of alleged contraventions of civil remedy provisions in the *Fair Work Act 2009* (Cth) and other Commonwealth statutes – whether the expression "other than civil proceedings" in s 73(2)(c) of the *RO Act* has a meaning which excludes civil penalty proceedings, with the consequence that the Commission could not have had the requisite satisfaction under s 73(2)(c) and therefore had no power to fix an amalgamation day **ADMINISTRATIVE LAW** – where the applicant sought writs of certiorari quashing the decisions of both the Deputy President of the Fair Work Commission and the Full Bench's decision on appeal – whether the Deputy President's decision is amenable to judicial review in circumstances where it has been the subject of an appeal decision by the Full Bench
Legislation:	*Acts Interpretation Act 1901* (Cth), ss 15AA, 15AB *Commonwealth Conciliation and Arbitration Act 1904*

(Cth), ss 44, 45, 49, 119

Conciliation and Arbitration Act 1972 (Cth), s 52

Fair Work (Registered Organisations) Act 2009 (Cth), ss 3, 5, 6, 28, 34, 40, 42, 43, 44, 62, 55, 58, 62, 63, 70, 72, 73, 74, 76, 79, 87, 105, 232, 304, 305, 306, 307, 307A, 308, 310, 315, 316, 329, 337, 338, 377BE

Fair Work (Registered Organisations) Amendment Act 2016 (Cth)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)

Fair Work Act 2009 (Cth), ss 3, 12, 45, 50, 293, 417, 512, 539, 545, 546, 549, 562, 570, 604, 605, 606, 607, 608, 675

Federal Court of Australia Act 1976 (Cth), s 20(1A), 23

Industrial Relations (Consequential Provisions) Act 1988 (Cth)

Industrial Relations Act 1988 (Cth), ss 178, 239, 241, 243, 246, 249, 253Q, 311, 312

Industrial Relations Legislation Amendment Act 1990 (Cth), s 15

Industrial Relations Reform Act 1993 (Cth), s 41

Judiciary Act 1903 (Cth), s 39B

Workplace Relations Act 1996 (Cth), ss 45, 170MW

Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 (Cth)

Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Workplace Relations and Other Legislation Amendment Act 1996 (Cth)

Evidence (Miscellaneous Provisions) Act 1958 (Vic), s 28

Cases cited:

Ajinomoto Company Inc v NutraSweet Australia Pty Ltd [2008] FCAFC 34; 166 FCR 530

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2016] FCAFC 169; 247 FCR 138

Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union [2018] FWCFB 3710

Australian Mines and Metals Association v Construction, Forestry, Mining and Energy Union [2018] FWC 1500

Carr v Western Australia [2007] HCA 47; 232 CLR 138

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd [2003] HCA 49; 216 CLR 161

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; 203 CLR 194

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd [2013] FCAFC 148

Craig v South Australia [1995] HCA 58; 184 CLR 163

Ex parte Hebburn Ltd; Re Kearsley Shire Council (1947) 47 SR (NSW) 416 at 420

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union [2018] FCA 934

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45; 256 CLR 137

Gapes v Commercial Bank of Australia Ltd [1979] FCA 99; 38 FLR 431

General Manager of Fair Work Commission v Thomson [2013] FCA 380

Kirk v Industrial Court of NSW [2010] HCA 1; 239 CLR 531

Medical Board of Australia v Kemp [2018] VSCA 168

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355

R v Connell; Ex parte Hetton Bellbird Collieries Ltd [1944] HCA 42; 69 CLR 407

R v Marks; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation [1981] HCA 33; 147 CLR 471

R v Seller [2013] NSWCCA 42; 273 FLR 155

Re Commonwealth of Australia; Ex parte Marks [2000] HCA 67; 177 ALR 491

Re Construction, Forestry, Mining and Energy Union [2018] FWC 1017

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 91 ALJR 936

Teys Australian Beenleigh Pty Ltd v Australasian Meat Industry Employees Union [2015] FCAFC 11; 230 FCR 565

Thiess Pty Ltd v Industrial Court of NSW [2010] NSWCA 252; 78 NSWLR 94

Toms v Harbour City Ferries Pty Ltd [2015] FCAFC 35; 229 FCR 537

Transport Workers' Union of Australia v Mayne Nickless

Ltd [1998] FCA 1022

Date of hearing:	21 November 2018
Registry:	Queensland
Division:	Fair Work
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	152
Counsel for the Applicant:	Mr S J Wood QC with Mr B Jellis and Mr S E Gladman
Solicitor for the Applicant:	Herbert Smith Freehills
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Solicitor for the First Respondent:	Slater and Gordon Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

QUD 500 of 2018

BETWEEN:	**AUSTRALIAN MINES AND METALS ASSOCIATION INC** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	FAIR WORK COMMISSION Second Respondent
JUDGES:	**ALLSOP CJ, GRIFFITHS AND O'CALLAGHAN JJ**
DATE OF ORDER:	**14 DECEMBER 2018**

THE COURT ORDERS THAT:

1. The originating application dated 20 July 2018 be dismissed.

2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 The principal issue is whether the expression "other than civil proceedings" (the **carve out expression**) in s 73(2)(c) of the *Fair Work (Registered Organisations) Act 2009* (Cth) (***RO Act***) has a meaning which excludes civil penalty proceedings, as contended by the applicant. The applicant's construction was rejected by a Deputy President of the Fair Work Commission (see *Re Construction, Forestry, Mining and Energy Union* [2018] FWC 1017) and also on appeal by the Full Bench of the Fair Work Commission (see *Australian Mines*

and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union [2018] FWCFB 3710). The applicant contends in this judicial review proceeding that the construction of the carve out expression adopted by both the Deputy President and the Full Bench involved jurisdictional error and that both decisions should be quashed.

2 Another issue is whether the Deputy President's decision is amenable to judicial review in circumstances where it has been the subject of an appeal decision by the Full Bench.

3 For the reasons that follow, we are of the view that the Deputy President and Full Bench were correct in their construction of s 73(2)(c) of the *RO Act*.

4 The answer to the problem of statutory construction, in this case, lies in the identification of the relevant informing statutory policy of the relevant provision, divined from an examination of the contextual legislative history of industrial relations laws in Australia. Up to 1990, the relevant legislation had historically distinguished between civil penalties for breach or non-observance of a term of an order or award, and criminal offences for wilfully defaulting in compliance with an order or award. This distinction was recognised when amalgamation of organisations became permitted. Until 1990, it was clear and express that one of the features that might prevent amalgamation was the existence of outstanding criminal **or** civil penalty proceedings against an organisation. In 1990, the relevant phraseology of the carve out expression was introduced and, thereafter from 1990, remained in a similarly structured form. If that new wording and structure could not be seen to be part of any change to the underlying arrangements for amalgamation, there would be much to be said for the principal argument of the applicant that the phrase "civil proceeding" should be given a narrow meaning of proceedings to adjudicate private rights.

5 This approach would see the continuation to the present day of the approach that was pellucid before 1990 that the existence of outstanding civil penalty proceedings against an organisation (as well as criminal proceedings) would prevent amalgamation. When, however, one examines the legitimate statutory contextual material and the terms of the various amendments made in 1990, and not thereafter relevantly altered, one does find a relevant policy to assist in the ascription of meaning to the phrase "civil proceedings" in s 73(2)(c). The policy was to encourage and make easier the process of amalgamation of organisations. The removal of outstanding civil penalty proceedings as a bar to that process was one of the features of the 1990 changes to give effect to that policy. Once one

appreciates that policy in the legislative history, the giving to the phrase "civil proceedings" a simple meaning of non-criminal proceedings becomes clear.

SUMMARY OF BACKGROUND FACTS

6 The core issue of statutory construction arises in respect of an amalgamation between three registered organisations, which took effect on 27 March 2018. The three registered organisations are the Maritime Union of Australia (**MUA**), the Textile, Clothing and Footwear Union of Australia (**TCFUA**) and the Construction, Forestry, Mining and Energy Union (**CFMEU**). Following the amalgamation, the MUA and TCFUA were deregistered and the CFMEU became the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**).

7 The general background to the amalgamation may be summarised as follows. On 20 June 2017, the organisations involved in the proposed amalgamation lodged an application with the Fair Work Commission (the **Commission**) seeking approval to submit the proposed amalgamation to ballot. The CFMEU also applied for an exemption from the requirement to ballot its members.

8 On 31 August 2017, a Deputy President of the Commission approved the submission of the proposed amalgamation to ballot and granted the exemption sought by the CFMEU. The amalgamation was subsequently approved by a ballot of the members of both the MUA and TCFUA.

9 The amalgamating entities asked the Commission to fix the amalgamation day for the amalgamation to take effect pursuant to s 73 of the *RO Act*. The matter was listed for hearing. The applicant in this judicial review proceeding (together with the Masters Builders Australia Limited (**MBA**)) was permitted to appear and make submissions on whether an amalgamation day should be fixed. The applicant (and the MBA) submitted that it should not because there were proceedings pending against the CFMEU and MUA for pecuniary penalties in respect of alleged contraventions of provisions of the *Fair Work Act 2009* (Cth) (***FW Act***) and other Commonwealth statutes and that such proceedings were not included in the carve out expression in s 73(2)(c).

10 As noted above, the Deputy President rejected that construction and proceeded to fix the amalgamation day on the basis that the carve out expression in s 73(2)(c) included

proceedings for a pecuniary penalty. The day fixed as the amalgamation day was 27 March 2018.

11 The applicant (and the MBA) sought permission to appeal the Deputy President's decision to the Full Bench of the Commission. The grounds of appeal all concerned the Deputy President's construction of the carve out expression. The applicant also sought a stay of the amalgamation day in order to preserve the status quo pending the hearing and determination of their application. The Full Bench refused the stay application and gave reasons which are reported as *Australian Mines and Metals Association v Construction, Forestry, Mining and Energy Union* [2018] FWC 1500.

12 On 22 June 2018 (i.e. post 27 March 2018 when the amalgamation came into effect), the Full Bench granted permission to appeal but dismissed the appeal. Although the Full Bench did not explicitly confirm the Deputy President's decision, it is necessarily implicit in the order that the appeal be dismissed that the primary decision was confirmed, as is provided for in s 607(3)(a) of the *FW Act*. The Full Bench published reasons for its decision.

13 The applicant's application for judicial review of both the Deputy President's decision and the Full Bench's decision on the appeal was filed in the Court on 20 July 2018. On the applicant's application, the hearing of the application was expedited on the basis that it was desirable to avoid or minimise any inconvenience or difficulty that might be caused to the parties or third parties in the event that the amalgamation was unwound. The applicant's position was that the amalgamation would need to be unwound if it succeeded in establishing that the decision to fix the amalgamation day was made without jurisdiction, was invalid and should be quashed *ab initio*.

14 The Chief Justice gave a direction under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) that the judicial review application be heard and determined by a Full Court.

RELEVANT PROVISIONS OF *RO ACT* SUMMARISED

15 It is desirable to provide a brief overview of the legislative scheme relating to the amalgamation of registered organisations before setting out the terms of some relevant statutory provisions.

16 As explained in the simplified outline to Ch 3 of the *RO Act* (s 34), the two main elements of the amalgamation procedure are:

(a) an application to the Commission seeking approval for a ballot to be held on the question of amalgamation; and

(b) the holding of a ballot conducted by the Australian Electoral Commission (**AEC**).

17 The amalgamation procedure commences with a "scheme" which must contain *inter alia* a general statement of the nature of the amalgamation and identify the existing organisations involved. Details as to whether one of the existing organisations is the proposed amalgamated organisation and the identity of any proposed de-registering organisation are also required (s 40).

18 The scheme (and each alteration thereof) must be approved, by resolution, by the committee of management of each existing organisation concerned in the amalgamation (s 42).

19 An application for approval must be lodged with the Commission for the submission of the amalgamation to a ballot (s 44(1)). The application for approval must be accompanied by a written outline of the scheme and provide sufficient information to enable members of the existing organisations to make informed decisions in relation to the scheme (ss 44(2) and (3)). The Commission has a power under s 62 to vary these requirements. It may also grant an exemption from the ballot requirement (s 63). The AEC's role in the conduct of a ballot is the subject of Div 4 of Pt 2 of the *RO Act*.

20 The procedure for approving an amalgamation is described in Div 5. Under s 55, the Commission is obliged to approve the submission of the proposed amalgamation to ballot if the Commission is satisfied of the matters specified in s 55(1). Where the Commission grants an approval under s 55, after consulting with the AEC, it must fix the commencing and closing days of the ballot (s 58).

21 If the members of each of the existing organisations concerned in a proposed amalgamation approve the proposal, the amalgamation is approved for the purposes of Pt 2 (s 70).

22 Division 6 of Pt 2 contains various provisions concerning the effect of amalgamation, including s 73, the full terms of which are set out in [25] below.

23 On the amalgamation day, all assets and liabilities of a de-registered organisation cease to be so and become assets and liabilities of the amalgamated organisation (s 74(1)). The provision is set out in [28] below). Other provisions deal with such matters as the effect of

amalgamation on modern awards, orders and enterprise agreements (s 76). The subject of pending proceedings is dealt with in s 79 (the terms of which are set out in [28] below).

24 Part 3 of the *RO Act* deals with withdrawal from an amalgamation.

25 Section 73 of the *RO Act* is at the heart of the proceedings. It relevantly provides (emphasis added):

> **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.
>
> …

26 Section 5 of the *RO Act* is also relevant. It is in the following terms:

> **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.

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.

27 The term "proceeding" is defined in s 6 of the *RO Act* as follows:

"***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.

This definition is explicitly stated to be subject to a contrary intention. The definition was only inserted into the legislation by the *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) (***2016 Act***) with effect from 2 May 2017 (see further [39] below).

28 Sections 74 and 79 of the *RO Act* should also be noted:

74 **Assets and liabilities of de- registered organisation become assets and liabilities of amalgamated organisation**

(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.

…

79 **Pending proceedings**

Where, immediately before the amalgamation day, a proceeding to which this Part applies was pending in a court or before the FWC:

(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.

RELEVANT PROVISIONS OF *FW ACT* SUMMARISED

29 The *RO Act* and the *FW Act* are closely related. The object of the *FW Act* is set out in s 3:

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized

businesses.

30 The establishment and functions of the Commission are set out in Ch 5. The appeals process, which substantially reflects the structure of the appeals process in the former *Workplace Relations Act 1996* (Cth) (***WR Act***), relevantly involves the Full Bench exercising an appellate function under s 604 in respect of a primary decision of the Commission. Relevantly, a person aggrieved by a decision may apply to the Full Bench to seek permission to appeal (s 604). As noted above, the appeal is by way of rehearing and requires the Full Bench to identify some error, whether it be of fact or law, on the part of the primary decision-maker. The President of the Commission may decide to refer a question of law arising in a matter before the Commission for the opinion of the Full Court of this Court (s 608).

31 The Commission is empowered by s 606 to stay the operation of the whole or part of a decision which is the subject of an appeal.

32 It is desirable to set out ss 607(2) and (3), which deal with the Commission's power to admit further evidence on an appeal and the relief which it may also grant (the reference to the "review" is a reference to a review conducted by the Commission as a result of an application by the Minister under s 605):

> **607 Process for appealing or reviewing decisions**
>
> …
>
> (2) The FWC may:
>
> (a) admit further evidence; and
>
> (b) take into account any other information or evidence.
>
> (3) The FWC may do any of the following in relation to the appeal or review:
>
> (a) confirm, quash or vary the decision;
>
> (b) make a further decision in relation to the matter that is the subject of the appeal or review;
>
> (c) refer the matter that is the subject of the appeal or review to an FWC Member (other than an Expert Panel Member) and:
>
> (i) require the FWC Member to deal with the subject matter of the decision; or
>
> (ii) require the FWC Member to act in accordance with the directions of the FWC.

THE REASONS OF THE FULL BENCH SUMMARISED

33 As the Full Bench noted at [3] of its reasons for decision, it was undisputed that, at all relevant times, there were proceedings pending against both the CFMEU and the MUA for pecuniary penalties in respect of alleged contraventions of civil remedy provisions in the *FW Act* and other Commonwealth statutes and that such proceedings were viewed as "civil penalty proceedings". It further noted that the applicant (and the MBA, who were also appellants in the Full Bench proceedings, but are not involved in this judicial review proceeding) contended that such proceedings did not fall within the exclusion of "civil proceedings" in s 73(2)(c), with the consequence that the Commission could not have the requisite satisfaction under that provision and, therefore, had no power to fix an amalgamation day. This construction had been rejected by the Deputy President, for reasons which are summarised in [198] of his reasons for decision:

> [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.

34 On appeal, the Full Bench adopted the same construction as the Deputy President and, with one exception, for substantially similar reasons.

35 It is convenient to summarise the Full Bench's reasons by reference to its response to eight primary submissions which were advanced in the appeal below by the applicant and the MBA (and which are largely repeated in the present proceeding).

36 The Full Bench rejected the submission that ss 73(2)(c)(ii) and (iii) had no practical work to do under the Deputy President's construction because breaches of modern awards, enterprise agreements and orders made under the *RO Act* cannot be the subject of criminal proceedings (the **redundancy argument**, as to which see further below). The Full Bench said at [33] that the proper construction of the carve out expression required a general categorisation of the nature of the proceedings which were pending against the existing organisations and not an

examination of whether in relation to any particular aspect of the proceedings (such as the onus or standard of proof) "some rule or principle derived from or reflective of the criminal law is to be applied". The Full Bench noted that all the pending proceedings against the CFMEU and the MUA were court proceedings for the imposition of civil penalties (with the exception of contempt proceedings against the MUA which were not raised in the appeal). The Full Bench noted and applied the observations of the plurality in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***Civil Penalties Case***) at [24], which the Full Bench described as "authoritatively" stating that proceedings for the institution of a civil penalty under Commonwealth legislation are civil proceedings.

37 The Full Bench found that cases in which civil penalty proceedings had been described as "quasi-criminal" did not assist the contrary construction. Rather, that description only served to confirm that civil penalty proceedings are not criminal, but rather are civil proceedings which do not fall into an intermediate category of proceedings.

38 Having concluded that civil penalty proceedings were "civil proceedings" within the ordinary meaning of that phrase, the Full Bench then explained why it did not accept the appellants' contention that the carve out expression should be given a special meaning by reason of its statutory context or because it allegedly served a normative purpose, namely to ensure that important industrial standards (which included compliance with Commonwealth industrial relations law) were met in order for organisations to be able to amalgamate. It did so by reference to the following four matters:

(a) The Full Bench concluded that s 73(2)(c) sets no standard at all. The Full Bench noted at [38] that the pendency of a proceeding against an organisation said nothing of itself about that organisation's propensity to comply with relevant legislative regulatory regimes. It added that, even if the provision was interpreted as applying to civil penalty proceedings, this would not bar an organisation with an extensive record of contraventions resulting in civil penalties from consummating an amalgamation as long as there were no civil penalty proceedings pending against it when the fixation of an amalgamation day arose for determination.

(b) If a pending proceeding against an organisation for the purpose of s 73(2)(c) is later determined, there would not be any bar to the Commission then fixing an

amalgamation day, even if the proceeding was a criminal one and resulted in a conviction.

(c) If the legislature wanted to establish a standard of conduct as a precondition to amalgamation, it would have done so at the outset or at least prior to the submission of the proposed amalgamation to a ballot, rather than leaving the issue to be addressed at the penultimate stage of the process.

(d) Any logical connection between the progression of an amalgamation process and the enforcement of standards of industrial conduct was "obscure", particularly having regard to the fact that any barrier to the fixation of an amalgamation day could only be temporary and while the relevant proceeding remained pending. The Full Bench agreed with the Deputy President's view that the legislation provided for a remedy where it is considered that an organisation has an unacceptable history of contravening conduct, i.e. by seeking cancellation of its registration under s 28, rather than straining the construction of s 73(2)(c).

39 The Full Bench rejected the contention that the definition of "proceeding" in s 6 of the *RO Act* indicated that there was no strict dichotomy between civil and criminal proceedings in that legislation. The Full Bench agreed with the Deputy President's observation that the proceedings referred to in s 73(2)(c) were "court proceedings", which cannot aptly be described as either "administrative" or "disciplinary". In any event, it added that the labels "administrative" and "disciplinary" cannot aptly be attached to civil penalty proceedings. Consequently, if the exclusion in s 73(2)(c) regarding "other than civil proceedings" means that the provision applies to criminal, administrative and disciplinary proceedings, that does not mean that it applies to civil penalty proceedings. Moreover, the Full Bench agreed with the Deputy President that the definition in s 6 was only introduced by the *2016 Act* and there was nothing to suggest that the Parliament intended to widen the ambit of s 73(2)(c) by the indirect means of introducing this definition and without any direct amendments to the terms of s 73(2)(c) itself.

40 The Full Bench rejected the contention that ss 315 and 316 demonstrated that the *RO Act* distinguished between civil penalty provisions and other "purely" civil proceedings. It noted that ss 315 and 316 are located in Ch 10 of the *RO Act*, which specifically deals with civil penalties. This was viewed as providing direct support for the proposition that proceedings for a civil penalty under the *RO Act* are treated as civil proceedings. This was seen to be

reinforced by the contents of other provisions, such as ss 305(2), 305(4), 306(2), as well as ss 315 and 316 themselves.

41 In further response to the redundancy argument, the Full Bench noted that the argument was founded on the proposition that there are no criminal offences established by the *RO Act*, the *FW Act* or any other Commonwealth statute for breaches of modern awards, enterprise agreements or orders made under the *FW Act*. That proposition was accepted as being correct by the Full Bench. The Full Bench noted that the Deputy President had in [187] and [189] of his reasons for decision identified a residual field of operation for these sub-paragraphs, but the Full Court considered this aspect of the Deputy President's reasoning to be "unpersuasive and unlikely to have been intended by the legislature" (at [41]). This is the only aspect of the Deputy President's reasoning in support of his construction with which the Full Bench disagreed. The Full Bench concluded, however, that if civil remedy proceedings were relevant to the operation of s 73(2)(c) and not included in the exclusion, this would not solve the redundancy argument because, as the Deputy President explained in [196] of his reasons for decision, breaches of a modern award, enterprise agreement or order made under the *FW Act* are actionable only as contraventions of particular provisions of that legislation and are therefore encompassed entirely within sub-paragraph (i) of s 73(2)(c). Accordingly, on any view of the scope of exclusion in s 73(2)(c), the Full Bench regarded sub-paragraphs (ii) and (iii) to be "substantially redundant". The Full Bench attributed this to a failure properly to adapt s 73(2)(c) to changes in enforcement mechanisms in various federal industrial relations statutes over the last three decades.

42 Finally, the Full Bench stated at [42] that the legislative history confirmed that the expression should be given its ordinary meaning. It described the "critical event" in that history as being the enactment of the *Industrial Relations Legislation Amendment Act 1990* (Cth) (***1990 Act***). This amending legislation replaced s 249(2)(c) of the *Industrial Relations Act 1988* (Cth) (***IR Act***) (which had been the earlier equivalent to the current s 73(2)(c) of the *RO Act*) with s 253Q(2)(c) (see further [120(c)-(e)] below). This latter provision included the carve out expression for the first time.

43 The applicable Explanatory Memorandum was described by the Full Bench as making it "absolutely clear" that it was intended that s 253Q(2)(c) only applied to "unresolved criminal proceedings against any organisation concerned in the amalgamation". The Full Bench viewed this unequivocal reference as confirming that the ordinary meaning of "civil

proceedings" was intended, with the consequence that "civil proceedings" in the carve out expression meant all proceedings other than criminal proceedings.

44 The Full Bench stated at [43] that it was not essential for the purposes of determining the appeal to conclude that the inclusion of the carve out expression in s 253Q(2)(c) was linked to the enactment in the *IR Act* of ss 253R and 253V as introduced by s 15 of the *1990 Act* (the precursors to ss 74 and 79 of the *RO Act* respectively).

THE JUDICIAL REVIEW PROCEEDING

45 The originating application was said to be based upon the Court's jurisdiction under s 562 of the *FW Act* and/or s 338 of the *RO Act*, as well as s 23 of the *FCA Act* and/or s 87 of the *RO Act*. In his reply address, senior counsel for the applicant said that his client also relied upon s 39B of the *Judiciary Act 1903* (Cth). It is desirable to set out the relief sought by the applicant which, as noted above, is not confined to the Full Bench's decision dated 22 June 2018, but also relates to the Deputy President's decision dated 6 March 2018 (emphasis in original):

> 1. A writ of certiorari issue to the Second Respondent removing into this Court and quashing the Second Respondent's decision dated 6 March 2018 in matter number D2017/5 to fix a day as the day on which the amalgamation is to take effect, purportedly pursuant to s 73 of the RO Act (**Amalgamation Day Decision**).
>
> 2. A writ of certiorari issue to the Second Respondent removing into this Court and quashing the Second Respondent's decision dated 22 June 2018 in matter number C2018/1245 to dismiss the Applicant's appeal from the Amalgamation Day Decision.
>
> 3. A writ of mandamus issue to the Second Respondent requiring it to hear and determine the Applicant's appeal from Amalgamation Day Decision in accordance with law.
>
> 4. Further or alternatively, to paragraph 3 above, a writ of mandamus issue to the Second Respondent requiring it to decide, pursuant to s 73 of the RO Act, whether to fix a day as the day on which the amalgamation is to take effect in accordance with law.
>
> 5. A declaration that the Amalgamation Day Decision is invalid and void ab initio.
>
> 6. Consequential orders to unwind the amalgamation, including orders to amend the register of organisations kept pursuant to s 13(1) of the RO Act.
>
> 7. Such further or other orders as the Court thinks fit.

THE PARTIES' SUBMISSIONS SUMMARISED

46 The applicant's submissions in support of its preferred construction of the expression were substantially similar to those which it advanced unsuccessfully before the Full Bench. In those circumstances, it would be unduly repetitive to restate those submissions at any length. In brief, however, the eight primary submissions put by the applicant may be summarised as follows.

47 First, it repeated its contention that the effect of adopting the construction favoured by both the Deputy President and the Full Bench was to render sub-paragraphs (i), (ii) and (iii) of s 73(2)(c) redundant either in whole or in part.

48 Secondly, it contended that the Full Bench had concluded at [42] of its reasons for decision that the term "proceedings (other than civil proceedings)" was synonymous with "criminal proceedings" and that if the Parliament had intended the criteria in s 73(2)(c) to capture only criminal proceedings, direct wording to that effect would have been used.

49 Thirdly, the applicant contended that the Full Bench's reasoning was predicated on an incorrect assumption that the Parliament must have intended to employ "a simple dichotomy between civil and criminal proceedings".

50 Fourthly, the applicant challenged the Full Bench's reasons for rejecting the relevance of the definition of "proceeding" in s 6 of the *RO Act*.

51 Fifthly, the applicant contended that the Full Bench erred in not identifying any purpose of s 73(2)(c). Implicit in this submission was the applicant's reliance upon the provision having a "normative purpose".

52 Sixthly, in support of its contentions concerning the importance of context and purpose in statutory construction, the applicant relied upon a recent decision of the Victorian Court of Appeal in *Medical Board of Australia v Kemp* [2018] VSCA 168 (***Kemp***).

53 Seventhly, the applicant challenged the correctness of the Full Bench's reliance upon the High Court's decisions in the *Civil Penalties Case* and *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45; 256 CLR 137.

54 Eighthly, the applicant challenged the Full Bench's reliance upon the Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 1990* (Cth) (***1990 Bill***).

55 It is unnecessary to summarise the CFMMEU's submissions as they are substantially reflected in the reasons below for dismissing the judicial review application, other than to describe one preliminary matter which is raised by the CFMMEU. The CFMMEU contended that any errors relating to the proper construction of s 73(2)(c) of the *RO Act* are errors within jurisdiction, citing *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 (***Coal and Allied***) at [30] per Gleeson CJ, Gaudron and Hayne JJ. The CFMMEU's preliminary point was that the errors of construction raised by the applicant, even if established, do not constitute jurisdictional error such as to support the relief they seek.

CONSIDERATION AND DISPOSITION OF JUDICIAL REVIEW APPLICATION

56 The applicant's standing to bring the proceeding is not contested. The following three matters do, however, require determination:

(a) whether or not the Deputy President's decision is now amenable to judicial review;

(b) the CFMMEU's preliminary point that any error of misconstruction, even if established, would not be a jurisdictional error; and

(c) the core issue, namely the proper construction of s 73(2)(c) of the *RO Act*.

(a) Is the Deputy President's decision now amenable to judicial review?

57 Before turning to the other two issues, it is convenient to explain why the applicant's attempt to have this Court review not only the Full Bench's decision dated 22 June 2018, but also the Deputy President's decision dated 6 March 2018, is misguided unless the applicant succeeds in establishing jurisdictional error on the part of the Full Bench.

58 An appeal under s 604 of the *FW Act* is an appeal by way of rehearing (see *Coal and Allied* at [13] and [17] per Gleeson CJ, Gaudron and Hayne JJ, whose reasoning, although directed to s 45 of the *Workplace Relations Act 1996* (Cth) (***WR Act***), applies equally to s 604 of the *FW Act*). The relief which may be granted in such an appeal is set out in s 607(3). It includes the power to confirm, quash or vary the decision the subject of the appeal, or to make a further decision in relation to the matter that is the subject of the appeal. In the present case, the Full Bench formally dismissed the appeal from the Deputy President's decision and thereby implicitly confirmed that decision. That does not mean, however, that as matters stand at present, the Deputy President's decision itself continues to be operative in a legal sense and is now amenable to judicial review, together with the Full Bench's subsequent decision.

59 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 169; 247 FCR 138 (***ABCC***), the Full Court acknowledged at [37] that it was theoretically arguable that there could be two decisions, in the circumstances of that case, both having continuing legal effect and being liable to be quashed. It is important to note, however, that the two decisions there were (a) a primary decision of the Commission to issue an entry permit to a person under s 512 of the *FW Act*, and (b) a decision by the Full Bench which refused permission to appeal the primary decision. As the Full Court noted in *ABCC* at [39], where permission to appeal is granted and a substantive appeal follows, the usual relief granted by the Full Bench is to confirm the primary decision, or replace it in some relevant way. Accordingly, the decision of the Commission then having operative effect will be the Full Bench decision on appeal, even if it operates by affirming the first instance decision the subject of the appeal. At [45], the Full Court stated that, because the Full Bench had refused permission to appeal, there was no appellate decision which is conclusive and operative as opposed to the interlocutory decision to refuse permission to appeal.

60 In *ABCC*, the Full Court noted at [40] that there had been some "controversy" about this issue, referring to the different views expressed in two cited cases. In *Transport Workers' Union of Australia v Mayne Nickless Ltd* [1998] FCA 1022, the Full Court held that certiorari should go to quash a primary decision of the Commission in circumstances where it considered that the Full Bench's subsequent decision on appeal was dependent upon the primary decision. This was contrasted with what Katzmann and Rangiah JJ said in their joint judgment in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 at [165]-[176].

61 The "controversy" need only be explored in greater depth in this case if the applicant establishes jurisdictional error on the part of the Full Bench. That is because there is an appellate decision of the Full Bench here which is *prima facie* conclusive and operative. The Full Bench dismissed the appeal from the Deputy President's decision. The necessary effect of that order was to confirm the Deputy President's decision dated 6 March 2018 that the amalgamation day be fixed as 27 March 2018. In order to give effect to the statutory regime under the *FW Act*, the Full Bench's confirmation of the Deputy President's decision operated *ab initio* so as to maintain that date as the amalgamation day, particularly in circumstances where an application to stay the Deputy President's decision had been refused.

62 An analogy can be drawn with the circumstances in *Teys Australian Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 11; 230 FCR 565. There, Buchanan J (with whom Katzmann J agreed) held that, where the Full Bench quashed a decision under s 607(3)(a), the *FW Act* itself had the consequence that a 2013 Agreement, which had been approved by a Deputy President, could not be considered to have commenced operation or later ceased operation. These consequences flowed from the operation of the relevant statutory regime itself. Accordingly, as Buchanan J said at [108], it was unnecessary to determine whether or not "the innate character of an order to 'quash' a decision under s 607(3)(a) of the FW Act carries the necessary consequence that the decision is set aside ab initio, or may be set aside from some later time" (Logan J's dissenting view is set out at [142]-[146]).

63 It is clear that the applicant here made a considered decision to appeal the Deputy President's decision, rather than seek judicial review. This is evident from the terms of its notice of appeal dated 8 March 2018. That document discloses the applicant's position at that time was that the appeal "involves only a narrow question of statutory construction", and that the grounds of appeal "… concern a jurisdictional error, which would be amenable to judicial review and so there is a public interest in having the alleged error properly ventilated before the Full Bench **rather than going directly to Court**" (emphasis added).

64 For these reasons, the issue whether or not the Deputy President's decision dated 6 March 2018 is no longer amenable to judicial review turns on whether the currently operative decision of the Full Bench is set aside for jurisdictional error. If that decision were set aside for jurisdictional error, it would also be necessary to set aside the Deputy President's decision as it would be infected by the same jurisdictional error of misconstruction (see, by analogy, *Kirk v Industrial Court of NSW* [2010] HCA 1; 239 CLR 531 at [108]; *R v Marks; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* [1981] HCA 33; 147 CLR 471 at 476 per Mason J and *Thiess Pty Ltd v Industrial Court of NSW* [2010] NSWCA 252; 78 NSWLR 94 at [74] per Spigelman CJ (with whom Beazley JA agreed) and at [84] per Basten JA).

65 If the Full Bench's decision is not affected by jurisdictional error, the Deputy President's decision cannot revive and be the subject of separate constitutional writ review.

(b) The CFMMEU's preliminary point alleging no jurisdictional error

66 It is convenient to next address the CFMMEU's preliminary point that any error of construction as alleged by the applicant would not give rise to jurisdictional error. For the following reasons, this submission is rejected.

67 First, the passage relied upon by the CFMMEU from *Coal and Allied* (i.e. at [30]) is directed to a different issue, namely whether or not the Full Bench in that case had misconceived the role of the Commission under s 170MW of the *WR Act*. The Commission had a discretion under that provision to suspend or terminate a bargaining period but only if the Commission was satisfied as to one of the circumstances specified in that provision. The plurality stated at [30] that, if the Full Bench misconceived the role of the Commission under s 170MW, that would not constitute jurisdictional error on the part of the Full Bench.

68 Secondly, of more relevance, is what the plurality then said in *Coal and Allied* at [31] (footnotes omitted, emphasis added):

> 31 There would only have been jurisdictional error on the part of the Full Bench if it had misconceived its role or if, in terms used by Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council*, it "misunder[stood] the nature of [its] jurisdiction ... or 'misconceive[d] its duty' or '[failed] to apply itself to the question which [s 45 of the Act] prescribes'… **or '[misunderstood] the nature of the opinion which it [was] to form**'". The Full Bench did none of those things.

69 In oral address, senior counsel for the CFMMEU submitted that this passage also supported the CFMMEU's preliminary point because it should be read as being directed only to some misunderstanding of the appellate function of the Full Bench and not to misunderstandings which occur in the course of discharging that appellate function. Reliance was also placed on *Re Commonwealth of Australia; Ex parte Marks* [2000] HCA 67; 177 ALR 491 (***Marks***) at [21] and [23]-[24] per McHugh J and *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35; 229 FCR 537 (***Toms***) at [51], [55] and [59] per Buchanan J (with whom Allsop CJ and Siopis J agreed).

70 None of those authorities supports the *CFMMEU's* preliminary point which is to the effect that, for the Full Bench to fall into jurisdictional error, the relevant error had to relate in some way to a misunderstanding of the nature and scope of its appellate jurisdiction and not, for example, a misconstruction by the Full Bench of a relevant statutory provision in the performance of that appellate function. The CFMMEU's contention is based on a narrow and selective reading of what the plurality said in *Coal and Allied* at [31] (the full terms of which

are set out in [68] above). The emphasised words in that passage demonstrate that the Full Bench can commit jurisdictional error, not only if it misunderstands the nature and scope of its appellate role (which is now set out in s 604 of the *FW Act*), but also if it misunderstands (or misconstrues) the nature of an opinion which it has to form in discharging that appellate function. This is borne out by reference to the full statement of principle enunciated by Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 (footnotes omitted):

> …I quite agree that the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction: *R. v. Minister of Health*. But there are mistakes and mistakes; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply "a wrong and inadmissible test": *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*; or to "misconceive its duty," or "not to apply itself to the question which the law prescribes"; *The King v. War Pensions Entitlement Appeal Tribunal*; or "to misunderstand the nature of the opinion which it is to form": *The King v. Connell*, in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law: *R. v. Board of Education*.

71 The emphasised words in [31] of *Coal and Allied* are derived from what Latham CJ said in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407 at 432 (to which Jordan CJ also referred) (emphasis added):

> It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he is to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorized to deal. It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. **What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed.** In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

72 Neither *Marks* nor *Toms* supports the CFMMEU's position. *Marks* involved a belated attempt to obtain prerogative writ relief in the High Court against a decision of the Full Bench of the Australian Industrial Relations Commission which refused an application for

leave to appeal from a decision of a Commissioner. Justice McHugh refused to extend time to enable the applicant to apply for prerogative writ relief, primarily on the basis of the applicant's delay in bringing the proceeding more than 12 months after the Full Bench had refused leave to appeal. His Honour also explained why none of the applicant's proposed grounds for constitutional writ relief had prospects. His Honour stated at [21] that, for the most part, those grounds challenged the merits of the decisions of both the Commissioner and the Full Bench. The applicant did not contend that there had been a misconstruction of any statutory provision which affected any opinion which had to be formed under the relevant statutory regime. The position is very different here.

73 *Toms* does not assist the CFMMEU's preliminary point. Reference was made in *Toms* at [48] to the "basic test" for jurisdictional error by an administrative tribunal being that stated by the High Court in *Craig v South Australia* [1995] HCA 58; 184 CLR 163 (***Craig***) at 179. An administrative tribunal commits jurisdictional error when it "falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question… and the tribunal's exercise or purported exercise of power is thereby affected". Nothing was said by Buchanan J in *Toms* with reference to *Coal and Allied* and the cases referred to therein which casts any doubt on the continuing relevance and authority of that basic test in *Craig*. It is inconsistent with the CFMMEU's preliminary point.

74 Applying those principles to the circumstances here, the relevant issue for the Full Bench was whether the Deputy President had misconstrued s 73(2)(c) in finding that, for the purposes of that provision, he was satisfied that there were no proceedings (other than civil proceedings) pending against any of the entities concerned in the proposed amalgamation. This required the Full Bench, in discharging its appellate function, to construe the meaning of the carve out expression in the provision in order to ensure that the requisite state of satisfaction (or opinion) was not based on a misconstruction of that provision. If the Full Bench's decision to dismiss the appeal was predicated on a misconstruction of that provision, this would give rise to jurisdictional error. That is because the misconstruction would involve a misunderstanding of the nature of the opinion which it had to form, as referred to in the emphasised part of [31] of *Coal and Allied*.

75 For these reasons, the CFMMEU's preliminary point is rejected.

(c) The proper construction of s 73(2)(c) of the RO Act

(i) Some general observations on statutory construction

76 The plurality in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 91 ALJR 936 (***SZTAL***) (Kiefel CJ, Nettle and Gordon JJ) provided a helpful and succinct description of the contemporary approach to statutory construction at [14] (footnotes omitted):

> 14. 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.

77 The following observations of Gageler J in *SZTAL* at [37]-[39] are also important (footnotes omitted):

> 37. … 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".
>
> 38. The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies".
>
> 39. Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth 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" "is in that respect a particular statutory reflection of a general systemic principle".

78 The task of statutory construction can be assisted by a wide range of more specific principles of statutory construction, many of which have been developed by the courts, while others are now expressed in legislation such as the *Acts Interpretation Act 1901* (Cth) (the ***AIA***), including ss 15AA and 15AB. Some caution is required in selecting and applying the non-statutory or common law principles. They are not inflexible rules and their application in

particular circumstances can be nuanced. Moreover, there can be tension between some of the principles. They are not masters, but should be viewed as servants and tools of analysis in the task of statutory construction.

79 One of the matters which the plurality and Gageler J highlighted in *SZTAL* is the importance of a purposive approach. Such an approach is also required by s 15AA of the *AIA*. It requires the Court, in interpreting a provision of an Act, to prefer an 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) over any other interpretation. That requirement is uncontroversial. In some instances, difficulties can arise in identifying the relevant purpose or object. This is frequently the case, for example, with legislation which reflects the Parliament's balancing of competing and conflicting interests or where the legislation has more than one purpose.

80 Where there is more than a single legislative purpose, it may be difficult to identify which, if any, of the overarching legislative purposes is apposite to an individual provision. These and other related difficulties were highlighted by Gleeson CJ in *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 (***Carr***) at [5] (footnotes omitted):

> 5. Another general consideration relevant to statutory construction is one to which I referred in *Nicholls v The Queen*. It was also discussed, in relation to a similar legislative scheme, in *Kelly v The Queen*. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) ("the Acts Interpretation Act"). It is also required by corresponding State legislation, including, so far as presently relevant, s 18 of the *Interpretation Act 1984* (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

81 These kinds of difficulties and challenges are well illustrated in construing s 73(2)(c) of the *RO Act*.

82 There are multiple underlying purposes or objects of the *RO Act* as a whole, some of which are reflected in the statement of the Parliament's intention in s 5. The full text of s 5 is set out in [26] above. It is made clear there that there is no single Parliamentary intention underlying the enactment of the *RO Act*. The intentions are diverse and include enhancing workplace relations and reducing the adverse effects of industrial disputation; the setting of standards which are intended to give effect to those two intentions; and to assist employees and employers to promote and protect their economic and social interests by providing for the registration of employee and employer organisations and according them certain rights and privileges. There is no specific objects provision for Ch 3, in which s 73(2)(c) is located.

83 The challenges which can arise in applying a purposive approach to the construction of s 73(2)(c) are further compounded by the interrelationship between the *RO Act* and the *FW Act.* The interaction between these pieces of legislation is explicitly acknowledged in the Note to s 5 of the *RO Act* (see [26] above). The *FW Act* contains an object provision in s 3 (the full terms of which are set out in [29] above). It is notable that the object provision itself explicitly acknowledges that the legislation reflects "a **balanced framework** for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians" in various specified ways (emphasis added).

84 While acknowledging these difficulties, the primary relevant purpose of s 73(2)(c) becomes apparent when regard is had to the legislative history surrounding the enactment in 1990 of the precursor to that provision, together with some parts of the associated extrinsic material. These matters are developed below (see [120]ff).

85 Some other potentially relevant principles of statutory construction are set out in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355. They may be summarised as follows. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute ([69]). The object is to construe all the provisions so as to give effect to harmonious goals. Where conflict exists, it must be alleviated, as far as possible, "by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions". This may require determining the hierarchy of the provisions and to identify the leading and subordinate provision, with the former prevailing ([70]). The Court must **strive** to give meaning to every word of the provision ([71]).

86 It has been recognised that, in some instances, it may not be possible to give a sensible meaning or operation to every word. Thus, for example, in *Ajinomoto Company Inc v NutraSweet Australia Pty Ltd* [2008] FCAFC 34; 166 FCR 530, Black CJ, Sundberg and Weinberg JJ acknowledged at [114] that all words must, prima facie, be given some meaning and effect, but that this general principle was "subject to the overriding consideration that it may be impossible to give a full and accurate meaning to every word. In such cases it is the duty of the court to give the words the construction that produces the greatest harmony and the least inconsistency".

(ii) The proper construction of s 73(2)(c)

87 Returning now to the general statements in *SZTAL* at [14], it is important to focus on the text of s 73(2)(c), whilst also taking into account at the same time relevant context and purpose (as best the latter may be ascertained and understood). We consider that the ordinary meaning of the expression "other than civil proceedings" in s 73(2)(c) is a reference to proceedings which are civil in nature and character, which includes proceedings seeking a civil penalty or remedy. The expression does not include proceedings in relation to a criminal offence.

88 In expressing that view, it is not suggested that there is necessarily a clear binary distinction between civil and criminal proceedings. It is well established that the position is far more nuanced (see, for example, *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [2003] HCA 49; 216 CLR 161 at [114] per Hayne J (with whom Gleeson CJ and McHugh J agreed) and the observations of Keane J in the *Civil Penalties Case* at [89]).

89 For reasons which will be developed below, this ordinary meaning of the carve out expression in s 73(2)(c) is supported by considerations of context and purpose. An important part of that context is the history of industrial relations legislation in Australia and the dichotomy which has traditionally been drawn between, on the one hand, proceedings in relation to a contravention of a criminal offence provision and, on the other hand, proceedings of a civil nature, which includes proceedings for the recovery of pecuniary penalties for a breach of an industrial award. The dichotomy is well illustrated by the Full Court's decision in *Gapes v Commercial Bank of Australia Ltd* [1979] FCA 99; 38 FLR 431 (***Gapes***) (see further at [120(a)] below).

90 The dichotomy was well recognised when the carve out expression was first inserted in Australia's industrial relations legislation in 1990 (again, see further [120(e)] below). It is

also reflected in relevant provisions of both the *RO Act* and the *FW Act*, to which we now turn.

(A) The RO Act

91 Chapter 10 of the *RO Act* deals with the subject of "Civil penalties". The simplified outline in s 304 explains that Ch 10 provides for civil penalties where specified provisions are contravened. The simplified outline also explains that the orders that may be made where a contravention has occurred are set out in Ch 10. Finally, it explains that the relationship with criminal proceedings arising out of the same conduct is also set out in Ch 10.

92 The *RO Act* uses the phrase "civil penalty provision", as opposed to the phrase "civil remedy provision", which is used in the *FW Act*.

93 "Civil penalty provision" has the meaning given by s 305(2). It provides that a "civil penalty provision" is a statutory provision that has set out at its foot a pecuniary penalty, or penalties, indicated by the words "Civil penalty". The Federal Court is empowered by s 306 to impose a pecuniary penalty on a person or organisation whose conduct has contravened a civil penalty provision. In the case of a contravention by a body corporate, the maximum penalty is five times the pecuniary penalty specified for the civil penalty provision and, in any other case, the pecuniary penalty is that specified for the civil penalty provision.

94 Part 2 of Ch 10 is headed "Civil consequences of contravening civil penalty provisions". It is provided in s 305(1) that, subject to Pt 2, an application may be made to the Federal Court for orders under ss 306, 307 and 308 in respect of conduct in contravention of a civil penalty provision. As noted above, the Court is empowered to make pecuniary penalty orders under s 306.

95 The Federal Court is empowered by s 307 to make an order that a person compensate an organisation in relation to damage resulting from a contravention of a civil penalty provision in Pt 2 of Ch 9.

96 The Federal Court is empowered by s 307A to make an order disqualifying a person from holding office in an organisation for a period that the Court considers appropriate if the person has contravened a civil penalty provision and the Court is satisfied that the disqualification is justified.

97 Section 308 empowers the Federal Court to make such other order as it considers appropriate in all the circumstances of the case, including injunctive and interim injunctive relief.

98 The persons who may apply for an order under Pt 2 of Ch 10 are set out in s 310. Apart from an order relating to a directions contravention (see the definition in s 6), the Commissioner or a person authorised by the Commissioner, and the General Manager or a person authorised by the General Manager, may make an application under Pt 2 (s 310(1)). An order under Pt 2 relating to a directions contravention may only be sought by the Minister or a person authorised by the Minister (s 310(2)).

99 The civil penalty provisions in the *RO Act* are broadly consistent with other Commonwealth statutory regimes which contain such provisions. The key features of such regimes were described by the plurality in the *Civil Penalties Case* at [24]:

> 24. 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.

100 Section 311 of the *RO Act*, which is headed "Civil proceedings after criminal proceedings", provides that the Federal Court must not make a pecuniary penalty order against a person or organisation for a contravention if the person or organisation has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. Various offences are created by the *RO Act* (see, for example, ss 72, 105, 232, 337 and 377BE), but there is no reason to limit the operation of the provisions in Pt 2 of Ch 10 to such offences alone. It appears that the provisions apply to criminal proceedings in relation to any offence (see generally *General Manager of Fair Work Commission v Thomson* [2013] FCA 380 per Jessup J).

101 There are also provisions in the *RO Act* which deal with the staying of proceedings for a pecuniary penalty where criminal proceedings are on foot (s 312) and the bringing of criminal

proceedings after orders have been made under Pt 2 of Ch 10 of the *RO Act* for conduct that is substantially the same (s 313).

102 Part 2 of Ch 10 also contains provisions which provide for relief from liability for contravention of a civil penalty provision (s 315) and relief from civil proceedings against an officer of an organisation for negligence, default, breach of trust or breach of duty (s 316). These provisions make clear that civil proceedings include not only any proceedings in relation to the contravention of a civil penalty provision, but also civil proceedings in respect of established causes of action such as negligence and breach of trust.

(B) The FW Act

103 The phrase "civil remedy provision" is used extensively throughout the *FW Act*. It is defined in s 12 thereof by reference to ss 539(1) and (3). The latter provisions are in Pt 4-1 of Ch 4 of the *FW Act*. Chapter 4 is headed "Compliance and Enforcement". Part 4-1 is headed "Civil Remedies". A Guide to Pt 4-1 is provided in s 537:

> **Guide to this Part**
>
> This Part is about civil remedies. Certain provisions in this Act impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these civil remedy provisions.
>
> Division 3 sets out when proceedings relating to a contravention of a civil remedy provision may be dealt with as small claims proceedings.
>
> Division 4 deals with general provisions relating to civil remedies, including rules about evidence and procedure.
>
> Division 4A imposes obligations on responsible franchisor entities in relation to certain contraventions of civil remedy provisions by franchisee entities and on holding companies in relation to certain contraventions of civil remedy provisions by subsidiaries.
>
> Division 5 deals with unclaimed money.

104 Section 539 deals with applications for orders in relation to contravention of civil remedy provisions. Section 539(1) states that a provision referred to in column 1 of an item in the table which is set out in s 539(2) is a "**civil remedy provision**" (emphasis in original). For each civil remedy provision set out in column 1, the table identifies who has standing to apply for an order (column 2); the courts to which an application for an order may be made (column 3); and the maximum penalty that may be imposed by a court (column 4). It is thus made abundantly clear that a proceeding in a court for a pecuniary penalty is included in the

expression "civil remedy provision". Under s 539(3), it is also provided that the regulations may provide that a provision set out therein is a civil remedy provision.

105 It is notable that there is potentially a wide range of persons who may apply to a court for an order in relation to the contravention or proposed contravention of a civil remedy provision under the *FW Act.* They include individual employees and employers, as well as employee organisations and employer organisations. They also include, in some instances, a Fair Work Inspector.

106 Subdivision B of Div 2 of Pt 4-1 deals with orders that can be made by a court if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision. Under s 545(1) the Federal Court or the Federal Circuit Court may make any order that the court considers appropriate if it is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision. Without limiting the breadth of that provision, it is specifically provided in s 545(2) that those courts may make orders including granting injunctive or interim injunctive relief, compensatory orders and an order for reinstatement of a person.

107 Those courts, as well as an eligible State or Territory court, are also empowered under s 546(1) to order a person to pay a pecuniary penalty that the court considers is appropriate if it is satisfied that the person has contravened a civil remedy provision.

108 Significantly, the court is also empowered to order that a pecuniary penalty, or part thereof, be paid to the Commonwealth, a particular organisation or a particular person (s 546(3)). Moreover, a pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable (s 546(4)).

109 It is evident from these provisions that pecuniary penalty orders may be made in respect of the contravention of a civil remedy provision, but that other traditional orders in civil proceedings generally may also be made in respect of either a proposed contravention or contravention of a civil remedy provision.

110 Under this statutory regime, it is open to a court to order, for example, an employer to pay to an employee a pecuniary penalty for contravention of the minimum wages provision (s 293). The court might also grant injunctive relief in such a case. In other cases, the court might order an employee or employer (or employee organisation or employer organisation) to pay a

pecuniary penalty to the Commonwealth for a contravention of, for example, s 417. Injunctive relief might also be granted in such a case.

111 These various scenarios illustrate the potential for the contravention or proposed contravention of civil remedy provisions to give rise to pecuniary penalty orders, as well as other orders which are traditionally regarded as civil remedies (e.g. orders for compensation and injunctive relief). Equally significantly, the court may order that a pecuniary penalty be paid to a private individual or particular organisation and not to the Commonwealth. Under Ch 4 of the *FW Act*, private individuals may bring and possibly personally benefit from proceedings for contravention or proposed contravention of many civil remedy provisions. These considerations highlight the difficulty of characterising proceedings in which pecuniary penalties are sought and ordered as necessarily being different from *inter partes* civil litigation.

112 A clear distinction is drawn in the *FW Act* between contravening a civil remedy provision and conduct which amounts to the commission of a criminal offence. It is made clear in s 549 that contravention of a civil remedy provision is not an offence. Division 9 of Pt 5-1 of the *FW Act* creates various offences in relation to the Commission, including contravention of an order made by the Commission under the *FW Act* (see s 675).

(iii) What is the purpose of s 73(2)(c)?

113 The applicant contends that s 73(2)(c) should be construed such that the expression "other than civil proceedings" is confined to ordinary civil proceedings for the vindication of private rights and not extend to include proceedings for a civil penalty. It contends that this construction gives effect to what it says is the purpose or purposes of the provision and that the Full Bench erred in failing to identify any purpose of s 73(2)(c). The applicant contends that the provision has two purposes:

(a) maintenance of the integrity of pending "proceedings (other than civil proceedings)" by ensuring that the defendant to those proceedings will be the existing organisation that engaged in the contravening conduct, rather than the proposed amalgamated organisation; and

(b) what it describes as the "related purpose", which it also describes as "normative", namely to prevent a proposed amalgamation taking effect where there are proceedings

on foot (other than civil proceedings) to vindicate the public interest in maintaining compliance with Commonwealth laws.

114 As to the first of those matters, the suggested purpose sits uncomfortably with the presence of s 79 in the *RO Act*. That provision (the full terms of which are set out in [28] above), specifically addresses the issue of pending proceedings as at the time of the amalgamation day. It is, in substance, a deeming provision which operates to have any pending proceeding continue as if the amalgamated organisation was, and always had been, the de-registered organisation which was a party to a proceeding to which Pt 2 of the *RO Act* applied. Section 79 of the *RO Act* replaced s 253V of the *IR Act* under the *1990 Act* amendments. The operation of the provision is illustrated by Jagot J's decision in *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCA 934.

115 As to the applicant's characterisation of the purpose as "normative", we do not consider that this assists the task of statutory construction for the following reasons. First, it is difficult to see how the provision serves a normative purpose of ensuring that industrial standards are met as a precondition to organisations amalgamating. As the Full Bench pointed out at [38], the pendency of a proceeding against an organisation is not determinative as to the organisation's propensity to comply with relevant regulatory regimes. The proceeding may or may not result in an adverse order being made against the organisation. Moreover, even if the expression is construed as including civil penalty proceedings which are extant, it would not operate to prevent an organisation such as the CFMEU from participating in an amalgamation notwithstanding the numerous past civil penalty orders against it, as long as there was no pending civil penalty proceeding at the time when the Commission considers whether or not to fix an amalgamation day.

116 Secondly, we respectfully agree with the Full Bench's observation at [38] that it is improbable that the Parliament intended s 73(2)(c) to serve a normative purpose by establishing a standard of conduct as a precondition to amalgamation, in circumstances where the provision operates at the penultimate stage of the amalgamation process, rather than at earlier stages.

117 Thirdly, there is force in the Full Bench's additional observation in [38] concerning the obscurity of any logic or connection between the progression of an amalgamation process and the enforcement of standards of industrial conduct. The bar to the fixation of an amalgamation day imposed by s 73(2)(c) can only be temporary while a relevant proceeding

is pending and it operates equally to sanction an amalgamation partner which did not have any pending proceedings against it. There is also available the procedure under s 28 of the *RO Act* for cancelling an organisation's registration if the organisation has an unacceptable history of contravening conduct.

118 Finally, we do not accept the applicant's contention that the Full Bench failed to identify any purpose of s 73(2)(c). It did so by approving the purpose which had been identified by the Deputy President (see [32] of the Full Bench's reasons for decision). That purpose is to encourage and facilitate union amalgamations by avoiding or minimising impediments to amalgamation, a purpose which is promoted by limiting the kinds of pending proceedings which bar the Commission from fixing an amalgamation date (see [181] of the Deputy President's reasons for decision). The Deputy President also referred to a statement in the Explanatory Memorandum to the *1990 Act* amendments concerning the need for the Presidential Member to be satisfied that there are no unresolved "criminal proceedings" before fixing the amalgamation date as supporting a construction that Parliament intended the reference to "other than civil proceedings" to include civil penalty proceedings because they are not criminal proceedings.

119 It is convenient to now summarise the relevant legislative history and extrinsic material. In our respectful view, it supports the construction of s 73(2)(c) and the carve out expression therein which was adopted by both the Deputy President and the Full Bench.

(A) Some relevant legislative history and extrinsic material

120 The legislative history leading up to the 1990 amendments to the *IR Act*, which inserted the carve out expression for the first time, provides important context for the construction of s 73(2)(c) of the *RO Act*. It also casts some light on the purpose of the amendments. The relevant legislative history (which is rather lengthy), may be summarised as follows.

(a) The legislative history commences with the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) (***CA Act***). As originally enacted, Pt IV dealt with the enforcement of orders and awards. Under s 44, various courts were empowered to impose a pecuniary penalty for any "breach or non-observance of any term of [an] order or award". Various people were eligible to commence proceedings for recovery of such a penalty, including the Registrar and any organisation (or member of any organisation) who is affected by the breach or non-observance (s 44(2)). Under s 45, the court was empowered to order that the penalty, or any part thereof, be paid into

the Consolidated Revenue Fund or to such organisation or person as is specified in the order. Under s 49, it was a criminal offence for a person to "wilfully make default in compliance with any order or award". When originally enacted, the *CA Act* did not explicitly deal with the amalgamation of organisations.

Section 44 ultimately became s 119 of the *CA Act* (the history of multiple amendments to s 44 are traced by J. B. Sweeney J in *Gapes*). Under s 119, the Court was empowered to impose a penalty on any organisation or person bound by an order or award who committed a breach or non-observance of a term of the order or award. In *Gapes*, the Full Court held that a proceeding under s 119 for the recovery of penalties in connection with a breach of an award was not a criminal proceeding. In contrast, s 122 (as s 49 had by then become) made it a criminal offence for a person to "wilfully make default in compliance with any order or award".

In the *Civil Penalties Case*, the plurality noted that the Full Court in *Gapes* had "observed the clear distinction that had been maintained throughout the history of the *Conciliation and Arbitration Act* between s 119 (and its predecessors) and other provisions of the Act that imposed criminal liability and criminal penalties of lesser amount". The plurality noted that J. B. Sweeney J (who gave the primary judgment in *Gapes*) inferred that this distinction had been consciously adopted and maintained because a conviction always carried "a stigma" and, even if a conviction and fine were for a lesser amount than a civil penalty, it would be regarded as "harsher treatment".

(b) From 1972, the amalgamation of organisations was expressly dealt with in Pt VIIIA of the *CA Act*. Section 158Q(2), which was inserted on 26 May 1972 by s 52 of the *Conciliation and Arbitration Act 1972* (Cth):

> **Action to be taken after ballots**
>
> 158Q. (1) If, after –
>
> (a) …
>
> (b) …
>
> the Industrial Registrar declares that the amalgamation has been approved at the ballots, the Industrial Registrar shall, after consultation with the organizations concerned, forthwith fix, and notify in the Gazette, a day, not being less than two months after the date of the notification, as the day on which the amalgamation is to take effect.
>
> (2) The Industrial Registrar shall not fix a day under the last

> preceding sub-section unless –
>
> (a) there are no proceedings pending against any of the organizations 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
>
> (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.
>
> …

It is notable that s 158Q(2)(a) drew a clear distinction between, on the one hand, a contravention of the Act, the regulations or any law of the Commonwealth (which would have included the criminal offence created by s 122) and, on the other hand, a breach or non-observance of an award or order under the Act or another law of the Commonwealth. Such a breach could give rise to a proceeding to recover a pecuniary penalty (see s 119 of the *CA Act*). Having regard to the terms of s 158Q(2)(a), as the Deputy President pointed out at [144] of his reasons, it is evident that the Industrial Registrar was prevented by that provision from fixing an amalgamation day where there were pending either criminal proceedings **or** proceedings to recover a pecuniary penalty. There was no equivalent to the carve out expression.

(c) In 1988, the *CA Act* was repealed by the *Industrial Relations (Consequential Provisions) Act 1988* (Cth) and replaced by the *IR Act*. Amalgamations were dealt with in ss 233 to 253 of the *IR Act*. The following relevant aspects of s 249, as enacted in 1988, should be noted:

> **Action to be taken after ballot**
>
> (1) A proposed amalgamation that is taken to be approved for the purposes of this Division takes effect in accordance with this section.
>
> (2) If a designated Presidential Member is satisfied:
>
> …
>
> (c) 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

(ii) breaches of:

(A) awards; or

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

(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

…

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.

Once again, the distinction between a contravention of the Act, the previous Act (i.e. the *CA Act*) or other laws of the Commonwealth (which involved criminal proceedings) and a breach of an award or orders was maintained. Moreover, an amalgamation day could not be fixed unless the Presidential Member was satisfied that there were no criminal proceedings **or** other proceedings pending in relation to breaches of awards or orders.

(d) Section 311 of the *IR Act* dealt with the contravention of awards and orders. It was a criminal offence for an organisation or person wilfully to contravene an award or order of the Commission (which echoes the criminal offence previously created by s 122 of the *CA Act*). A further offence was created by s 312. It was an offence for a person who was an officer or agent of an organisation or branch of an organisation bound by an award to *inter alia* "advise, encourage or incite a member to refrain from working in accordance with the award" (s 312(1)(a)). In contrast, a breach of an award or order of the Commission which was not wilful was not a criminal offence, but could give rise to a proceeding to recover a pecuniary penalty (see s 178 of the *IR Act*). Thus the distinction referred to above was retained.

(e) Amendments were made to the *IR Act* by the *1990 Act*, which commenced on 1 February 1991. The *1990 Act* replaced the old s 249 with a new s 253Q. Section 253Q provided:

Action to be taken after ballot

…

> (2) If a designated Presidential Member is satisfied:
>
> …
>
> (c) 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.
>
> …

Once again, the distinction referred to above was retained. Significantly, however, for the first time "civil proceedings" were explicitly carved out from the kinds of pending proceedings which barred the fixing of the amalgamation day.

(f) The Explanatory Memorandum which accompanied the *1990 Bill* explained that the major amendments proposed by that Bill included a new Division (i.e. Div 7), which dealt with the topic of the amalgamation of organisations. It was stated on page 1 of the Explanatory Memorandum that this provided "speedier and more flexible procedures" and that "difficulties in the amalgamation process will be avoided or minimised". On page 2, it was stated that two new objects would be added to the *IR Act*, namely:

(i) encouraging and facilitating the amalgamation of organisations; and

(ii) encouraging and facilitating the development or organisations, particularly by a reduction in the number of organisations that are in an industry or enterprise.

(g) Page 28 of the Explanatory Memorandum to the *1990 Bill* should also be noted. With reference to the proposed s 253Q, it was stated that, before fixing the amalgamation day, the Presidential Member must be satisfied that "…there are **no unresolved criminal proceedings** against any organisation concerned in the amalgamation" (emphasis added).

(h) The legislative policy or purpose underlying the 1990 amendments is further suggested by comments of the then Minister for Industrial Relations (Senator Cook) in the second reading speech. The Minister said that "the multiplicity of unions is an impediment to industrial and administrative efficiency". He said that the amendments were designed to encourage a substantial reduction in the numbers of federally registered unions and to have those unions "more oriented in their industrial operations towards particular industries and sectors of industry". The Minister described one of the main elements of the amendments as introducing "revised procedures to bring about speedier amalgamations. At page 2081 of the Commonwealth Hansard, Senate, 23 August 1990, the Minister said:

> The voluntary restructuring of the union movement should be encouraged. To assist unions to rationalise, the Act's amalgamation provisions are to be completely revised. Their operation will be quicker and more adaptable. Mechanisms for avoiding or minimising technical difficulties and other problems will be provided.

The Minister added that whereas amalgamation proposals could take anything up to two years to be decided under the existing legislation, with the amendments in place this should be able to be completed "in a few months at most".

(i) Before describing the key features of the new amalgamation scheme created by the 1990 amendments (see [121]ff below), it is convenient to complete the relevant legislative history.

(j) The *IR Act* became the *WR Act* with the enactment of *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). The subject of amalgamations was dealt with in Div 7. Section 253Q(2)(c) provided:

> **253Q Action to be taken after ballot**
>
> …
>
> (2) If a designated Presidential Member is satisfied:
>
> …
>
> (c) 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.

The concept of "certified agreements" was inserted into s 253Q(2)(c)(ii)(A) and was juxtaposed with the traditional concept of "awards", which reflected the introduction of enterprise bargaining. Moreover, at that time the only remedy for breach of an award or certified agreement was by way of pecuniary penalty. That is because ss 311 and 312 of the *IR Act* (see [120(d)] above) had been repealed in 1993 by s 41 of the *Industrial Relations Reform Act 1993* (Cth). It should also be noted, however, that despite those particular provisions having been repealed, s 253Q(2)(c)(i) still referred to contraventions of the *WR Act*, the previous Act (i.e. the *IR Act*) or "other Commonwealth laws". Thus the provision still operated in respect of offences apart from those created by ss 311 and 312 of the *IR Act*. Finally, it is notable that the carve out expression was retained.

(k) The *WR Act* was amended by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002* (Cth), which inserted a new Sch 1B which commenced on 12 May 2003. Division 6 in Pt 2, Ch 3 of Sch 1B dealt with amalgamations taking effect. It included s 73. Section 73(2)(c) then provided:

73 Action to be taken after ballot

…

(2) If the Commission is satisfied that:

…

(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

…

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.

These amendments added references to contraventions of Sch 1B, the *WR Act* or other Commonwealth laws as being in one category, with separate references to breaches of awards, certified agreements or old IR agreements as well as orders made under Sch 1B, the *WR Act* or other Commonwealth laws in another category. In essence, however, s 73(2)(c) substantially reflected s 253Q(2)(c) of the *IR Act*, including the carve out expression.

(l) Section 73 of Sch 1B to the *WR Act* was amended again by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The reference to "certified agreements or old IR agreements" was replaced with the concept of "collective agreements" in s 73(2)(c)(ii)(A). This amendment took effect from 27 March 2006. Section 73 of Sch 1 then relevantly provided as follows:

73 Action to be taken after ballot

(1) …

(2) If the Commission is satisfied that:

…

(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 collective agreements; or

(B) orders made under this Schedule, the Workplace Relations Act or other Commonwealth laws; and

…

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.

Although some of the terminology changed, the key features of the previously worded s 73(2)(c), as noted above, were maintained, including the carve out expression.

(m) The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) created the *RO Act*. Section 73 of Sch 1 to the *WR Act* became s 73 of the *RO Act.* From 1 July 2009, s 73(2)(c) provided that:

> **73 Action to be taken after ballot**
>
> …
>
> (2) If FWA is satisfied that:
>
> …
>
> (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
>
> …
>
> FWA 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.

Again, although some of the terminology changed, the key features of the previously worded s 73(2)(c) were retained, including the carve out expression.

(B) The key features of the 1990 Act amendments

121 The *1990 Act* created a fundamentally new amalgamation scheme. Its key features may be summarised as follows.

122 First, the following new object was inserted into the *IR Act*: "to encourage and facilitate the amalgamation of organisations".

123 Secondly, prior to the *1990 Act* amendments, s 239 provided that the Commission could make a "community of interest declaration" (a **declaration**) in particular circumstances which had the effect under s 246 of lowering the requisite level of approval members balloted in relation to a proposed amalgamation. If a declaration was made then there was no

minimum voter participation level required in addition to a majority approving the amalgamation. If no declaration had been made then the requisite participation level was 25% of voters.

124 Section 241, enacted by the *1990 Act*, made it easier for organisations to obtain a declaration. It was no longer necessary for the Commission to be satisfied that the amalgamation furthers the objects of the *IR Act*. The new s 241 also conferred a discretion on the Commission to declare a community of interest in circumstances other than those which were explicitly specified. Further, the reforms gave the Commission power to make a declaration before a formal application had been made for approval of the submission of a proposed amalgamation to a ballot. Section 241 is now reflected in s 43 of the *RO Act*.

125 Thirdly, s 244 enabled the Commission to exempt a proposed amalgamated organisation from having a ballot of its members upon an application by the proposed amalgamated organisation. This provision is now reflected in s 63 of the *RO Act*.

126 Prior to the *1990 Act* amendments, the ballot requirements were contained in s 243 of the *IR Act*. An organisation could only apply for an exemption from the requirement that a ballot of its members be held if it satisfied the conditions in s 243(8) and the Presidential Member did not consider that the exemption should be refused in the special circumstances of that case (s 243(9)).

127 Fourthly, s 253Q(2)(c) narrowed the kinds of proceedings which would impede the amalgamation taking effect, by inserting the carve out expression "other than civil proceedings". This provision is now reflected in s 73(2)(c) of the *RO Act*.

128 Prior to the introduction of the limiting words in s 253Q(2)(c), all proceedings which related to the matters specified in (i) or (ii) of the old s 249(2)(c) barred the amalgamation day taking effect.

129 Fifthly, s 253R provided for the automatic succession to an amalgamated organisation of the assets and liabilities of an organisation which is deregistered when an amalgamation takes effect. This provision is now reflected in s 74 of the *RO Act*.

130 Prior to the introduction of s 253R there was no provision in the statute that provided that the assets and liabilities of the deregistered organisation would, by operation of the statute, automatically become the assets and liabilities of the amalgamated organisation. Prior to the amendments, ss 249(2)(d) and (e) provided that it was a condition of approval that the

amalgamation scheme had made arrangements for property and liabilities of the deregistering organisation to become the property and liabilities of the amalgamated organisation, and that there were no penalties imposed on the deregistering organisation remaining unpaid.

131 Sixthly, s 253V provided for the automatic substitution of an amalgamated organisation as a party to a proceeding to which a de-registered organisation was a party immediately before the amalgamation day. This provision is now reflected in s 79 of the *RO Act*.

132 Prior to the introduction of s 253V, there was no provision in the statute that provided that the amalgamated organisation would be substituted as a party to existing proceedings. Previously, if there was any pending proceeding (which related to the matters specified in s 249(2)(c)(i) or (ii)) the amalgamation could not proceed).

133 Seventhly, s 253ZC conferred power on the Federal Court to resolve difficulties encountered in the amalgamation process. This provision is now reflected in s 87 of the *RO Act*. Previously, there was no similar power granted to the Court.

(iv) Conclusions on purpose, legislative history and extrinsic material

134 Having regard to the matters set out above, the following conclusions may be drawn.

135 First, a primary purpose of the *1990 Act* amendments was to encourage and facilitate union amalgamations, including by avoiding or minimising impediments to amalgamation.

136 Secondly, a construction of s 73(2)(c) which includes civil penalty proceedings within the carve out expression "other than civil proceedings" promotes that purpose.

137 Thirdly, that construction is also consistent with the unequivocal statement in the Explanatory Memorandum which suggests that the bar operated only with respect to unresolved criminal proceedings. Plainly, the wording of the Explanatory Memorandum cannot displace the text of the statute but this is a case where the Explanatory Memorandum is relevant in confirming the ordinary meaning of the text in the carve out expression in s 73(2)(c).

138 Fourthly, for the reasons given above, we reject the alternative purpose or purposes as contended by the applicant.

139 Fifthly, a dichotomy has been drawn throughout the history of Australia's industrial relations legislation between conduct which involves a criminal offence and conduct which exposes a

person (including an organisation) to proceedings to recover a pecuniary penalty (or some other civil remedy).

140 Sixthly, it is important not to lose sight of Gleeson CJ's observations in *Carr* regarding the limitations of a purposive approach where, as is the case here, there is a question about the extent to which legislation gives effect to an evident purpose. That is particularly so where numerous amendments were made in 1990 in introducing the new amalgamation scheme. It should not be assumed that all the amendments, including the insertion of s 253Q of the *IR Act* (the precursor to s 73(2)(c) of the *RO Act*), should be construed as though they all equally give full effect to the purpose described above. The text of such reform amendments generally reflects the Parliament's judgment in balancing a wide range of competing interests and considerations. There is room for debate and argument about the extent to which the *1990 Act* amendments give effect to the purpose stated above, either individually or collectively, and whether, for example, it is necessary to read s 73(2)(c) as effectuating that purpose when the purpose is also effectuated, to a greater or lesser extent, by the other amendments which accompanied it. On balance, however, for the reasons set out above, a purposive approach favours the construction of s 73(2)(c) which was adopted by both the Deputy President and the Full Bench.

(v) Response to other matters raised by the applicant in support of its construction

141 As noted above, the applicant contended that the reasons given by the Deputy President and the Full Bench in support of their construction, if accepted, had the effect of rendering sub-paragraphs (i), (ii) or (iii) in s 73(2)(c) either wholly or partly redundant. The redundancy argument was based on the proposition that there are no criminal offenses established by the *RO Act*, the *FW Act* or any other Commonwealth statute for breach of a modern award, an enterprise agreement or an order made under the *FW Act*. Thus, if the phrase "other than civil proceedings" is construed as including civil pecuniary penalty proceedings, sub-paragraphs (ii) and (iii) have no work to do. Moreover, the applicant contended that if the Full Bench's reasoning at [41] of its reasons for decision is accepted (i.e. that breaches of modern awards, enterprise agreements or orders made under the *FW Act* are actionable only as contraventions of particular provisions of the *FW Act*, such as ss 45 and 50), part of sub-paragraph (i) is also rendered redundant.

142 The central difficulty with the applicant's position is that its acceptance would not produce the harmonious results for which the applicant contends. That is because, as the Full Bench

explained at [41], adoption of that construction would mean that sub-paragraphs (ii) and (iii) would be rendered redundant. This is because such breaches are only actionable as contraventions of statutory provisions such as ss 45 and 50 of the *FW Act*, which are both civil remedy provisions and fall within sub-paragraph (i) of s 73(2)(c) of the *RO Act*.

143 Accordingly, on both the applicant's construction and that of the Full Bench, there is disharmony. This unfortunate messy outcome is far from ideal. There appears to be considerable force in the Full Bench's observations at the end of [41] of its reasons for decision that this disharmony reflects a failure to coordinate the terms of s 73(2)(c) with changes in enforcement mechanisms over the last 30 years.

144 The applicant separately argued that the Full Bench erred at [39] of its reasons for decision in failing to give any weight to the definition of "proceeding" in s 6 of the *RO Act* in construing s 73(2)(c). The applicant contended that this definition (which is set out in [27] above) confirmed its submission that the operation of s 73(2)(c) did not involve a strict dichotomy between "civil" and "criminal" proceedings. Whilst acknowledging that the definition in s 6 applied unless there was a contrary intention, the applicant submitted that the definition applied throughout the entirety of the *RO Act*, including s 73(2)(c).

145 It may be accepted that even though the definition was only introduced by the *2016 Act*, this does not mean that the definition has no effect on existing words of the *RO Act*. As Bathurst CJ said in *R v Seller* [2013] NSWCCA 42; 273 FLR 155 at [100]:

> … Where a statute is amended both the act which is amended and the amending act must be read together as a combined statement of the will of the legislature as a consequence of which the effect of the amending act may be to alter the meaning which the remaining provisions of the amended act bore before the making of the amendments…

146 Of course, having regard to the explicit terms of s 6 of the *RO Act*, Bathurst CJ's observations may not apply if a contrary intention is manifested. The difficulty lies in the fact, however, that even if the applicant's contention be accepted that no such contrary intention appears here, the kind of proceedings described in s 73(2(c) are court proceedings, and cannot be characterised as "administrative" or "disciplinary". Accordingly, as the Full Bench pointed out at [39], the position remains that s 73(2)(c) includes criminal proceedings and excludes civil proceedings. In these circumstances, the terms of the definition in s 6 provide little assistance in resolving the task of statutory construction here.

147 Another of the applicant's contentions is that ss 315 and 316 highlight a distinction between civil penalty provisions and other "purely" civil proceedings. In our view, these provisions, which are located in Ch 10 of the *RO Act*, are equivocal on the task of statutory construction, as are other relevant provisions in that Chapter. As noted above, Ch 10 deals specifically with the subject of "civil penalties". Provisions in Ch 10 suggest that proceedings for a civil penalty under the *RO Act* are treated as civil proceedings, together with other more orthodox civil proceedings. For example, s 305(4) requires the Federal Court to apply the rules of evidence and procedure for civil matters when hearing and determining an application for any order under Pt 2 of Ch 10. This includes, for example, orders to pay a pecuniary penalty as well as other orders which are generally available in a civil proceeding in appropriate circumstances, such as an order for compensation or injunctive relief. As noted above, ss 315 and 316 respectively provide for relief from liability in respect of two different types of proceedings, both of which have the character of civil proceedings, namely proceedings for a contravention of a civil penalty provision and civil proceedings in respect of established causes of action, such as negligence or breach of trust.

148 Finally, the applicant overstates the assistance given to the task of statutory construction here of the Court of Appeal's decision in *Kemp*. The issue there was whether a disciplinary proceeding brought against Dr Kemp in the Victorian Civil and Administrative Tribunal was a "civil proceeding" within the meaning of s 28(2) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). It provided that a doctor shall not without the consent of his or her patient, divulge "any civil suit action or proceeding" information which the doctor had acquired in attending the patient and which was necessary to enable the doctor to prescribe or act for the patient. The Court construed the term "civil proceeding" in s 28(2) as referring to "a process that represents a curial adjudication of private rights". The disciplinary proceeding was not a "civil proceeding" because it was regulatory in nature and served a public purpose. It did not involve the *inter partes* determination of private rights, and it was heard by an administrative tribunal which was not bound by the rules of evidence (see [9] per Niall JA, with whom Maxwell P and Tate JA agreed). Reference was also made to legislative history and earlier decisions of the Court, as well as to the consequences of denying access to medical records in a regulatory setting as making a broader construction improbable.

149 The analysis in *Kemp* provides no direct assistance to the task of statutory construction here. It correctly illustrates the importance of context and purpose, but it concerns a very differently worded provision in a very different statutory context.

CONCLUSION

150 For these reasons, the construction of the carve out expression in s 73(2)(c) adopted by the Full Bench is correct and the applicant's alternative construction is rejected. The reasons for upholding the Full Bench's construction differ in some respects from the reasons given by the Full Bench. Since there was no misconstruction of the expression by the Full Bench there was no error at all, let alone an error which has the character of a jurisdictional error.

151 In its originating application, the applicant did not seek costs. Presumably, this was in recognition of the operation of s 329 of the *RO Act* and s 570 of the *FW Act*. Nor did the CFMMEU seek costs if the originating application was dismissed. In these circumstances, there should be no order as to costs.

152 The originating application should be dismissed. There should be no order as to costs.

I certify that the preceding one hundred and fifty-two (152) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Griffiths and O'Callaghan .

Associate:

Dated: 14 December 2018