FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v State of Victoria [2013] FCA 445

Citation:	Construction, Forestry, Mining and Energy Union v State of Victoria [2013] FCA 445
Parties:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v STATE OF VICTORIA**
File number:	VID 1097 of 2012
Judge:	**BROMBERG J**
Date of judgment:	17 May 2013
Catchwords:	**INDUSTRIAL LAW** – s 340(1) of the *Fair Work Act 2009* (Cth) – whether respondent took adverse action against employees of independent contractor because those employees had a workplace right – whether the employer of the employee's was an "independent contractor" with whom the respondent was "proposing to enter into a contract for services" within the meaning of Item 4 of s 342(1) – meaning of "independent contractor", "proposing to enter" and "contract for services" – whether respondent took adverse action by threatening to refuse to engage independent contractor or make use of its services – meaning of "refuse to engage" – meaning of "threatening to take action" in s 342(2)(a) – whether threat capable of being made in the context of an agreed process – whether prohibition imposed by s 340 may be avoided by contract, waiver or estoppel – whether adverse action taken because the employees were entitled to the benefit of an industrial instrument – meaning of "entitled to the benefit" of a workplace instrument – consideration of s 361 and onus of proof. **CONSTITUTIONAL LAW** – *Melbourne Corporation* limitation – whether ss 340-342 of *Fair Work Act 2009* (Cth) exceed the Constitutional legislative capacity of the Commonwealth by imposing limitations upon the capacity of a State to select a contractor to provide major infrastructure. **PRACTICE AND PROCEDURE** – s 21 of the *Federal Court of Australia Act 1976* (Cth) – whether declaration may be made in the absence of a justiciable controversy.

Legislation:

Acts Interpretation Act 1901 (Cth) ss 2C(1), 15AA
Conciliation and Arbitration Act 1904 (Cth) ss 5, 5(1A), 9(1), 132(4), 132A
Constitution ss 51, 51(xxxvii), 109
Fair Work Act 2009 (Cth) s 12, 23, Pt 2-4 ss 172(1), 194, Pt 3-1 ss 336, 340, 340(1), 340(1)(a)(i), 341, 341(1), 341(1)(a), 341(1)(c)(ii), 342, 342(1), 342(2), 342(2)(a), 343, 346, 357, 358, 359, 360, 361, 361(1), Pt 3-2
Fair Work (Commonwealth Powers) Act 2009 (Vic)
Fair Work (Registered Organisations) Act 2009 (Cth)
Federal Court of Australia Act 1976 (Cth) s 21
Independent Contractors Act 2006 (Cth) ss 4, 11
Industrial Relations Act 1988 (Cth) ss 4(1A), 127A, 127A(1), 127B, 127B(1), 127C, 195(1A), 334, 334(2), 334(7A), 336
Industrial Relations Legislation Amendment Act 1992 (Cth)
Project Development and Construction Management Act 1994 (Vic) s 3
Workplace Relations Act 1996 (Cth) s 4(1A), 4(2), Part XA ss 298K, 298K(1), 298K(2), 298L, 298L(1), 298L(1)(c)(i), 298L(1)(m), 298B(5), s356, Pt 10 ss 515(g), 515(h) Pt 16 ss 792, 792(1), 792(5), 793
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)
Workplace Relations and Other Legislation Amendment Act 1996 (Cth)
Workplace Relations and Other Legislation Amendment Act 1997 (Cth)
Workplace Relations Regulations 2006 (Cth)

Cases cited:

Melbourne Corporation v Commonwealth (1947) 74 CLR 31
Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2) [2013] FCA 446
Informax International Pty Ltd v Clarius Group Ltd (2012) 207 FCR 298
AB v Western Australia (2011) 244 CLR 390
Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390
Barclay v Board of Bendigo Regional Institute of Technical and Further Education (2011) 191 FCR 212
Kelly v Construction, Forestry, Mining and Energy Union (No.3) (1995) 63 IR 119
Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council (2000) 101 IR 143
National Union of Workers v Qenos Pty Ltd (2001) 108 FCR 90
Construction, Forestry, Mining and Energy Union v

Pilbara Iron Co (Services) Pty Ltd (No 3) [2012] FCA 697
Waugh v Kippen (1986) 160 CLR 156
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Neale v Atlas Products (Vic) Pty Ltd (1955) 94 CLR 419
On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366
Ready Mixed Concrete (South East) Limited v Minister for Pensions and National Insurance [1968] 2 QB 497
Queensland Stations Pty Limited v Federal Commissioner of Taxation (1945) 70 CLR 539
Quarman v Burnett (1840) 6 M & W 499 [151 ER 509]
Scott v Davies (2000) 204 CLR 333
Leichhardt Municipal Council v Montgomery (2007) 230 CLR 22
Roads and Traffic Authority v Scroop (1998) 28 MVR 233
Kondis v State Transport Authority (1984) 154 CLR 672
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520
Murphy v Brentwood District Council [1991] 1 AC 398
S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (2005) 143 FCR 217
Moore v Doyle (1969) 15 FLR 59
ATS (Asia Pacific) Pty Ltd v Dun Oir Investments Pty Ltd [2012] FCA 1004
Dowling v Fairfax Media Publications Pty Ltd (2008) 172 FCR 96
Wallace-Smith v Thiess Infraco (2005) 218 ALR 1
Maritime Union of Australia v Burnie Port Corporation Pty Ltd (2000) 101 IR 435
Fletcher v Fraser Corporation Australia Limited (1996) 70 IR 117
Burnie Port Corporation Pty Ltd v Maritime Union of Australia (2000) 104 FCR 440
Community and Public Sector Union v Telstra Corporation Limited (2001) 107 FCR 93
Gietzelt v Craig-Williams Pty Ltd (No 1) (1959) 1 FLR 456
Gietzelt v Craig-Williams Pty Ltd (No 2) (1959) 1 FLR 465
Community and Public Sector Union v Telstra Corporation Limited (2000) 99 IR 238
Community and Public Sector Union v Telstra Corporation Limited (2000) 101 FCR 45
Construction, Forestry, Mining and Energy Union v Bengalla Mining Company Pty Ltd (No 2) [2013] FCA 362
Metropolitan Health Service Board v Australian Nursing Federation (2000) 99 FCR 95
Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd (2002) 121 IR 250
Ace Insurance Limited v Trifunovski (2011) 200 FCR 532
Greater Dandenong City Council v Australian Municipal,

Administrative, Clerical and Services Union (2001) 112 FCR 232
Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 86 ALJR 1044
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 CLR 1
David's Distribution Pty Ltd v National Union of Workers [1999] FCA 1108
National Tertiary Education Union v Royal Melbourne Institute of Technology [2013] FCA 451
General Motors-Holdens Pty Ltd v Bowling (1976) 51 ALJR 235
R v Hush; Ex parte Davanny (1932) 48 CLR 487
Re Australian Education Union; Ex parte Victoria (1995) 184 CLR 188
State of Victoria v Commonwealth of Australia (1996) 187 CLR 416
Austin v Commonwealth of Australia (2003) 215 CLR 185
Clarke v Commissioner of Taxation of the Commonwealth of Australia (2009) 240 CLR 272
Queensland Electricity Commission v Commonwealth of Australia (1985) 159 CLR 192
Commonwealth v Tasmania (1983) 158 CLR 1
State of Victoria v Riordan (Unreported, Industrial Relations Court of Australia, Wilcox CJ, Lee and Madgwick JJ, 330/1996, 26 July 1996)
Williams v Commonwealth (2012) 86 ALJR 713
Direct Factory Outlets Pty Ltd v Westfield Management Limited (2003) 132 FCR 428
Re Judiciary and Navigation Acts (1921) 29 CLR 257
Fencott v Muller (1983) 152 CLR 570
Abebe v Commonwealth (1999) 197 CLR 510
Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd (2000) 200 CLR 591

Date of hearing:	19, 20, 26, 27 March 2013 and 24 April 2013
Place:	Melbourne
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	284
Counsel for the Applicant:	Ms R Doyle SC with Mr M Harding
Solicitor for the Applicant:	Slater & Gordon Lawyers

Counsel for the Respondent: Mr M Wheelahan SC with Mr P Willis and Mr P O'Grady

Solicitor for the Respondent: Ashurst Australia

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION **VID 1097 of 2012**

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **Applicant**
AND:	**STATE OF VICTORIA** **Respondent**

JUDGE: **BROMBERG J**
DATE OF ORDER: **17 MAY 2013**
WHERE MADE: **MELBOURNE**

THE COURT DECLARES THAT:

1. In contravention of s 340(1)(a)(i) of the *Fair Work Act 2009* (Cth), between 19 November 2012 and 5 April 2013, the respondent took adverse action against employees of Lend Lease Project Management & Construction (Australia) Pty Limited ("Lend Lease") by threatening to refuse to engage or make use of the services of Lend Lease for the construction of the New Bendigo Hospital because the employees were entitled to the benefit of the Lend Lease Project Management & Construction/CFMEU Joint Development Agreement Mark 8 2012-16.

AND THE COURT ORDERS THAT:

2. On or before 24 May 2013 the parties consult and file with the Court minutes of proposed orders addressing the filing and service of outlines of submissions in relation to the applicant's claim for the imposition of a penalty upon the respondent.

3. The matter be listed for further hearing on a date to be fixed.

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

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION **VID 1097 of 2012**

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **Applicant**
AND:	**STATE OF VICTORIA** **Respondent**

JUDGE: **BROMBERG J**
DATE: **17 MAY 2013**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 Part 2-4 of the *Fair Work Act 2009* (Cth) ("the FW Act") provides a scheme by which employees may collectively bargain with their employer for collective industrial agreements known as enterprise agreements. Once made, enterprise agreements that are approved by the Fair Work Commission ("the FWC") are given legal effect by the FW Act. Part 3-1 of the FW Act includes s 340 which, broadly speaking, prohibits the taking of, or threatening of, adverse action by one person because another person has a workplace right. One of the workplace rights protected is the entitlement of a person (such as an employee) to the benefit of an enterprise agreement made under the FW Act.

2 This proceeding raises some interesting and novel issues in the context of a potential clash between the application of the policies of a State and the operation of a Federal enactment. That context has raised a Constitutional challenge that I deal with later. However, the primary question raised is whether in contravention of s 340 of the FW Act, the State of Victoria ("the State") threatened to take adverse action against particular employees because those employees were entitled to the benefit of an enterprise agreement.

3 The background is the development and construction of the New Bendigo Hospital in the regional Victorian city of Bendigo ("the Project"). The new facility will become Victoria's largest regional hospital. The development and construction of the hospital requires substantial investment from the State. The State has conducted a tender process to

select a consortium to build the new facility and provide facility management and maintenance services once it is constructed.

4 Lend Lease Project Management & Construction (Australia) Pty Limited ("Lend Lease") is a large construction company that operates nationally. It focuses on large scale construction projects and is often engaged on government funded projects. Lend Lease is a member of a consortium of corporations called the Exemplar Consortium ("Exemplar"), that participated in the tender process for the contract to build the New Bendigo Hospital and provide the other services the subject of the tender. In Exemplar's bid, Lend Lease is the corporation put forward as the prospective builder of the new facility.

5 Lend Lease employs employees to perform construction work. On 13 September 2012, the FWC approved an enterprise agreement made between Lend Lease and its employees and known as the Lend Lease Project Management & Construction/CFMEU Joint Development Agreement Mark 8 2012-16 ("the Lend Lease Enterprise Agreement"). The Agreement also covers the Construction, Forestry, Mining and Energy Union ("the CFMEU").

6 The CFMEU is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). The CFMEU has members who are employed by Lend Lease and is entitled to represent their industrial interests. The CFMEU's standing to bring this proceeding was not in issue at trial.

7 The claim made by the CFMEU arises from the alleged application by the State upon Lend Lease and its employees of industrial relations policies adopted by the State. Those policies are contained in the Victorian Code of Practice for the Building and Construction Industry ("the Code") and the Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry ("the Guidelines"). The Guidelines include provisions which proscribe the inclusion in industrial agreements of provisions dealing with specified matters including provisions dealing with certain employee entitlements. The State has assessed the Lend Lease Enterprise Agreement as non-compliant with the Code and Guidelines because it contains provisions that deal with subject matter proscribed by the Guidelines. In its capacity as a purchaser of building and construction services, the State has

sought compliance with the requirements of the Code and Guidelines from those tendering and contracting for State Government building and construction work.

8 The CFMEU claims that in that context, the State threatened to refuse to engage or use the services of Lend Lease to construct the New Bendigo Hospital because of the entitlements of the Lend Lease employees to the benefits of the Lend Lease Enterprise Agreement. That is the claimed contravention at the heart of this proceeding.

9 For the reasons that follow, I have determined that in contravention of s 340(1)(a)(i) of the FW Act, between 19 November 2012 and 5 April 2013, the State took adverse action against employees of Lend Lease by threatening to refuse to engage or make use of the services of Lend Lease for the construction of the New Bendigo Hospital.

10 In arriving at that conclusion I have, for the reasons that follow, determined that:

(i) Lend Lease is an "independent contractor" within the meaning of Item 4 of s 342(1) of the FW Act; and

(ii) The State and Lend Lease were, in the period from 19 November 2012 to 5 April 2013, "proposing to enter into a contract for services" within the meaning of Item 4 of s 342(1) of the FW Act.

11 Those findings together with my finding that the State threatened to refuse to engage or make use of the services of Lend Lease on the Project, have led to my conclusion that the State took "adverse action" within the meaning of s 340(1) of the FW Act. The State did not contest that, if adverse action was taken, it was taken against the employees of Lend Lease because those employees were entitled to the benefit of the Lend Lease Enterprise Agreement.

12 I have rejected the State's contention that if ss 340-342 of the FW Act sustain a contravention by the State of the kind I have determined occurred, those provisions would exceed the legislative capacity of the Commonwealth by reason of the limitation explained in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. I have also determined that it is neither necessary nor appropriate that I consider the CFMEU's claim for a declaration that the Code and Guidelines are an invalid exercise of the State's executive power.

13 I should also indicate by way of introduction that this proceeding was listed for hearing as an expedited trial and heard in conjunction with another proceeding which raised similar issues. My reasons for judgment in the related proceeding have also been published today as *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* [2013] FCA 446. Evidence in each matter was received separately. Some of the legal submissions received addressed issues in both matters. These reasons for judgment have been crafted so that they stand alone and need not be read with the reasons for judgment in the other matter. I first reserved my judgment in this matter on 27 March 2013. On 24 April 2013 I granted each of the parties leave to re-open its case to tender further evidence and make additional submissions. The reasons for that will later become apparent.

THE FACTS

The Code and Guidelines

14 In 1997, the Commonwealth Government, in conjunction with State and Territory Governments, established the National Code of Practice for the Construction Industry ("the National Code"). The National Code was intended to set down general principles that businesses must meet to be eligible for Commonwealth Government funded building and construction work. The National Code expressly sets out "the principles which Commonwealth, State and Territory Governments agree should underpin the future development of the construction industry in Australia".

15 The National Code acknowledges that the State and Territory Governments will develop their own codes and that the National Code will constitute a set of "core principles" which establish a minimum level of compliance to guide practices and initiatives in each jurisdiction. It was envisaged that State and Territory codes would supplement, but remain consistent with, the core principles set out in the National Code.

16 Relevantly, the industrial relations core principles set down in the National Code include the following:

> **Awards and Legal obligations relating to employment**
> All parties must comply with the provisions of applicable:
> - awards and workplace arrangements which have been certified, registered or otherwise approved under the relevant industrial relations legislation; and
> - legislative requirements.

> **Workplace Arrangements**
>
> Workplace arrangements which reflect the needs of the enterprise are important elements in achieving continuous improvement and best practice.
>
> The content of the workplace arrangements are a matter for the parties to those arrangements, subject to them meeting legislative requirements. However they may encompass:
>
> - improved OHS and rehabilitation practices;
> - training and skill formation strategies;
> - multi skilling; and
> - flexible work practices, for example in relation to working time.
>
> A party must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to and/or the contents or the form of their workplace arrangements. This does not prevent action sanctioned by relevant industrial relations legislation.

17 As envisaged by the terms of the National Code, in about March 1999, the State of Victoria established the Code. The Code specifically incorporates the National Code and supplements its terms with provisions relating to processes for initiating projects, selecting contractors and consultants, contract administration and enforcement of the Code. On the issue of industrial relations, the Code states only that:

> The Industrial Relations elements of the National Code shall apply to all Victorian and Commonwealth Government construction projects.

18 The Code, which has remained in force since 1999 without amendment, applies to all parties involved in "public construction" as defined in s 3 of the *Project Development and Construction Management Act 1994* (Vic).

19 Neither the National Code nor the Code are legislative instruments. Both documents set out a range of policies, standards and expectations which the respective governments have adopted.

20 In April 2012 the Code was supplemented by the Guidelines. The Guidelines have no legislative foundation. The Guidelines state that they apply to all public building and construction work that is the subject of an expression of interest or request for tender on or after 1 July 2012. The Guidelines were amended in December 2012. The Guidelines incorporate a range of very specific provisions regulating industrial practices of parties engaged in building and construction activities. In many respects those provisions travel well beyond what was envisaged by the National Code or the Code and, although said to be

complimentary, some of the Guidelines' provisions arguably conflict with the respective codes. In particular, it is difficult to reconcile the aspirations of the National Code and the Code that parties should be free to make their own workplace arrangements with the provisions of the Guidelines which seek to dictate what may or may not be included in such arrangements.

21 In the introduction page, the Guidelines state:

> [The Guidelines] have been developed to further assist in the achievement of the objectives of the [Code] and in particular, the industrial relations, OHS&R and workforce reform elements as adopted from the National Code.
>
> These Guidelines reflect the Victorian Government's commitment to greater flexibility and productivity within the State's building and construction industry and to ensure that the Victorian Government maximises value for money on its spending on infrastructure projects.

22 The contents of the Guidelines identify that they have been formulated in furtherance of workplace and other industry reform objectives being pursued by the State. Whilst many of the provisions of the Guidelines may be intended to provide value to the State as a purchaser of building and construction services, the stated objectives have a wider purpose. In that respect, the Guidelines may be fairly characterised as a policy initiative of the State to exert influence through capital investment in building and construction, to promote conduct by building and construction industry participants consistent with State policies, in particular industrial relations policies.

23 A number of clauses in the Guidelines identify non-compliance with the Code and Guidelines by reference to the content of industrial instruments including enterprise agreements. Some clauses in the Guidelines do so directly by listing subject matters that if included in an industrial agreement, render the agreement non-compliant with the Code and Guidelines. Examples of this can be found in cl 4.4 which prohibits terms that constrain the use of independent contractors and cl 5.5 which prohibits terms considered to restrict the efficient performance of work or productivity improvements. Further, a number of other clauses either require or restrict particular practices. The inclusion in an agreement of provisions permitting prohibited practices or the omission from an agreement of required practices, also results in non-compliance. In these respects, an evident purpose of the

Guidelines is to regulate the content of industrial agreements applicable to the building and construction industry in Victoria.

24 The Guidelines are broad in their application. They are said to apply to any party that responds to an invitation for expressions of interest for public building and construction work in Victoria, from the date they first express interest in, or tender for a contract to perform the work. Further, a party required to comply with the Guidelines for public work will also be required to do so in relation to privately funded work, as will the related entities of such a party. "Privately funded building and construction work" is defined in the Guidelines to mean "building and construction work in Victoria that is not public building and construction work". The term "related entity" is also broadly defined so that the application of the Code and Guidelines extends to any entity "connected with the tenderer" (a term defined to include an entity with the capacity to materially influence a tenderer's activities).

25 The Guidelines further require that a party to whom the Guidelines apply must "actively ensure compliance... by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work".

26 In order to monitor and enforce compliance with the Code and Guidelines, the State has established the Construction Code Compliance Unit ("CCCU") within the Victorian Department of Treasury and Finance. While the Minister for Finance has overall responsibility for the implementation of the Guidelines, the CCCU is tasked with a range of monitoring and compliance functions including site visits, site inspections and audits.

27 Sanctions for non-compliance with the Guidelines applicable to entities not associated with the State (ie non-governmental entities) include but are not limited to:

- a formal warning that a further breach will lead to severe sanctions;
- referral of a complaint to the relevant industry organisation for assessment against its own professional code of conduct and appropriate action;
- reduction in tendering opportunities at either agency or government-wide level, for example, by exclusion of the breaching party from tendering for government work above a certain value or for a specified period (this sanction may only be imposed by the Minister for Finance in consultation with the responsible Minister);
- reporting of the breach to an appropriate statutory body; and
- publicising the breach and the identity of the party.

28 The CCCU is responsible for investigating and determining whether a party has complied with the Code and Guidelines. The Guidelines require the CCCU to report "all proven breaches" to the Minister for Finance. The Minister is then responsible for determining the appropriate sanction.

29 The legal basis which the State relies upon to require and enforce compliance with the Code and Guidelines is contractual. To that end, the Department of Treasury and Finance has published model clauses and contract documentation (including model tender documents) which require parties to comply with the Code and Guidelines and to undertake to ensure their related entities and subcontractors also comply with the Code and Guidelines ("the Model Clauses"). Certain Model Clauses must be included in tender and contract documentation for building and construction work to which the Code and Guidelines apply. A number of these Model Clauses were included in the Project documentation including the draft Project Agreement. Examples of their content are described at [49] and [50] below.

30 In addition to requiring tendering parties to agree to contractual terms mandating compliance with the Code and Guidelines, the State has made clear through a number of public announcements, that parties that fail to comply with the Code and Guidelines, will be excluded from tendering for State Government funded work. Upon the introduction of the first iteration of the Guidelines in April 2012, the then Premier of Victoria Ted Baillieu stated at a press conference:

> [T]he bottom line for the construction industry is that if contractors wish to contract and tender into State Government projects in Victoria, they will have to comply with these guidelines. If contractors don't comply with these guidelines, then they won't be working on State Government projects, and we believe that that's an important step – these guidelines will restore the balance.

31 At that same press conference, the Treasurer for the State of Victoria Robert Clark reiterated the Premier's comments. After referring to the abolition of the Australian Building and Construction Commissioner and the need to "fill the gap that's been created by the failures of the Commonwealth Government", Mr Clark went on to say:

> [The Guidelines] are using the Victorian Government's power and purchasing strength as a major acquirer of building and construction work here in Victoria, to make clear, as the Premier has indicated, that companies that wish to tender to undertake public construction work here in Victoria, have to commit to comply with those Guidelines. And, ultimately, if firms fail to do that, they face the sanction of being restricted or, indeed, ultimately totally excluded from future Victorian

Government and public sector construction work.

The New Bendigo Hospital Project

32 Bendigo is a regional city in Victoria. It has a large public hospital and other health facilities located on two discrete sites. The Project involves an investment of some $630 million in developing and constructing what will become Victoria's largest regional hospital. The Project is one of twenty-two 'Partnerships Victoria' projects currently in existence in which the State is investing in new infrastructure through public/private partnerships. The twenty-two projects concerned, involve around $11.5 billion of capital investment. The State has a program of investment in capital projects that involves some $29 billion of investment. In the 2012-2013 financial year, capital expenditure by the State is expected to total around $8.6 billion.

33 The State has and continues to conduct, a tender process to select a consortium to deliver the Project. A large number of documents related to the tender process ("the Project documentation") were tendered. In these reasons, unless the context otherwise suggests, capitalised terms are the defined terms used in the Project documentation.

34 As initially structured, the tender process involved three stages: first an Expressions of Interest phase ("the EOI phase"), the purpose of which was to select a short-list of Respondents; then a Request for Proposal phase ("the RFP phase"), the purpose of which was to select the Preferred Respondent from the Short-listed Respondents; thereafter, it was envisaged that the tender process would move to a Negotiation and Completion phase, the purpose of which was to negotiate with the Preferred Respondent and to otherwise finalise and complete contractual arrangements.

35 The EOI phase commenced on 1 September 2011 with the State issuing invitations for expressions of interest. The document inviting expressions of interest ("the EOI document") is a comprehensive document by which the State outlined (in a preliminary way) the nature, purpose and intended objectives of the Project. The intended process contemplated that upon the selection of a successful tenderer, a project specific entity (described in the document as "Project Co") will contract with the State to deliver the Project. Whilst the EOI document included reference to the evaluation methodology and criteria by which Respondents were required to demonstrate their capabilities, no part of the evaluation criteria expressly referred

to employment or industrial relations practices. However, the EOI document identified that the Victorian Government had announced in June 2011, that it would review the industrial relations principles as they applied to the Code. The document stated:

> The Government wishes to promote compliance, productivity and broader cultural change across the Victorian building and construction industry. Project Co will be required to comply with these new principles.

36 In describing the Procurement Process for the Project, the EOI document stated that in the RFP phase, Short-listed Respondents would be required to submit "fully costed binding offers based on the requirements outlined in the RFP". The EOI document also expressly stated that it was the State's preference to select a single Preferred Respondent with whom to negotiate in the Negotiation and Completion phase and that the State preferred "not to employ a Best and Final Offer (BAFO) or other extended procurement phase". As events transpired, and in the circumstances which I will outline, a BAFO phase was required.

37 The EOI document also identified the indicative scope of the Project. There are two distinct requirements sought from the successful tenderer. The first is the construction of buildings and other works referred to in the Project documentation as the Works. The second is the provision of a range of ongoing facility management and maintenance services to the New Bendigo Hospital referred to in the Project documentation as the Services. It is envisaged that the Services will include building management services such as ongoing maintenance and facilities management services including security, cleaning, catering, laundry, waste management, grounds and gardens maintenance, utilities, pest control and car parking as well as the provision of retail outlets complimentary to the health facilities provided at the hospital.

38 The scope of the Works envisaged by the State for the Project was described in the EOI document as follows:

- the design and construction of:
  - a new acute hospital on the Barnard Street Site with 372 acute inpatient beds, 80 acute same day beds, 80 psychiatric inpatient beds and 10 operating theatres;
  - a new integrated regional cancer centre on the Barnard Street Site with 26 chemotherapy places (included in the 80 acute same day beds listed above), 4 radiotherapy bunkers expandable to 6 should this be required in the future, and 5 consulting rooms;
  - a satellite dialysis facility with 16 places (included in the 80 acute same day beds listed above);

- the refurbishment of the existing facilities on the Lucan Street Site as necessary to facilitate the continued use of those facilities for administration and education purposes; and
- the design and construction of commercial opportunities, including retail development, in the Bendigo Health Precinct.

39 The EOI document also identified the contractual framework the State intends will be put in place for the Project. Project Co will enter into a Project Agreement with the State which will be the primary legal document that sets out the rights and obligations of the parties for the delivery of the Project. In addition, the anticipated contractual structure includes agreements between the State, Project Co and the Builder that will construct the Works as well as the State, Project Co and the Service Provider that will provide the Services. The EOI document described the proposed Builder Direct Deed as the contract that will govern the relationship between the State and the Builder. While Project Co will be a party to the Builder Direct Deed, it is envisaged that a separate contract called the Construction Contract will be made between Project Co and the Builder relating to the construction work to be carried out by the Builder.

40 The EOI process resulted in two consortia being short listed for participation in the RFP phase. One of the two successful consortia was Exemplar, of which Lend Lease is a member, and for which Lend Lease was identified as the prospective Builder. The other Short-listed Respondent was a consortium known as InteCare.

41 In or about early February 2012, each of the members of Exemplar including Lend Lease, executed a Deed Poll in favour of the State. The Deed dealt with a range of matters related to the tender process including the discretions reserved to the State in the Procurement Process which included the State's right to require one or more of the competing consortia to make a best and final offer.

42 The RFP documentation was released to the successful short-listed consortia in May 2012. In announcing the release of the RFP documentation, the Minister for Health was quoted in a media release as having stated, "The tender documents also require bidders to comply with the Victorian Government's new [Guidelines]."

43 The RFP documentation provided detailed information and instructions to the two Short-listed Respondents and invited them to submit their Proposal. In a section dealing with

key project and commercial issues, reference was made to the Code and Guidelines. The Guidelines were stated to reflect the Victorian Government's commitment to greater flexibility and productivity within the State's building and construction industry and were said to be designed to ensure that the Victorian Government maximises value for money on its spending on infrastructure projects.

44 Detailed evaluation criteria for evaluating Proposals across a wide range of topics were set out in the RFP documentation. The criteria included "Evaluation Criterion H6: Workplace Relations Management Plan". By that criterion the State indicated that it would evaluate the approach of Respondents to workplace relations and workplace safety and the extent of a Respondent's compliance with the Code and Guidelines. That would involve evaluating whether a Respondent's Workplace Relations Management Plan ("WRMP") complied with the requirements of the Code and Guidelines. The criterion stated that a Respondent must provide a draft WRMP "which complies with the Guidelines as published in April 2012". By an addendum to that Evaluation Criterion issued at the request of the CCCU on 22 September 2013, the RFP required that a Respondent provide a signed Compliance Schedule in the form of an appendix. By completing the Compliance Schedule and submitting an expression of interest or tender response, the tenderer:

- acknowledged that the Code and Guidelines applied to the Project;
- undertook that it and its related entities (including the Builder) would comply with the Code and Guidelines on the Project and on any other privately or publicly funded Victorian building and construction work in which they are involved, on and from the date of submitting the tender response;
- confirmed that it and its related entities have complied with the Code and Guidelines on all of its other projects to which the Guidelines apply or have applied, as well as all applicable legislation, court and tribunal orders, directions and decisions, and industrial instruments; and
- consented to the State (including the CCCU) monitoring compliance with the Code and Guidelines on the Project site, as well as on any private construction site of Project Co or its related entities, investigating any alleged breaches of the Code and Guidelines and imposing sanctions in respect of any breaches.

45 The Compliance Schedule also identified sanctions for non-compliance. The sanctions identified mirror the sanctions set out in the Guidelines.

46 The RFP documentation identified the governance structure for the Procurement Process including that a Steering Committee had been established to oversee the Project and make decisions as required. A Project Board comprising senior officials from relevant State Departments was established to advise Government on significant decisions, as requested. The Secretary of the Department of Health was identified as the person to make formal recommendations on the Project to the Minister for Health and the Victorian Government. The Secretary would be advised by the Steering Committee but could recommend a different course of action from that proposed. The RFP documentation indicated that the Victorian Government would ultimately make key decisions on the Project, such as the selection of the Preferred Respondent. In making those decisions the Victorian Government would be informed by advice from the Secretary, the Project Board, the Steering Committee and others including the Department of Treasury and Finance.

47 Drafts of various contracts were circulated during the RFP phase. The draft Project Agreement contemplates that the State will contract with Project Co and that Project Co will be obligated to undertake the Works and provide the Services. The draft further contemplates that Project Co will engage the Builder under a Construction Contract. However, as might be expected, the State does not intend to contract with a newly created entity with no commercial history or experience without appropriate protections. The draft contractual provisions suggest that a range of controls over the Builder and other entities chosen to provide the requisite services are intended to be put in place. The draft Project Agreement requires Project Co to obtain the State's agreement to and/or consent to make or alter key arrangements of Project Co which extend to:

- the appointment of Key Subcontractors, including the Builder, which Project Co must employ to provide the Works and perform the Services;
- the appointment of Key Personnel to be charged with managing the delivery of the Works and Services;
- the terms of the Construction Contract between Project Co and the Builder; and
- the control and ownership of Project Co.

48 Additionally, by way of the anticipated Builder Direct Deed made between the State, the Builder and Project Co, the Builder will be required to grant to the State rights in relation to the Construction Contract it will make with Project Co. Those rights include the right of the State to insist on performance by the Builder of its obligations under the Construction Contract and the right (in defined circumstances of default by Project Co) to "step-in" and exercise Project Co's powers and obligations under the Construction Contract to the exclusion of Project Co. Where the State's step-in rights crystallise, the contemplated Builder Direct Deed will provide the State with the power to novate the Construction Contract so as to assume the obligations of Project Co and take the rights and benefits of Project Co under the Construction Contract. These provisions are addressed in more detail later.

49 The draft Project Agreement sets out the obligations of Project Co to comply with both the National Code as well as the Code and Guidelines. The draft Project Agreement was amended at the request of the CCCU on 22 September 2012 to incorporate the Model Clauses relating to Code compliance released by the Department of Trade and Finance to which reference has already been made. In respect of the Code and Guidelines, Project Co will be required to comply with and meet any obligations imposed by the Code and Guidelines; notify the CCCU of any alleged breaches of the Code or Guidelines; and not appoint or engage or permit the appointment or engagement of another party where the appointment or engagement would breach a sanction imposed on the other party in connection with the Code or Guidelines. The draft Project Agreement contains clauses dealing with the maintenance of adequate records of compliance with the Code and Guidelines and the rights of the Victorian Government (including the CCCU), to enter, inspect and investigate compliance with the Code and Guidelines. A draft clause also deals with sanctions and requires Project Co to warrant that, as at the date the Project Agreement is made, neither it, nor any of its related entities (as defined in the Guidelines), are subject to a sanction in connection with the Code or Guidelines that would preclude them from tendering for work to which the Code and Guidelines apply.

50 Project Co will also be required to acknowledge that if it does not comply with or fails to meet obligations imposed by the Code or Guidelines, sanctions may be imposed upon it. Project Co will further be required to acknowledge that in relation to any non-compliance leading to a sanction, the State is entitled to take the sanction into account in the evaluation of

any future expressions of interest or tender responses that may be lodged by Project Co or its related entities in respect of work to which the Code and Guidelines apply. Project Co will also be required to ensure that the Construction Contract and relevant sub-contracts made by the Builder will require the Builder and relevant subcontractors to perform obligations and provide acknowledgments and warranties equivalent to those to be provided by Project Co under the Project Agreement in relation to the Code and Guidelines. Further, Project Co will be required to ensure that the Builder and its subcontractors comply with the Code and Guidelines and otherwise act consistently with the obligations, acknowledgments and warranties to be provided by Project Co in relation to the Code and Guidelines.

The Lend Lease Enterprise Agreement

51 The Lend Lease Enterprise Agreement came into operation on 20 September 2011, has a 'nominal' expiry date of 31 March 2016 and will continue in force at least until that time unless varied or terminated in accordance with the FW Act. It covers Lend Lease and all employees of Lend Lease employed as construction workers in all States and Territories as well as covering the CFMEU. It is a comprehensive agreement providing for pay and a wide range of terms and conditions of employment.

52 There is no issue that the Lend Lease Enterprise Agreement is a valid industrial instrument enforceable under the FW Act, and that each of the terms of the Agreement are terms permitted to be included in an enterprise agreement made under Pt 2-4 of the FW Act. In that respect, the FW Act identifies "permitted matters" (s 172(1)), "unlawful terms" (s 194) and mandatory terms (Div 5 of Pt 2-4).

Alleged non-compliance and the selection process

53 Three days before the Lend Lease Enterprise Agreement was approved by the FWC, Mr Hadgkiss, the Director of the CCCU, wrote to Lend Lease. Mr Hadgkiss stated that it had come to his attention that Lend Lease was seeking approval from the FWC for an agreement with the CFMEU. He noted that the proposed agreement contained clauses which he described as "seriously non-compliant with the Guidelines". His expressed purpose for writing was to remind Lend Lease that contractors negotiating agreements made after 1 July 2012 must ensure that their agreements comply with the Guidelines.

54 Contact was made by Mr Hadgkiss with the Director, Capital Projects and Service Planning in the Department of Health ("the Director") sometime prior to 3 October 2012. On that day, the Director advised the Secretary of the Department of Health that Mr Hadgkiss had raised a potential issue for the Project in relation to Lend Lease and its involvement as a member of one of the two consortia preparing bids for the Project. The Secretary of the Department of Health was informed that the CCCU believed that Lend Lease had entered into an industrial agreement that was non-compliant with the requirements of the Code and Guidelines. The Director noted that if not resolved, the issue had potential to impact on the Project.

55 A meeting between the CCCU and Lend Lease to discuss the Lend Lease Enterprise Agreement was scheduled for 16 October 2012. For the purposes of that meeting, the CCCU provided Lend Lease with a table setting out the CCCU's assessment of those clauses of the Lend Lease Enterprise Agreement which the CCCU had assessed as non-compliant with the Guidelines. The table included a brief indication of the clauses of the Guidelines in question and the nature of the non-compliance.

56 I will briefly identify the Lend Lease Enterprise Agreement clauses in question and the nature of the difficulties suggested in the CCCU table ("the Table").

57 Clause 4.3 of the Lend Lease Enterprise Agreement deals with the application of the Agreement and includes an exception where a client of Lend Lease imposes "tender conditions that are different from those contained herein". However, the clause qualifies the operation of the exception. It states that "where such tender conditions are to apply employees will not be disadvantaged compared to the terms of this Agreement". The Table alleges, for reasons not apparent to me from the terms of the Guidelines, that the clause imposes "restrictions on labour" and provides for site allowances in a manner which contravenes the Guidelines.

58 Clause 8.2 expresses a qualified commitment by Lend Lease to use its own employees (where possible) and not to use contracting or labour hire arrangements in a way designed to undermine the job security of those employees. Clause 27 also deals with the use of contractors and supplementary labour and requires Lend Lease to consult with its potentially affected employees and the CFMEU and, when engaging additional labour, to do so on terms

and conditions no less favourable than those provided by relevant CFMEU enterprise agreements or by the Lend Lease Enterprise Agreement. Clause 22 of Appendix F requires that all Gatemen on new Lend Lease projects in Victoria must be Lend Lease employees. The Table alleges that these provisions offend requirements of the Guidelines which prohibit restrictions on the use of independent contractors and or prohibit restrictions on the use and the terms and conditions of employment of employees who are not parties to the industrial instrument concerned. The Table also asserts that the consultation provision in cl 27 contravenes a prohibition contained in the Guidelines on the names of new staff or contractors or subcontractors being provided to a union. Further, the Table suggests (for reasons not apparent to me) that cl 27 also offends provisions in the Guidelines restricting the making of 'project agreements'.

59 Clause 16 deals with time, facilities and access to union training and union meetings to be provided to elected employee representatives. It also provides for those representatives to be given an opportunity to address new employees about the benefits of union membership and to place union information on a noticeboard. The Table asserts that this provision offends the Guidelines' prohibition on the names of employees being given to a union and other 'freedom of association' restrictions such as a prohibition on practices which imply union membership is anything other than a matter of individual choice. It also asserts a breach of the prohibition on the involvement of union representatives in site induction processes. A 'freedom of association' contravention is also alleged in relation to cl 20 of Appendix F, by which Lend Lease has agreed to fly a CFMEU flag on its cranes.

60 The Guidelines restrict the provision of site allowances to those approved by specified industrial instruments. The Table asserts that clauses 11 and 12 of Schedule 1 of the Lend Lease Enterprise Agreement infringe that requirement by allowing the Panel Chairperson of the Victorian Building Industry Disputes Panel to determine the site allowance to apply to a particular project where the parties have failed to reach agreement.

61 Clause 19.1 of the Lend Lease Enterprise Agreement deals with conflict resolution and provides for a procedure which contemplates that a union official will be given access to a worksite for the purpose of representing employees involved in the conflict resolution process. The Table asserts that the proposed access to be provided to the union official infringes prohibitions in the Guidelines limiting the access of union officials to worksites.

62 The conflict resolution procedure provided by cl 19 also nominates the FWC and other dispute resolution bodies as institutions to which an unresolved dispute may be referred. The Table asserts that this provision breaches the requirements of cl 8.5 of the Guidelines. Clause 8.5 requires that any agreement containing a dispute settlement procedure and providing for a third party to arbitrate or otherwise settle a dispute, must contain an express limitation that any outcome determined by the third party cannot be inconsistent with the Code or Guidelines.

63 The assertions made by Mr Hadgkiss and the CCCU that the Lend Lease Enterprise Agreement contravened the Code and Guidelines was not a matter with which Lend Lease agreed. In the course of October and November 2012, Lend Lease made a number of representations on this issue to the CCCU and to the Victorian Government to which I will return.

64 Whilst that was occurring, preparations for the RFP evaluation process were under way. On 22 October 2012, the Steering Committee met to consider a final Evaluation Plan. The plan noted that the objective of the RFP evaluation process was to evaluate each of the Proposals against the Evaluation Criteria and to select a Preferred Respondent with whom to engage in the Negotiation and Completion phase. The plan noted the preferred process that the Evaluation Panel nominate a single Preferred Respondent, although the possibility that it may be necessary to undertake negotiations with the two Respondents concurrently was also acknowledged. The plan indicated that a Preferred Respondent was to be identified based on the evaluation and ratings contained in the Evaluation Report prepared by the Evaluation Panel. The plan stated that in determining an overall rating for each Evaluation Criterion, the Evaluation Panel was to have regard to the ratings assigned to each Evaluation Sub-Criterion and the relative importance of each Evaluation Sub-Criterion. The evaluation methodology recognised that some Evaluation Criteria should have a high relative importance compared with other Evaluation Criteria and that each criteria had been given a star rating. One star indicated the criteria as comparatively less important. Three stars indicated that the criteria was of the highest importance.

65 The Steering Committee noted media reports that Lend Lease had entered into an industrial agreement with the CFMEU which contravened the Code. The Steering Committee considered it unlikely that any action would occur in relation to that matter prior

to the receipt of bids on 1 November 2012. It determined that as such, the evaluation of both Proposals would be undertaken as initially proposed and in accordance with the Evaluation Plan. It was also noted that the Evaluation Criteria dealing with a Respondent's approach to workplace relations and workplace safety and the extent of compliance with the Code and Guidelines was a one star weighted criteria.

66 Prior to a meeting with Mr Hadgkiss scheduled for 23 October 2012, Lend Lease provided the CCCU with a document outlining its explanation of the clauses in the Lend Lease Enterprise Agreement which had been impugned by the CCCU. The detailed explanation contended that the Agreement was compliant with the Code and Guidelines. It argued that in relation to some clauses, the view taken by the CCCU was misconceived and that in relation to the other clauses, cl 4.3 of the Agreement had the effect that the clause in conflict would have no application given the tender requirements for the Project.

67 By letter of 31 October 2012, Lend Lease wrote to Mr Hadgkiss confirming a number of matters that had been raised at their meeting. Lend Lease maintained its view that the Lend Lease Enterprise Agreement complied with the Code and Guidelines. However, Lend Lease indicated a preparedness to follow a process to vary the Lend Lease Enterprise Agreement to ensure its compliance. Lend Lease offered to give an undertaking that during the variation process, Lend Lease would apply the Code and Guidelines in relation to the Project and all subsequent public and private work in which it was engaged. Lend Lease noted that its bid for the Project included such an undertaking. The letter urged upon Mr Hadgkiss the importance to Lend Lease that it not be excluded from any bid whilst the intended process to obtain a new enterprise agreement was underway.

68 A copy of the WRMP submitted by the tenderers was provided by the Department of Health to the CCCU for its assessment. In response and on 9 November 2012, officials within the Department of Health with responsibility for the Project were advised by the CCCU that the Lend Lease Enterprise Agreement could not operate in a way that is compliant with the Code and Guidelines. The CCCU advised that attempts by Lend Lease to vary the Agreement would require the agreement of other parties and that Lend Lease could not guarantee an outcome within a particular period of time, if at all.

69 On 14 November 2012, Lend Lease wrote to the Victorian Attorney-General and Minister for Finance. The letter referred to discussions that had been held on 7 November 2012 and the undertaking offered by Lend Lease to comply with the Code and Guidelines in relation to all public and private building and construction work that is or was the subject of an expression of interest or request for tender on or after 1 July 2012. The Minister was referred to cl 4.3 of the Lend Lease Enterprise Agreement and Lend Lease's commitment given in the letter of 31 October 2012 to pursue a process for the variation of the Agreement. On the basis of Lend Lease's proposed undertaking and commitment, Lend Lease requested that whilst it was working to implement the variations, Lend Lease not be assessed as non-compliant with the Code and Guidelines. Lend Lease also requested that its current tenders with the Victorian Government be assessed on the basis that the Lend Lease Enterprise Agreement is deemed to be compliant with the Code and Guidelines.

70 On 19 November 2012, Mr Hadgkiss wrote to Lend Lease. He stated that he had considered Lend Lease's proposed undertakings and the arguments put forward by Lend Lease as to how the Lend Lease Enterprise Agreement could be applied in a manner that was Code compliant. Mr Hadgkiss advised that he was unable to agree that the Lend Lease Enterprise Agreement, even when read in conjunction with the proposed undertakings, was compliant with or was capable of being applied in a way that was fully consistent with the Code and Guidelines. Accordingly, Mr Hadgkiss stated that the CCCU was not in a position to advise that Lend Lease was compliant with the Guidelines whilst the Lend Lease Enterprise Agreement continued to cover Victorian employees in its current form. Mr Hadgkiss indicated that he would be pleased to reconsider the position upon Lend Lease varying the Lend Lease Enterprise Agreement to exclude Victorian employees from its coverage and entering into a new enterprise agreement covering Victorian employees that complied with the Code and Guidelines.

71 On the same day, the CCCU advised the Department of Health that Lend Lease was not compliant with the Code and Guidelines whilst the Lend Lease Enterprise Agreement continued to cover Victorian employees in its current form.

72 On 21 November 2012, the Department of Health forwarded to the CCCU a letter in which Lend Lease had set out how its WRMP could comply with the Code. The CCCU

responded that there was nothing in that letter that required any change to the conclusion reached by Mr Hadgkiss on 19 November 2012.

73 Meanwhile, the Evaluation Panel met to consider the two competing Proposals. Sometime prior to 17 December 2012, the Evaluation Panel presented a detailed report to the Steering Committee which, on that day, considered the report and made its recommendations. Parts of the report of the Evaluation Panel, together with other information about the assessment made by the Evaluation Panel, is subject to a suppression order made by me on 21 March 2013. Whilst I have taken that evidence into account, I will avoid reference to it so as not to reveal its content. There is evidence that I can refer to which, for current purposes, gives a sufficient account of the considerations of, and recommendations made by, the Evaluation Panel.

74 The Evaluation Panel assessed the tender submitted by Exemplar as the superior tender. It ranked the Exemplar Consortium's proposal as "materially ahead" of the other proposal "across most of the evaluation criteria, including net present cost, functionality/health planning and overall value for money".

75 The report of the Evaluation Panel addressed the WRMP submitted with the Exemplar Consortium's Proposal. It regarded the WRMP as broadly compliant with the requirements and noted that "the Respondent has a good track record of delivering projects on time and on budget". However, the report recorded a concern that there are contradictions between the WRMP and the Lend Lease Enterprise Agreement and that the CCCU had determined that the Agreement does not comply with the Code.

76 As the agenda papers considered by the Steering Committee noted and as other evidence confirmed, the evaluation required of the Evaluation Panel did not call for the WRMP of each Respondent to be assessed on a pass or fail basis. The WRMP was to be assessed consistently with the one-star weighting accorded to the "H6-WRMP" criterion. As the agenda papers noted, that criterion consequently formed a "minor part" of the Evaluation Panel's overall assessment of each Proposal.

77 The agenda papers record the recommendation of the Evaluation Panel that in view of the significant gap between the overall assessment of the two Proposals, it would be

inappropriate to continue to progress the inferior tender. The Evaluation Panel recommended that the Exemplar Consortium be notified that the State is prepared to grant it an exclusive negotiation period of 6 weeks in order to allow that consortium to address all outstanding material issues to the satisfaction of the State. At the end of that period, the Evaluation Panel proposed that it and its Sub-Panels be reconvened to assess and report on the outcome from that process and consider whether to recommend the formal appointment of Exemplar as the Preferred Respondent.

78 On 17 December 2012, the Steering Committee endorsed the ratings and rankings determined by the Evaluation Panel and recommended that the results of the evaluation be forwarded to the Project Board for its consideration. The Steering Committee did not expressly endorse the Evaluation Panel's recommendation that Exemplar be given a six week exclusive negotiation period, but instead recommended the forwarding of the results of the evaluation to the Project Board for its consideration.

79 The Project Board met on 21 December 2012. The Project Board noted that the proposal from the Exemplar Consortium was ranked ahead of that from the InteCare Consortium across most of the evaluation criteria. It also noted that the evaluation had indicated a range of outstanding issues associated with both proposals and that the CCCU considered the Exemplar Consortium's Builder as being unable to comply with the requirements of the Code and Guidelines. Subject to the relevant Minister's approval, the Board endorsed the use of a six week Best and Final Offer ("BAFO") process during which both Respondents would be given the opportunity to address specific issues within their Proposals as noted by the Evaluation Panel. The Project Board further noted that at the end of the BAFO process, the Evaluation Panel and Sub-Panels would reconvene to evaluate the Revised Proposals.

80 Despite the three phase process originally preferred for the Procurement Process, on the approval of the Minister for Health, the tender proceeded to the additional BAFO phase as recommended by the Project Board.

81 On 24 December 2012, the Victorian Minister for Health wrote to the then Victorian Premier and also to the Victorian Treasurer informing them of his endorsement of the Procurement Process proceeding to a BAFO phase. In those letters the Minister for Health

advised that the evaluation had indicated a range of outstanding issues associated with both Proposals and that the Exemplar proposal was generally rated ahead on most of the Evaluation Criteria but the CCCU had issued a letter to Lend Lease indicating that the Lend Lease Enterprise Agreement was not compliant with the Code and Guidelines. The recommendation made by the Project Board for the tender to proceed to a BAFO phase was communicated. It was noted that the proposed BAFO phase would likely delay the completion of the Procurement Process by up to two months and may jeopardise the 2016 completion date for the Project. An indicative timeline was set out in the correspondence which provided for the issue of 'revised and retender' packages, the receipt of Revised Proposals, the evaluation of those Proposals, consideration by the Steering Committee and the Project Board of those Proposals and final selection and announcement of the Preferred Respondent by 16 April 2013.

82 It is of some importance to note that a number of high level officials of the State were concerned as to what the State would do if the leading bidder for the Project was assessed to be the Exemplar Consortium in circumstances where the Lend Lease Enterprise Agreement was considered not to comply with the Code and Guidelines. In particular the Project Director, Mr Anthony Lubofsky of the Department of Health, had discussions with the CCCU in mid December of 2012 in which he expressed the view that the Victorian Government did not have the legal right under the agreed tender process to exclude the Exemplar Consortium on the basis of an assessment as to its compliance with the Code and Guidelines. In a briefing note addressed to the "Secretary" (which I would infer was communicated to the Secretary of the Department of Health), Mr Lubofsky repeated those concerns. His briefing note concludes with the following warning:

> In summary therefore, if Government was to award the contract to a party that was not the party whose tender was ranked highest by the Evaluation Panel, there is a very real risk the decision could be challenged in the courts. Should that occur, it is considered more likely than not that the Courts will find against Government, the consequences of which would be severe:
>
> - Government will be liable for loss of profits for the aggrieved consortium (financiers, builder, facility manager, architects etc)
> - There will be significant delay (which could be exacerbated to the extent the aggrieved tenderer was able to obtain injunctive relief)
> - In addition to the loss of profits, Government will bear any additional costs associated with the tender it selected (which will be more expensive), and would also be in a significantly reduced competitive position in finalising the contract / design with that tenderer
> - There is a real risk aggrieved Bendigo Health stakeholders will air their grievances in the media

- Perception regarding the integrity of any Government tender process will be compromised, which may jeopardise future tenders.
- BH [Bendigo Hospital] end up with a hospital that will not be as well designed and operationally efficient as it otherwise might have been.

83 It is not apparent from the evidence whether Mr Lubofsky's concerns were communicated to the Minister for Health. On 27 December 2012, the Minister for Health issued a media release in which he announced that a decision had been made by the Victorian Government to enter into a BAFO phase with the two short-listed consortia. The Minister's statement referred to the Code and the Guidelines and stated that the tender documents required bidders to comply with the Code and Guidelines.

84 By letter of 21 January 2013, the Chief Executive Officer for Construction and Infrastructure Australia within the Lend Lease Group ("the Lend Lease CEO") wrote to the Victorian Minister for Finance. He requested that the Minister for Finance exercise his authority, as contemplated under the Guidelines, to put in place a transitional arrangement that would grant Lend Lease provisional or deemed compliance with the Guidelines for a transitional period to 30 June 2013. The letter referred to a letter dated 17 December 2012 from the Director of the CCCU, the contents of which were described as making it clear that the CCCU's position was that Lend Lease was ineligible to tender for new State funded work because the Lend Lease Enterprise Agreement did not comply with the Code and Guidelines. The letter identified Lend Lease's intent to take steps to modify the Lend Lease Enterprise Agreement through discussion and agreement with its employees and the CFMEU. It noted the existence of this proceeding and the claims made by the CFMEU in it and suggested that it was likely that the CFMEU would oppose steps taken to modify the Lend Lease Enterprise Agreement. Lend Lease indicated a preparedness to give a number of specified undertakings in relation to what it described as the nine concerns identified by the CCCU with the Lend Lease Enterprise Agreement. In essence, Lend Lease offered to apply the impugned clauses in a manner consistent with the Code and Guidelines. It further offered to support its commitment by agreeing to the imposition of financial penalties should it be found to have breached its undertakings in a material respect. Lend Lease agreed to forfeit to the State $10,000 in respect of each such breach, up to an aggregate amount of $500,000. In support of that financial obligation, Lend Lease offered to provide a bond in the amount of $500,000.

85 The letter also urged the Minister to agree to the transitional arrangement suggested on the basis of a range of what were described as public interest grounds. The matters relied upon by Lend Lease included its contention that the strict application of the Guidelines upon Lend Lease would:

- lead to delays in infrastructure development to the detriment of the State;
- lessen competition in the construction sector;
- cause significant harm to subcontractors relying on Lend Lease's business (noting that Lend Lease supports approximately 500 subcontractors and had injected approximately $450m into the Victorian economy through its subcontractors in the financial year ended June 2012);
- would impact upon cash injection in Victoria (noting that Lend Lease has spent approximately $500m in Victoria in the financial year ended June 2012); and
- result in loss of jobs and future employment opportunities (noting that Lend Lease alone employs approximately 250 employees in Victoria).

86 On 29 January 2013, the Chief of Staff to the Minister for Finance sent an email to the Lend Lease CEO, which gave the Minister's response to the letter of 21 January 2013. The email relevantly said:

> I have been directed by the Minister to inform you that the arrangements proposed by Lend Lease in the 21 January draft letter are not acceptable to the Government. The suggested performance bond is not an appropriate solution and could not be contemplated. Otherwise, the position previously expressed to Lend Lease by the Construction Code Compliance Unit remains the position of the Government.

87 In accordance with the process delineated for the BAFO phase, both of the Short-listed Respondents submitted a Revised Proposal on 28 February 2013. As part of its Revised Proposal, the Exemplar Consortium provided a response to a question posed by the State in relation to Evaluation Criterion H6. In that response it was stated on behalf of Exemplar that:

> [The Exemplar Consortium] intends to and will be compliant with the Victorian Code and Implementation Guidelines (Code) at Contract Close.

88 Following a reference to this proceeding and the need for the Exemplar Consortium to be careful not to "exacerbate or unduly prejudice the proceedings", the response went on to state:

> We are also currently engaged with the CCCU to agree to the extent of modification required to the [Lend Lease Enterprise Agreement] to enable the CCCU to assess it as Code and Guideline compliant. Once we have the necessary information from the above matters, and depending upon the outcome, we propose to address any remaining concerns through negotiation of the agreement with our employees or, if required, augmenting the consortium (within the Lend Lease group) and amending the proposed Workplace Relations Management Plan to ensure compliance with the Code.

89 In correspondence and in meetings between each of the State and Lend Lease's external solicitors occurring between February and April 2013, Lend Lease proposed a number of changes to the Lend Lease Enterprise Agreement and sought instructions from the CCCU as to whether, on the basis of those changes, the CCCU would assess the proposed amended agreement as being compliant with the Code and Guidelines. Lend Lease's solicitors expressed that it was important for its client to understand the scope of the required changes before approaching its employees and their representatives to seek to vary the Lend Lease Enterprise Agreement, to maximise the chances of a successful outcome. In response, the solicitors for the State advised that according to the CCCU, Lend Lease's proposed amended enterprise agreement remained non-compliant with the Code and Guidelines and gave an indication of the clauses that continued to be non-compliant.

90 In parallel with these consultations, and as part of the Evaluation Panel's assessment of the Revised Proposals, the WRMP of each consortium was sent to the CCCU for assessment. On 14 March 2013, the CCCU responded indicating that the Exemplar Consortium's WRMP remained non-compliant with the Guidelines.

91 By 28 March 2013 the Evaluation Panel had completed its evaluation of the two Revised Proposals. A Revised Evaluation Report was prepared comprising the original Evaluation Report marked to show amendments arising from the BAFO process. In relation to Code compliance, a marked-up comment appeared under the heading "Issues/Concerns" which stated that the CCCU still considers that Lend Lease does not comply with the Code. No change was made to the overall assessment of the Exemplar Consortium's bid and the Evaluation Report concluded that the Exemplar bid "has been evaluated as delivering better value for money to the State".

92 On 2 April 2013 the Project Steering Committee met and endorsed the ratings and rankings determined by the Evaluation Panel. At that meeting the Steering Committee noted

the Revised Proposal of the Exemplar Consortium was ranked ahead of its competitor, including in relation to "net present cost, functionality/health planning and overall value for money". The agenda papers together with the minutes note that the BAFO process had not resulted in any changes in relation to Code compliance issues and that Lend Lease continued to be assessed by the CCCU as non-compliant with the Code and Guidelines.

93 On 3 April 2013, the Project Board endorsed the rankings of the Evaluation Panel and recommended that the Minister for Health be briefed on the outcome of the evaluation process so that he could provide a recommendation to the Victorian Government. The Project Board also noted that Exemplar's Builder had been assessed by the CCCU as non-compliant.

94 On 4 April 2013, the Minister for Health made a submission to a Cabinet Committee dealing with the tender process. That Cabinet Submission is subject to a suppression order made by me on 24 April 2013. I have had regard to the Cabinet Submission but will not here refer to its contents.

95 The following day, in a joint media release from the Victorian Premier and the Minister for Health, the Exemplar Consortium was announced as the "preferred bidder" for the Project.

96 This announcement and many of the events I have just described occurred following the last scheduled hearing date of 27 March 2013, when I first reserved my judgment in this matter. On the joint application of both parties on 24 April 2013, I gave the parties leave to re-open their cases for the purpose of receiving further documentary evidence which largely related to events which had arisen following the end of the trial. Upon re-opening, the State proffered an undertaking to the following effect:

- in the course of the Negotiation and Completion phase, the State will not refuse to agree to contractual documents;
- having agreed the contractual documentation for the Project, the State will not fail to satisfy preconditions to completion; or
- having achieved contractual and financial close, the State will not allege any breach of contractual documentation for the Project,

because of non compliance of the Lend Lease Enterprise Agreement with the Code and/or Guidelines.

97 As a result of that undertaking, the CFMEU acknowledged that there was no longer a foundation for a finding that the State had "refused to engage" Lend Lease because of the workplace rights of its employees. The CFMEU no longer pressed its claim for an injunction to prevent Lend Lease from being excluded from the tender process. However, the CFMEU maintained its claim that the State had taken adverse action by having threatened to refuse to engage or make use of the services of Lend Lease.

RELEVANT STATUTORY PROVISIONS

98 The provisions of the FW Act pursuant to which allegations of adverse action are made against the State are contained in Pt 3-1, which is entitled "General Protections".

99 The objects of Pt 3-1 are set out in s 336 which is in the following terms:

> **336 Objects of this Part**
>
> (1) The objects of this Part are as follows:
>
> (a) to protect workplace rights;
>
> (b) to protect freedom of association by ensuring that persons are:
>
> (i) free to become, or not become, members of industrial associations; and
>
> (ii) free to be represented, or not represented, by industrial associations; and
>
> (iii) free to participate, or not participate, in lawful industrial activities;
>
> (c) to provide protection from workplace discrimination;
>
> (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.
>
> (2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

100 The CFMEU alleges that the State has contravened s 340. That section is as follows:

> **340 Protection**
>
> (1) A person must not take adverse action against another person:
>
> (a) because the other person:
>
> (i) has a workplace right; or
>
> (ii) has, or has not, exercised a workplace right; or
>
> (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
>
> (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

101 Pursuant to s 340, the CFMEU claims that "adverse action" was taken by the State against members of the CFMEU employed by Lend Lease because they have a "workplace right", namely an entitlement to the benefit of a workplace instrument, being the Lend Lease Enterprise Agreement.

102 A "workplace right" is defined in s 341(1) as follows:

Meaning of ***workplace right***

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

103 The dictionary in s 12 of the FW Act contains definitions of "workplace instrument" and "workplace law". The FW Act itself is a workplace law. An instrument made under or recognised by a workplace law, and concerning the relationships between employers and employees, is a workplace instrument. The parties to these proceedings do not dispute that the Lend Lease Enterprise Agreement is such an instrument.

104 Section 342(1) contains a table setting out circumstances in which a person takes adverse action against another person for the purposes of s 340. The adverse action relied upon by the CFMEU is that set out in Item 4 of the table as amplified by s 342(2), namely, that the State is a person proposing to enter into a contract for services with Lend Lease and has threatened to refuse to engage or make use of the services of Lend Lease. While this case primarily concerns Item 4, the entire table is extracted below because the interpretation of Item 4 is assisted by consideration of its terms in their context.

Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the ***principal***) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the ***principal***) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or

Meaning of *adverse action*

Item	Column 1 *Adverse action* is taken by ...	Column 2 if ...
		(c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

105 Section 342(2) provides:

(2) Adverse action includes:
(a) threatening to take action covered by the table in subsection (1); and
(b) organising such action.

106 The meaning of the terms "independent contractor" and "proposing to enter into a contract for services" as used in Column 1 of Item 4 of the table, are the subject of considerable discussion below.

107 The definition of "adverse action" in the dictionary in s 12 of the FW Act refers to s 342, thereby making it clear that the meaning given in s 342 is applicable to the term "adverse action" when it is used in s 340.

108 Sections 360 and 361 are also important provisions for the operation of Pt 3-1. So far as is relevant, they provide:

> **360 Multiple reasons for action**
>
> For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.
>
> **361 Reason for action to be presumed unless proved otherwise**
>
> (1) If:
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
> (b) taking that action for that reason or with that intent would constitute a contravention of this Part;
> it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

ISSUES OF STATUTORY CONSTRUCTION

109 Much of the battleground over which this case was fought involved the construction of key words or phrases found in s 342(1) of the FW Act.

110 The task of statutory construction must focus on the text of the provisions in question, but the meaning of that text requires consideration of the purpose and policy of the provision in the context of the legislation as a whole: *Informax International Pty Ltd v Clarius Group Ltd* (2012) 207 FCR 298 at [162] (Besanko, Jagot and Bromberg JJ). As French CJ, Gummow, Hayne, Kiefel and Bell JJ said in *AB v Western Australia* (2011) 244 CLR 390 at [10] (by reference to the observations of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397), the context, general purpose, policy and fairness of a statutory provision are guides to its meaning. Their Honours continued:

> The modern approach to statutory interpretation uses "context" in its widest sense, to include the existing state of the law and the mischief to which the legislation is addressed. Judicial decisions which preceded the Act may be relevant in this sense, but the task remains one of the construction of the Act.
> [Footnotes omitted.]

111 The objects of Pt 3-1 reveal that the FW Act seeks to protect the rights conferred by the Part and to provide to persons on whom those rights are conferred effective relief from being discriminated against, victimised or otherwise adversely affected by reason of the holding or exercising of those rights. The rights protected under Pt 3-1 are:

- the workplace rights conferred by Div 3 (the "workplace rights");
- the rights of association and participation in the industrial activities conferred by Div 4 (the "industrial activities rights"); and
- anti-discrimination rights and other protections conferred by Divs 5 and 6.

112 In interpreting a legislative provision, the Court is required to prefer a construction that "would best achieve the purpose or object of the Act" (whether or not that purpose or object is expressly stated in the Act): s 15AA of the *Acts Interpretation Act 1901* (Cth).

113 Provisions of the kind contained in Pt 3-1, and in particular those in Div 3 and Div 4, have long been regarded as remedial and beneficial in nature despite their penal aspect: *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at [14]-[17] (Gray and Bromberg JJ); *Kelly v Construction, Forestry, Mining and Energy Union (No.3)* (1995) 63 IR 119 at 130 (Moore J); *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* (2000) 101 IR 143 (*"Australian Municipal, Administrative, Clerical and Services Union")* at [75] (Madgwick J); *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90 at [48] (Weinberg J); *Construction, Forestry, Mining and Energy Union v Pilbara Iron Co (Services) Pty Ltd (No 3)* [2012] FCA 697 at [35] (Katzmann J); and see *Waugh v Kippen* (1986) 160 CLR 156 at 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ).

114 Accordingly, the terms of the legislative provisions in question should be given "a fair and liberal interpretation in order that they achieve the Act's beneficial purposes": *AB v Western Australia* at [38] (the Court). The approach that should be taken to the construction

questions is one that gives effect to the evident purpose of the legislation and is consistent with its terms: *AB v Western Australia* at [23] (the Court).

Is Lend Lease an "independent contractor"?

115 The State claims that Lend Lease and its employees do not attract the protection of Item 4 in s 342(1) as Lend Lease is not an "independent contractor" within the meaning of that section. The State contended that the term "independent contractor" has historically been used in contra-distinction to "employee" so as to mean the functional equivalent of an employee in that he, she or it provides services in the form of labour which would otherwise be performed by an employee. For ease of reference I will refer to the meaning contended for by the State as "the confined meaning". In support of the confined meaning being applied to the term as used in Item 4 of s 342(1), the State relied upon the textual support said to be found in the structure of the table in s 342(1) and in the use of the phrase in other provisions of the FW Act. The State also relied upon the definition of the term "independent contractor" in s 4 of the *Independent Contractors Act 2006* (Cth) ("the IC Act").

116 The CFMEU contended that the term "independent contractor" as used in s 342(1) is not limited to an entity that is the functional equivalent of an employee and extends to a person carrying on the business of a contractor that provides services, irrespective of its scale. It accepted that the term is used in different ways throughout the FW Act and contended that the term takes its meaning from the particular context in which it is employed. The CFMEU submitted that the more confined use of "independent contractor" in the IC Act is mandated by the specific terms of that Act and has nothing to say about the meaning of the term in s 342(1) of the FW Act.

117 To determine whether Lend Lease is an "independent contractor", it is best to commence by considering the words utilised in the provisions in question. The starting point is s 340 of the FW Act, where the phrase "adverse action" (later amplified by s 342(1)) is used. Section 340 is found in a division headed "Workplace Rights" and bears the heading "Protection". Section 340(1) prohibits "a person" taking adverse action against "another person" because of the prohibited reasons there identified. The nature or character of the person subjected to the adverse action is unrestricted by any qualifying criteria expressed by s 340. A "person" includes "a body politic or corporate as well as an individual": s 2C(1) *Acts Interpretation Act 1901* (Cth).

118 The term "adverse action" is included in the s 12 dictionary, but the definition merely refers the reader to s 342. Section 342 provides the meaning of "adverse action" in relation to the workplace rights protections dealt with in s 340 and also the industrial activities protections specified by s 346.

119 The expressed purpose of s 342(1) is to set out the "circumstances in which a person takes adverse action against another person". That is done in a table with two columns. The heading of each column is intended to be read as the introductory words to the text in the column for each of the seven circumstances numbered as Items 1 to 7. For each of the Items, the text of the first column identifies the kind of person adverse action may be taken by ("the first person") and the kind of person or persons adverse action may be taken against ("the second person or persons"). The second column identifies the kind of action taken by the first person which falls within the description "adverse action".

120 It is apparent then that the meaning given to "adverse action" serves to confine the application of s 340, including by imposing qualifications upon the kind of person who falls within the protective scope of that section.

121 There is also a further restriction imposed on the kind of person who can take the protective benefit of s 340. Each of the prohibited reasons identified in s 340 depend upon the person against whom adverse action is taken having a "workplace right" as defined by s 341(1). In each case, the workplace right identified by s 341(1) is sourced in a workplace law or workplace instrument, other than for the case referred to in s 341(1)(c)(ii), where the right is sourced in a person's employment. Only a person who has a workplace right specified by s 341(1) and is a second person referred to in s 342(1), will fall within the protective scope of s 340.

122 The CFMEU alleges the State took adverse action within the meaning of Item 4 of s 342(1). That Item identifies the first person as "a person (the principal)" and the second person as an "independent contractor" or "a person employed or engaged by the independent contractor". It also identifies the nature of the nexus between the first person and the independent contractor by identifying that there must be a transaction in prospect between them in the nature of a "contract for services". The first matter which is apparent and is made so by the use of the phrase "contract for services" rather than "contract of services", is that

the relationship in prospect between the first person and the independent contractor is not an employment relationship. That makes it clear that neither the first person nor the independent contractor is an employee and that the relationship in prospect is a commercial relationship in which the independent contractor operates a business.

123 The nature or scale of the business of the independent contractor is not directly addressed but there are some indications given. The reference to a contract for services is suggestive of a business that supplies services rather than a merchant selling goods. That is reinforced in paragraph (c) of Column 2 by the reference to "services offered by the independent contractor". The business referred to is also a business that may employ or engage others to carry out its activities. That much is apparent from the description of the other second persons whose workplace rights and industrial activities rights fall to be protected, namely, persons employed or engaged by the independent contractor.

124 There is no limit suggested as to the number of persons such a business may employ. The word "engage" when used disjunctively with "employed" suggests that the business of the independent contractor may engage other contractors. That conclusion is supported by the terms of Item 6 of s 342(1), which expressly contemplate that an "independent contractor" is the kind of person who may engage other "independent contractors".

125 So far, the characteristics of the independent contractor which s 342(1) expressly contemplates, do not sit well with the notion that the independent contractor envisaged by Item 4 is limited to the functional equivalent of an employee. Nor is the State's characterisation assisted when it is recognised that the s 12 definition of "independent contractor" identifies that the kind of independent contractor contemplated includes a corporate entity.

126 One of the hallmarks of an employee is the personal performance by that individual of the services which the employee has been contracted to provide: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24-26 (Mason J) and 38 (Wilson and Dawson JJ); *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 425 and 428 (the Court). A limited or an occasional delegation of work to another person may not disqualify the existence of an employment relationship: *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 at [283] (Bromberg J); *Ready*

Mixed Concrete (South East) Limited v Minister for Pensions and National Insurance [1968] 2 QB 497 at 515 (MacKenna J). However, a person substantially providing personal services to another through the use of employees or contractors is not an employee of the other person in relation to the provision of those services. Such a person is not the "functional equivalent" of an employee. Such a person may well be providing services which could be provided directly by employees of the recipient of the services. However, the persons who fit within that description extend to many entities providing the efforts of their employees or contractors, including corporations which hire labour and a wide range of contractors who provide maintenance, cleaning, engineering, building trades, professional and other services. The confined meaning contended for by the State is not given textual support by the characteristics of an "independent contractor" which s 342(1) itself identifies.

127 If the State's contention is correct, much must turn on the phrase "independent contractor" itself and any particular meaning attached to it in the context of the industrial relations subject matter dealt with by the legislation. For that purpose, and also for the purpose of assisting to identify the mischief to which Item 4 is addressed, it is necessary to turn to and consider the legislative predecessors of s 340 and Pt 3-1.

128 Before doing so, I should say something about the words that constitute the phrase. Whilst a "contractor" can simply mean a person who contracts, in the world of work and commerce, a contractor is likely to be thought of as a person who contracts to furnish supplies or perform work at a certain price or rate: *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers, 2009) p 371. A contractor is not generally thought of as an employee. The term contractor by itself and without any assistance from the word "independent", sufficiently identifies that the entity in question is not an employee. Nor does contractor necessarily connote something akin to an employee. The operations of a contractor may be small or vast. The labour or other services provided by a contractor may be provided by a single owner/operator or alternatively by many tens if not hundreds of employees. The size or scale of a contractor's operations is in many contexts suggested by prefixes such as "principal", "head" or "sub".

129 I presume that the word "independent" came to be connected with the word "contractor" for the purpose of assisting to draw a legal distinction between a person providing services to another as the other's servant or agent and a person providing services

under an "independent contract". An example of the use of the term "independent contract" is found in the judgment of Dixon J in *Queensland Stations Pty Limited v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552. The phrase "independent contractor" is commonly used in the case law. It is likely that it originates from cases dealing with vicarious liability. At common law, a person is not generally liable for the negligence of an independent contractor: *Stevens v Brodribb* at 43 (Wilson and Dawson JJ). That proposition can probably be traced back to *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509], as McHugh J observed in *Scott v Davies* (2000) 204 CLR 333 at [37]. As his Honour identified in that passage, although the nomenclature was different at the time *Quarman* was decided, the defendants in that case were not liable for the acts of "what we now call an independent contractor".

130 In the discourse about vicarious liability, an independent contractor may be a self-employed individual providing personal services. Alternatively, an independent contractor may also be a substantial corporate entity carrying out work under a contract comprising labour and the provision of materials. There are many examples in the cases in which the term "independent contractor" has been used to refer to entities of that kind: *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 (a construction company engaged to undertake footpath reconstruction works); *Roads and Traffic Authority v Scroop* (1998) 28 MVR 233 (a company engaged to resurface a portion of a major highway); *Kondis v State Transport Authority* (1984) 154 CLR 672 (a company that rented out mobile cranes for use in construction work); *Australian Municipal, Administrative, Clerical and Services Union* (a company engaged to provide home and community care services involving upwards of 70 employees); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (a company engaged to install additional refrigeration at cold storage facilities owned by a port authority); *Murphy v Brentwood District Council* [1991] 1 AC 398 (a firm of consulting engineers retained to check the designs and calculations for the construction of 160 homes on a sloping site); *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217 (a company contracted to provide general services at an immigration detention centre).

131 The term independent contractor, in its broad conception, connotes an entity that furnishes supplies or performs work under a contract that does not create a relationship of principal and agent as between the contractor and the person who contracts for the benefit of

the services supplied. The word independent serves to emphasise the contractor's independence from the person for whom the contractor's services are provided.

132 However, when a term receives constant attention in a particular context it can take on a particular connotation. The term independent contractor seems most often to have been used in the cases, whether dealing with negligence, taxation law, employment or industrial law, to identify a distinction between an employee at common law and a person who is not an employee. Those cases generally involved questions of characterisation, made upon facts involving persons performing roles that are at the juncture between what the common law recognises as an employee on the one hand and an independent contractor on the other. That context called for comparisons to be made between an employee and something closely akin to an employee, but not recognised as such by the common law.

133 The connotation for the term independent contractor which that context encouraged, has entered into common parlance, including because of the increasing trend over the past half century towards self-employment and the need to distinguish the status of the self-employed contractor from that of an employee.

134 It does not matter for current purposes whether the trend to self employment was the consequence of employers seeking to escape obligations imposed by the law in relation to the employment of employees, or whether the trend was the result of genuine decisions made by individuals to provide their labour as self-employed persons. The fact is that the trend became the subject of industrial concern which was ultimately, to some extent, reflected in industrial laws. The loss of the status of an employee for an individual regarded as self-employed, resulted in the loss of access to legislative industrial protections as well as ineligibility to join and be represented by industrial organisations of employees. It is not necessary to chart the history in any great detail. It is sufficient to observe that the industrial contest over the status of individuals who provided labour but who were not recognised as employees by the common law, led to the adoption of deeming provisions in the industrial legislation of some States. Those provisions resulted in the inclusion of a range of persons not recognised by the common law to be employees, within the protective scope of industrial regulation, including by providing such a persons the capacity to join and be represented by unions.

135 These events were referred to in passing in the last major review of Australia's industrial relations system conducted in 1985. The Report of the Committee of Review on Australian Industrial Relations Law and Systems ("the Hancock Report") notes that amendments were made to the *Conciliation and Arbitration Act 1904* (Cth) ("the C&A Act") in 1973 and 1974, to enlarge the scope of membership of federal employee organisations to include persons who were not employees but who nevertheless "followed an occupation in the industry concerned otherwise than as employees or employers". Those amendments were intended to deal with the conflict between federal and state unions, including by reason of a discord in membership as between many federally registered unions and their state based counterparts, which followed the introduction of deeming provisions in the industrial legislation of some States. This conflict was brought to notice in *Moore v Doyle* (1969) 15 FLR 59 and became the subject of consideration by the Committee of Inquiry on Co-ordinated Industrial Organisations conducted in 1974 by Mr Justice JB Sweeney. As the Hancock Report notes at [7.59] of Volume Two, with the enlarged scope of membership of federal employee organisations brought about by the 1973 and 1974 amendments, some federal organisations amended their rules "to enable them to enrol independent contractors (such as owner-drivers in the transport industry and self-employed persons 'working on the tools' in the building industry)".

136 In 1977, s 132(4) was inserted in the C&A Act. It had the effect of restricting the categories of non-employee members of federal employee organisations to persons deemed to be employees in the State based industrial legislation specified in the provision. Section 132A was also inserted into the C&A Act in 1977. It seems to be the first occasion on which the term "independent contractor" was used in federal industrial legislation. The title to s 132A was "Offences in relation to independent contractors, etc". The term "independent contractor" was not used in the text of s 132A and instead, the persons the subject of the provision were those that fell within the defined description of "eligible person". An "eligible person" was a person "engaged in activities in an industry, otherwise than as an employee; and by reason of being so engaged, is, or would, if he were an employee, be eligible to join [a federally registered] organisation". The evident purpose of s 132A was to protect such persons against discriminatory action or coercion designed to pressure them to join a federally registered union.

137 The workplace rights and industrial activities protections provided by Pt 3-1 of the FW Act can be traced back to s 9(1) of the C&A Act as enacted in 1904. Since 1904, the protective scope of provisions of that kind has been greatly expanded both in relation to the subject matter of the protections and the persons protected. Prior to the repeal of the C&A Act in 1988, s 5 of that Act contained the relevant protections. The provisions were limited in their scope to the conduct of an employer taken against an employee. The protections conferred included action taken by an employer because the employee was entitled to the benefit of an industrial agreement or an award. There was no reference to independent contractors. The position of prospective employees was not dealt with.

138 The C&A Act was replaced by the *Industrial Relations Act 1988* (Cth) ("the IR Act"). The relevant protections were then set out in s 334 of the IR Act. Section 334 continued to provide protection in relation to action taken by an employer because an employee was entitled to the benefit of an award or an order of the Australian Industrial Relations Commission. A wide range of other protections from harm at the hands of an employer, not dissimilar to those now found in Pt 3-1, were also in place by that time.

139 There are two notable aspects of the protections as they stood in the IR Act. The first is that their application was extended to independent contractors in amendments made in 1992 by the *Industrial Relations Legislation Amendment Act 1992* (Cth). That was done by the enactment of s 334(7A), which for the purposes of the relevant sub-sections of s 334, extended the meaning of "employee" to include an independent contractor and extended the meaning of "employer" to include a person engaging an independent contractor. Section 4(1A) of the IR Act declared that a reference in that Act to an independent contractor was confined to a natural person. The second notable feature is that the protections provided extended to prospective employees and prospective independent contractors.

140 The 1992 amendments also introduced ss 127A-127C into the IR Act. By those amendments, for the first time, federal industrial legislation provided a scheme for the review of contracts made by independent contractors ("the unfair contracts provisions"). The power to conduct such a review and make orders setting aside or varying such contracts (s 127B(1)) was reposed in the federal industrial tribunal then called the Australian Industrial Relations Commission and which is now called the FWC. Section 127A(1) of the IR Act defined the term "contract" and identified the contracts to which ss 127A-127C had application. They

were limited to contracts binding on an independent contractor which related to the performance of work by the independent contractor, other than work for private and domestic purposes. A fuller account of those provisions and successor provisions which ultimately found their way into the IC Act is given in *Informax* at [107]-[155].

141 Amendments were also made in 1992 to the description of the persons who may constitute associations of employees to include "independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be employees eligible for membership of the association". A corresponding change was made by the enactment of s 195(1A), which dealt with the membership eligibility rules of organisations of employees. The IR Act also included s 336, a provision like that earlier found in s 132A of the C&A Act, which did not use independent contractor in the text of the provision but was headed "Offences in relation to independent contractors etc".

142 It seems to me likely that when s 334 of the IR Act was extended by the 1992 amendments to include independent contractors, what Parliament had in mind when it used the term "independent contractor", was a self-employed individual personally providing his or her labour, or perhaps labour and some equipment, under a contract for services. That confined connotation of independent contractor is apparent from the use of the defined term "employee" to refer to an independent contractor and also from the subject matter dealt with by the text of s 334. There is no hint in those provisions that the fundamental characteristics of an independent contractor of the kind there contemplated, were not characteristics shared by an employee. In fact, the deeming provision used to bring independent contractors within the scope of s 334, denied any possible distinction of that kind being drawn. By limiting the contracts which could be reviewed to those related to the performance of work by the independent contractor, the unfair contracts provisions also used the term independent contractor in its confined sense. As did the membership related provisions to which I have referred.

143 The *Workplace Relations and Other Legislation Amendment Act 1996* made substantial changes to the IR Act and renamed it as the *Workplace Relations Act 1996* ("the WR Act"). Part XA titled "Freedom of Association" replaced s 334 of the IR Act and further extended the scope of the protections conferred, particularly in relation to conduct by

industrial associations against others. Much of what had been contained in s 334 became the subject of ss 298K and 298L of the WR Act. However, the definition of employee no longer included an independent contractor and the conduct prohibited was separated into two sub-sections. Section 298K(1) dealt with employer conduct against an employee and s 298K(2) dealt with conduct by a person against an independent contractor. The prohibited reasons for conduct were spelt out by s 298L(1). An "entitled to the benefit" protection was retained. Of some note is 298L(1)(c)(i) which indentified one of the prohibited reasons as:

> (c) in the case of a refusal to engage another person as an independent contractor:
> (i) has one or more employees who are not, or do not propose to become, members of an industrial association;

144 By that sub-paragraph, for the first time, the scope of the workplace rights and industrial activity protections dealt with by federal industrial legislation was extended to protect against conduct taken by a person against an independent contractor by reason of the circumstances of the contractor's employees. The sub-paragraph recognised that independent contractors were persons who may employ employees. That recognition challenged the notion that the term "independent contractor", when used in the WR Act, necessarily meant a self-employed individual personally providing labour under a contract for services. Some of the provisions of s 298L(1) were suggestive of the confined meaning. For instance, paragraph (m) dealt with "the case of an employee or an independent contractor" who had "absented himself or herself from work without leave". What started to become apparent with the enactment of s 298L(1)(c)(i) was that the term "independent contractor" began to be used in a manner which required that its meaning be taken from the context given by the particular provision in which it was found.

145 The *Workplace Relations and Other Legislation Amendment Act 1997* (Cth) made further changes to the WR Act. In the Minister's Second Reading speech, the Minister stated that the Bill made a number of technical amendments aimed at clarifying existing provisions and ensuring that they operated in the manner originally intended. The amending legislation did two things of some importance to my consideration. First, it amended the definition in s 4(1A) of "independent contractor" to declare that "except in Part XA" a reference in the WR Act to an independent contractor was confined to a natural person. It also inserted within Pt XA itself s 298B(5), which declared that a reference to an "independent contractor" in that Part or in regulations made for the purposes of that Part, was not confined to a natural person.

146 Those amendments were moved by the Government in the Senate. They were the subject of a Supplementary Explanatory Memorandum. In several passages, the Supplementary Explanatory Memorandum states that the amendments were designed to ensure that freedom of association protections were not limited in their application to non-corporate independent contractors. That was said to "give effect to the Government's policy intention that the freedom of association provisions apply to all contractors". When the amendments were introduced in the Senate, Senator Campbell who moved the amendments, echoed the intent expressed by the Supplementary Explanatory Memorandum: Australia, Senate, *Debates* (1997) Vol S187, p 7933-7934.

147 The WR Act was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* ("the WorkChoices amendments"). The 'freedom of association' provisions came to be dealt with in Pt 16 of the WR Act. Sections 298K and 298L were essentially replaced by s 792 and s 793 respectively. The latter dealt with the prohibited reasons to which the conduct described in s 792 applied. A refusal to engage another person as an independent contractor because the independent contractor has one or more employees who are not or do not propose to become members of an industrial association, continued as the only prohibited reason focused upon employees of an independent contractor. The provisions continued to identify separately the conduct not to be taken against employees (s 792(1)) and the conduct not to be taken against independent contractors (s 792 (5)).

148 Following the introduction of the WorkChoices amendments, s 4(2) declared that a reference to an "independent contractor" in the WR Act, except in Pts 10 and 16, and in regulations made for the purposes of s 356, was confined to a natural person. As mentioned, Pt 16 of the WR Act contained the 'freedom of association' provisions. Part 10 was entitled "Awards", and insofar as it related to independent contractors, it set out matters (referred to as "non allowable award matters") that were prohibited from inclusion in awards. Section 356 gave the Minister power to make regulations specifying content that was prohibited from inclusion in workplace agreements.

149 Section 515(g) of Pt 10 of the WR Act post the WorkChoices amendments, prevented the inclusion in any award of "restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement". Section 515(h) prohibited similar restrictions in relation to labour hire workers. Pursuant to a regulation making power

in s 356, the *Workplace Relations Regulations 2006* set out substantially identical prohibitions in relation to the content of workplace agreements.

150 The Supplementary Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* stated that the amendments to the WR Act to provide that references to an "independent contractor" were not confined to a natural person in Pt 10 and in regulations made under s 356, would have the following effect:

> - the prohibition on award terms that restrict the engagement of independent contractors in section [515] would extend to terms restricting the engagement of corporate contractors;
> - prohibitions specified in the regulations against agreements containing terms which restrict the engagement of independent contractors would apply to both individual independent contractors and corporate contractors.

151 The apparent legislative policy behind the prohibition on the inclusion in awards or agreements of terms restricting the use of independent contractors, is that enterprises should be free to engage such persons without restriction. It is difficult to discern any legislative intent to confine this protection given to enterprises, to the use of self-employed or individual contractors and not to apply the protection in relation to a wide range of contractors providing services of the kind which could be provided by employees or groups of employees. The protections here dealt with are to be understood as a reaction to restrictions which were commonly found in awards and agreements made in the context of employees and their unions resisting the trend to contracting out or outsourcing. I deal with that trend in more detail later.

152 In my view, the phrase "independent contractor" was not here used in its narrow sense. The juxtaposition in the Supplementary Explanatory Memorandum of "individual independent contractors" and "corporate contractors" supports the conclusion that the term was intended to have a broad meaning.

153 The unfair contracts provisions in the WR Act were removed from that Act when the IC Act was enacted in 2006. Under the IC Act, the capacity for a contract to be reviewed is limited to what is described as a "services contract". The s 4 definition of "independent contractor" explains that the meaning of that term is not limited to a natural person. However, the terms of s 11 make it clear that where the independent contractor is a body corporate, the unfair contracts provisions only apply to a "services contract" that relates to the

performance of work by a director of the corporation or a member of the family of a director. The Explanatory Memorandum to the *Independent Contractors Bill 2006* at [55] explains that the limitation in s 11 "contemplates that large bodies corporate would be excluded from accessing this Part as directors would not usually personally perform all or most of the work" under the "services contracts" of such corporations.

154 The legislative survey just undertaken satisfies me that at least until the WR Act was enacted, the term "independent contractor" was consistently used in its confined sense, to mean a self-employed individual personally providing work under a contract. Perhaps the term "individual contractor" or "self-employed contractor" would have been a better descriptor for the kind of person that Parliament had in mind. A wider conception of what was meant by independent contractor for some purposes, first appeared in the WR Act, where corporatised independent contractors employing employees were contemplated as falling within the description.

155 What is notable about the change made in 1996 to the WR Act with the inclusion of s 298L(1)(c)(i), is that for the first time, the provisions addressed what must have been perceived to be a need to protect against action taken by a third party directed at employees of an independent contractor. In that case, the concern was limited to adverse action taken because the employees of the independent contractor were not or did not propose to become members of a union. What I think is telling about the current provisions, is that the concern about action taken by a principal against employees of an independent contractor has been significantly expanded. Not only is non-membership of a union covered, but each and every workplace right and each of the industrial activities protections, now operate in respect of persons employed (or engaged) by an independent contractor. That result is consistent with the observations made in the Explanatory Memorandum to the Bill which became the FW Act at [1336] as follows:

> The consolidated protections in Part 3-1 are intended to rationalise, but not diminish existing protections. In some cases, providing general, more rationalised protections has expanded their scope.

156 There is a discernable rationale for the expansion of the protections afforded to employees of independent contractors from action taken by a principal who engages the contractor. It is well known that the trend to self-employment was accompanied by a growing practice by enterprises to contract out or outsource to contractors many of the

functions which had formerly been performed internally by a part of an enterprise's direct workforce. As Owens and Riley point out, throughout the 1980's and 1990's the organisational model utilised by business underwent transformation. Many companies resolved to focus on their "core business" and to carve out or outsource non-core functions to separate enterprises that could provide services under contract: Owens R and Riley J, *The Law of Work* (Oxford University Press, 2007) p 145. The carving out or outsourcing of cleaning, security or maintenance services provide common examples. As a result, there has been a proliferation of employees of contractors working in the workplaces of enterprises involved in outsourcing.

157 In that context, enterprises that engage contractors have a heightened interest in the industrial rights, practices and arrangements made between the contractor and its employees. That is primarily because the employees of contractors commonly work in the same workplace as the direct employees of the principal or with employees of other contractors also engaged by the principal. Additionally, the labour costs of a contractor will often be of significant relevance to the ultimate price paid by the principal. In many situations, those costs may be directly passed on to the principal. As a result, the interests of a principal in the workplace relations arrangements of a contractor may extend to the selection of employees, their terms and conditions of employment and the nature and extent of their union activities. Any or all of those matters have a capacity not only to affect the price paid by the principal, but also the relations between the principal and those of its own employees employed in the same workplace as that in which the independent contractor's employees work.

158 The terms of the former s 298L(1)(c)(i) of the WR Act show that the mischief sought to be addressed by that provision, was directed against a principal requiring a contractor to have its employees join a union. Items 3 and 4 of s 342(1) go much further in guarding against the conduct of a principal which has an adverse effect on the workplace rights and industrial activities rights of employees of a contractor. It seems to me that this extended protection involves a recognition that contracting arrangements are a fertile area in which workplace rights and other protected activities are at risk of adverse action taken by a third party principal. It is likely that Items 3 and 4 were substantially directed at that mischief.

159 The only mischief that the State identifies to explain why adverse action by a principal against the employees of an independent contractor has been prohibited, if

independent contractor is to be given its confined meaning, is the protection of the workplace rights of the owner/operator who is employed by his or her own company from adverse action by a principal. It is possible to conceive of a situation such as that. For instance where adverse action might be taken by a principal against the owner/operator employed by his or her own company because he or she has decided to join a union. However, the possibility of protection is so narrow and the occasion for its use likely to be so rare, that it is difficult to imagine that Items 3 and 4 were enacted for such an inconsequential purpose. It is far more likely that the very significant expansion of protection provided by Items 3 and 4 has been undertaken to guard against the unique power and interest in industrial matters, of principals who engage contractors. With that objective in mind, it is unlikely that "independent contractor" when used in Items 3 and 4 was intended to have a confined meaning.

160 The mischief to which I consider Items 3 and 4 are principally directed, helps also to explain why the draftsperson did not use the word "person" or "employer" instead of "independent contractor". To have done so would have extended the reach of the provisions beyond the particular arena targeted for regulation.

161 Once that door is stepped through, there is nothing to suggest that Parliament sought to constrain the application of Items 3 or 4 to small rather than large contractors. If Parliament had sought to constrain the scope of those protections to small businesses it could have done so expressly, as it has done in relation to unfair dismissal protections, where unique arrangements have been established for businesses employing fewer than 15 employees: see s 23 and Pt 3-2 of the FW Act. The manner in which the IC Act has limited its protective scope for corporatised independent contractors to small family run corporations is another example of what might have been done, if Parliament's intent was consonant with that for which the State contends.

162 I should add in relation to the IC Act, that the express restrictions found in s 11 are an obvious point of distinction from the provisions here under consideration and in that context, neither the Explanatory Memorandum nor the observations of Cowdroy J in *ATS (Asia Pacific) Pty Ltd v Dun Oir Investments Pty Ltd* [2012] FCA 1004 at [43] relied upon by the State, are of much assistance.

163 For all those reasons, I reject the State's contention that when used in Item 4 of s 342(1) of the FW Act, the phrase "independent contractor" is confined to mean an individual or corporate entity which is the functional equivalent of an employee. In my view, whilst the term includes such a person, it also includes a wide range of contractors who, independently of the person with whom they contract, provide services pursuant to a contract which includes the provision of labour but which may also include the provision of other services. That does not mean that the protective scope of s 340 extends to all such contractors and all of the persons employed or engaged by them in all circumstances. It is only where those persons have a workplace right which is adversely affected by a principal in the manner specified by the table in s 342, that the section is engaged. That requirement provides a requisite nexus with workplace relations which serves to confine the reach of the provision within the reasonable boundaries which must have been contemplated and does so without the need for a confined meaning to be attached to the phrase "independent contractor".

164 In coming to that view, I have also considered the various provisions of the FW Act which the State pointed to as suggesting an intended 'equivalence' between an employee and an independent contractor. I accept that some of those provisions do suggest an equivalence. However, all that the exercise serves to demonstrate is that like its predecessors, the FW Act uses the term "independent contractor" differently in different provisions and that the term takes it's meaning from the particular context in which it is found. That is apparent, for instance, from the provisions of ss 357-359 which use the term "independent contractor", but make it clear that the protection proffered is only available to an individual. It is also the case that a narrow conception of an independent contractor is contemplated in relation to provisions dealing with eligibility for union membership and related topics. The confined meaning intended for "independent contractor" in those provisions is a reflection of the predecessor provisions dealing with the composition of unions in the context of the industrial history to which I have referred.

165 As set out earlier, Lend Lease is a construction company that usually contracts to undertake large scale construction projects. Lend Lease provides services under contract including labour services provided by its own employees and by contractors which it engages. In my view, where it is proposed that Lend Lease contract with a principal under a

contract for services (the meaning of which I will shortly outline), Lend Lease is an "independent contractor" within the meaning of Item 4 of s 342(1).

Is the State proposing to enter into a contract for services with Lend Lease?

166 The State contends that the phrase "proposing to enter into a contract" in Item 4 requires that there be certainty of counterparty and at least an intent to enter into a contract for services with a particular contractor. In my view, the State's contention takes an overly narrow view of the text and evident intent of Item 4.

167 Attention needs to be given to the function of Column 1 of s 342(1) as compared to that of Column 2. The scope of the conduct prohibited by Item 4 is primarily the subject of Column 2. The primary purpose of the first column is to identify the person who is not to engage in the prohibited conduct and the person or persons against whom that conduct is not to be directed.

168 It is necessary also to bear in mind, when interpreting the meaning of "proposing to enter into a contract with an independent contractor", that the action prohibited includes a threat to refuse to engage the independent contractor and also a threat to "refuse to make use of, or agree to make use of", services offered by the independent contractor. Threats of that kind are capable of arising very early on in the relations between a principal and a contractor over the prospect of a contract between them. For instance, it is difficult to see why a statement by a principal to prospective tenderers at a meeting at which expressions of interest are sought, that no contractor with a unionised workforce will be further considered, was not intended to be within the purview of the protection given by Item 4. On the State's construction, neither the contractor nor the employees concerned would have any recourse under Item 4. That result would run counter to the objects of Pt 3-1 set out in s 336, including the protection of freedom of association by ensuring that persons are free to become or not become members of industrial associations. It would also deny the object of providing "effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part". Much of the scope for effective relief suggested by the text of Column 2 of Item 4 would be denuded by the narrow construction for which the State contends.

169 The verb to "propose" has a number of meanings including, relevantly:

> 1. to put forward (a matter, subject, case, etc.) for consideration, acceptance, or action…
> 2. to put forward or suggest as something to be done…
> …
> 4. to put before oneself as something to be done; to design; to intend:
>
> *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers, 2009) p 1330.

170 In *Employment Advocate v Williamson* (2001) 111 FCR 20, having referred to the meaning given to "proposed" in the Macquarie Dictionary, Gray J said at [15]:

> The verb can therefore be used in the sense of to make a proposal, ie to put forward for consideration, acceptance or action. Alternatively, it can mean simply to intend or to form a purpose.

171 The construction proffered by the State essentially adopts the latter meaning which would have the effect of construing "proposing to enter into a contract" as "intending to enter into a contract". The adoption of this narrow connotation for "proposing" has the result of creating a dichotomy between Item 2 and Item 4 of s 342(2). Item 2 of s 342(1) protects a prospective employee from adverse action by a prospective employer. The phrase "prospective employee" is not an expression ordinarily confined to a person that an employer intends to employ. For an employer to say "I am interviewing prospective employees" does not suggest the formation of an intent to employ any particular person. The statement merely suggests that potential employees are being considered.

172 In my view, read in the context of the entirety of Item 4 and with an eye to the objects of the Part, the text in the first column of Item 4 also speaks of the future and to a potential contractor whose engagement is under consideration or in prospect.

173 The only basis the State was able to suggest for the dichotomy between Items 2 and 4 which its preferred construction would create, is that Parliament must have intended that independent contractors be given narrower access to relief than that given to prospective employees. Why that should have been thought necessary is not apparent. The scope of the prohibited conduct dealt with in Item 4 is not narrower than that dealt with in Item 2 and is arguably broader.

174 The CFMEU bears the onus of proof on the issue of whether I can be satisfied that the State was proposing to enter into a contract with Lend Lease. The civil standard of the balance of probabilities applies.

175 The evidence of the tender process for the Project shows that Lend Lease has been under consideration as the potential Builder since at least February 2012. By February 2012, Exemplar had been identified as one of the two Short-listed Respondents. By that time, each member of the Exemplar Consortium, including Lend Lease, had contracted with the State through a Deed Poll. By that contract Lend Lease assumed obligations in favour of the State in relation to the tender process. It is clear that by February 2012, the State was well aware that Lend Lease was being put forward by Exemplar as the prospective Builder.

176 The EOI document issued in September 2011 foreshadowed the intent of the State to enter into a Project Agreement with an entity representing the successful consortium and a Builder Direct Deed with the Builder. Drafts of those contracts were circulated during the RFP phase which commenced in May 2012.

177 I will shortly say more about the complex nature of the transaction foreshadowed in the various draft contractual documents for the Project. For current purposes, it is sufficient to observe that by the time the Short-listed Respondents were identified in February 2012, Lend Lease was one of two possible candidates for the role of Builder. Further, the draft Project documents show that the State envisaged that it would contract with the Builder directly under the Builder Direct Deed which, for reasons I will shortly explain, is a proposed agreement which would confer rights upon the State in relation to the Builder's obligations to provide services.

178 Those facts satisfy me that a contract with Lend Lease was a matter under consideration or in prospect from February 2012 when the Short-listed Respondents were identified. That was certainly the case by 1 November 2012. By that time, the Exemplar Consortium had submitted its bid. Although the bid was not in evidence, I would infer (consistently with the requirement specified in the EOI document) that the bid was a "fully costed binding offer based on the requirements outlined in the RFP". At least by that time, a contract with Lend Lease was a matter under consideration and the State was proposing to enter into a contract with Lend Lease within the sense required by Item 4 of s 342(1) of the FW Act.

179 If it be the case that Item 4 requires an intent be formed to enter into a contract before it can be said that the first person is proposing to enter into a contract with a particular

independent contractor, the evidence satisfies me that by late December of 2012, the State held a sufficient intent to enter into a contract with Lend Lease to satisfy the requirements of Item 4 of s 342(1). Any such intent need not be legally binding and may be contingent. In *Dowling v Fairfax Media Publications Pty Ltd* (2008) 172 FCR 96 at [95] Jagot J recognised that one meaning of "propose" is intend. However her Honour went on to say, that the idea of intention itself has shades of meaning, ranging from a fixed and immediate resolve to a contingent proposition. I agree with and respectfully adopt those observations.

180 By the end of December 2012, Exemplar had been evaluated by the Evaluation Panel as having submitted the superior tender. The extent of Exemplar's superiority is a matter I cannot here outline, but it is a matter that weighs heavily in my consideration of the conduct of the State since the evaluation of bids took place and the reason for the State taking the course that it did.

181 Despite the preferred course outlined in the EOI document, that the evaluation process would lead to the selection of a single Preferred Respondent with whom the State would then finalise and complete contractual agreements, the Minister for Health determined in late December 2012 to impose a BAFO phase. The deliberations and recommendations of the Steering Committee and the Project Board, together with the correspondence of 24 December 2012 from the Minister for Health lead me to infer that the only substantive reason that the State did not move directly to the Negotiation and Completion phase with Exemplar by at least late December 2012, is the assessment made that the Lend Lease Enterprise Agreement is not compliant with the Guidelines. The inference I have drawn is influenced by the extent of the superiority of Exemplar's bid. In my view, it is likely that if compliance with the Code and Guidelines had not been an issue, the State would have appointed Exemplar as the Preferred Respondent on or before late December of 2012.

182 By that time, other than for the non-compliance issue, the State wanted to contract with the Exemplar parties including Lend Lease. Whilst that desire or intent may have been contingent upon the non-compliance issue being resolved or excused, that contingency is not a matter that the State can rely upon as a basis to escape the intended reach of Item 4 of s 342(1). First, a contingent intent would suffice so long as the contingency did not make the prospect of the intent being fulfilled so remote as to be illusory. That was not the case here. Second, the contingency here in question is not available as a basis for denying intent. That

is because the basis for that contingent intent is part of the conduct which I consider Item 4 is designed to prohibit. A contingent intent to contract based upon conduct which would otherwise be prohibited by Item 4, can hardly provide a basis for escaping the prohibition which s 340(1) imposes. I will explain with a simple example. It could not be suggested that a principal who holds a contingent intent to contract with an independent contractor, is not "proposing to enter" into a contract for the purposes of Item 4 because the principal's intent is contingent upon the independent contractor ensuring that its employees cease to be union members. The contingency which qualifies the intent cannot be founded upon the denial of the workplace right that s 340 seeks to protect.

183 For those reasons, I am satisfied that a contractual relationship between the State and Lend Lease was under consideration or in prospect from February 2012. If Item 4 requires an intent to contract, I am satisfied that the intent existed from late December 2012. I need however to consider whether the State was "proposing to enter into a contract" by reference to the particular contract in prospect including by reference to whether the particular contract was a "contract for services" within the meaning of Item 4.

184 The ordinary and natural meaning of a "contract for services" is not confined to a contract in which the only kind of service contemplated is the provision of labour. All manner of service provision could be dealt with by a contract which, in ordinary parlance, would be described as a contract for services. If "independent contractor" had its confined meaning in s 342(1) of the FW Act, there may be a stronger basis for reading "a contract for services with an independent contractor" as intended to be limited to labour contracts. However, even then, what of the self-employed owner/driver who provides both labour and capital?

185 On the other hand, some nexus with the provision of labour is demanded by the context in which the phrase appears. In the context in which it is utilised by s 342(1), a "contract for services" must be a contract for the provision of human or personal services to a material extent, otherwise the nexus to workplace relations would be lost. However, the provision of labour services need not be all that the contract deals with, otherwise the intended protection of workplace rights and industrial activities would be unavailable simply because the contract dealt with the provision of other services or other subject matter. Many contracts made with either small or large contractors involve both labour and the provision of

materials or plant. The cost of the plant to be installed may overshadow the labour costs involved, but the provision of labour may nevertheless be material if not extensive. Indeed, it may involve the utilisation of many more employees of the independent contractor working in the principal's workplace, than might a labour only contract between the principal and another independent contractor. I cannot discern any basis for thinking that employees in the latter case were targeted for protection, while those in the former are excluded from the remedial scope of s 340.

186 That all suggests that in characterising whether a contract is a "contract for services" for the purposes of Items 3 and 4 of s 342(1), the question is whether the contract made or contemplated is a contract which does or will require the provision of labour services to a material degree, irrespective of what else may be required. That approach takes account of both the text of the provision and its underlying purpose.

187 Insofar as the State contended that a "contract for services" within the meaning of s 342(1) does not include a contract with a builder to build and refurbish buildings, I disagree. A contract of that kind will inevitably require the provision of labour services to a material degree. In my view, it does not matter whether the task contracted for involves the building of a paling fence, the repairing of a leaking tap or the construction of a building, so long as the provision of labour is a material requirement of the contract. Nor is the nexus to which I have referred lost, if human effort is provided not by direct employees of the independent contractor, but by independent contractors which that entity engages. That construction is supported by the connection made in Items 3 and 4 between the principal and the persons employed *or engaged* by the independent contractor.

188 The draft Project Agreement is a complex and extensive document which, as its recitals state, involves Project Co undertaking to perform the Works, provide the Services and finance the Project, in exchange for payment by the State. It is sufficient for current purposes, that I find that because the Works required to be provided under the proposed Project Agreement will require the provision of labour to a material extent, the draft Project Agreement is to be characterised as a draft "contract for services" within the meaning of Item 4. The proposed parties to the Project Agreement are the State and Project Co.

189 The draft Project Agreement requires that a Construction Contract be made between Project Co and the Builder. The draft terms of that agreement were not in evidence. However, the references to it made in the draft Project Agreement are sufficient to identify that what is proposed by way of the Construction Contract is a contract for the Builder to provide labour and other services to Project Co in order to undertake and provide the Works. The proposed Construction Contract can therefore also be characterised as a draft "contract for services" within the meaning of Item 4.

190 However, it is not envisaged that the State will be a party to the Construction Contract or that the Builder will be a party to the Project Agreement. The State therefore contends that as the CFMEU has failed to establish that the State is proposing to enter into any contract for services with Lend Lease, the requirements of Item 4 are not satisfied.

191 Item 4 requires more than that the provision of services to the first person by the independent contractor, be in prospect. The text demands that a contract for services made between the principal and the independent contractor be in prospect or under consideration. The requirement for a contract to be in prospect between those two specific persons is clear. The language utilised does not permit a wider construction despite the purposive approach to interpretation which I consider appropriate. That requirement corresponds with the direct contractual relationship that Item 3 also demands.

192 It must follow therefore that neither the draft Project Agreement nor the proposed Construction Contract provide the contractual nexus which Item 4 requires. However, the CFMEU contended that the proposed Builder Direct Deed contemplates that a contract will be entered into by the State with the Builder and that the contemplated contract is a "contract for services" which the State is proposing to enter into with Lend Lease.

193 The Project documentation includes a draft Builder Direct Deed to which the State, the Builder, Project Co and the Builder Guarantor are intended parties. Whilst the State does not deny that the draft Builder Direct Deed contemplates a direct contractual relationship between the State and the Builder, the State contends that the Builder Direct Deed is not capable of being characterised as a "contract for services".

194 It is necessary to evaluate whether the draft Builder Direct Deed is a prospective "contract for services", in that it will require the provision of labour services to a material extent. That exercise needs to be undertaken keeping in mind that the draft Builder Direct Deed must be read and understood as part of a contractual scheme in which each of the Project Agreement, the Construction Contract and the Builder Direct Deed are intended to be linked and in which each will contribute to ensuring that the State obtains the Works and Services including those required to be provided by the appointed Builder. The Project documentation shows that the State will take a central position in the proposed contractual framework and will be given a high degree of power and control.

195 Some of the controls intended to be conferred upon the State under the Project Agreement have already been touched upon at [47]. Significant additional controls are to be conferred upon the State by the Builder Direct Deed. For reasons I will explain, those controls may be seen as providing the State, in relation to the Works, a capacity to ensure the continuity of service provision by the Builder.

196 The recitals to the draft Builder Direct Deed refer to the Project Agreement as setting out the relevant background to the arrangements encompassed by the Deed. They note that Project Co and the Builder will become parties to the Construction Contract. It is then stated:

> The Builder has agreed to grant to the State certain rights in relation to the Construction Contract.

The connection between the Builder Direct Deed and the Construction Contract is further confirmed by cl 11, which links the life of the Deed to that of the Construction Contract by providing that the Deed will terminate upon the performance and satisfaction of all the obligations under the Construction Contract.

197 The CFMEU relies upon the rights to be given to the State and the obligations to be imposed upon the Builder in favour of the State in three clauses in the draft Builder Direct Deed to ground its contention that the Builder Direct Deed is a proposed "contract for services".

198 Clause 4.2 will have the effect of providing the Builder's acknowledgment of the existence of various rights of the State under the Project Agreement. The Builder will agree to exercise its rights under the Construction Contract in a way that facilitates the effective

exercise by the State of those rights under the Project Agreement which the Builder has acknowledged. The rights to be acknowledged refer to particular clauses of the draft Project Agreement. The headings given indicate their subject matters as follows: Access and inspection by the State; Emergency events; Defaults, Major Defaults and Default Termination Events; State's rights to cure defaults; Termination; Probity Investigations; and Requirements for Subcontracting.

199 I agree with the contention of the CFMEU that by cl 4.2 of the Builder Direct Deed, certain rights of the State will effectively be carried over from the Project Agreement and given life in the Builder Direct Deed vis a vis the Builder. The clause will have the effect of requiring the Builder to assume certain obligations in favour of the State, despite the fact that the Builder will not be a party to the Project Agreement. However, the obligations to be assumed are for the Builder to conduct itself in a way which facilitates the exercise of specified rights of the State under the Project Agreement. In my view, cl 4.2 would not impose obligations upon the Builder to provide services to either Project Co or the State. Other than as another indicator of the nature and extent of the central place of the State in the contractual framework, I do not regard cl 4.2 as advancing the position contended for by the CFMEU.

200 The next clauses relied on were 7.2 and 7.4 which will limit the Builder's capacity to exercise any right the Builder may have under the Construction Contract to terminate the Construction Contract or to suspend the performance of its obligations under the contract. It is not in issue that the effect of cl 7 of the Builder Direct Deed will be to qualify the termination and suspension rights of the Builder under the Construction Contract. By cl 7.2, the Builder may only suspend performance of the Works or terminate the Construction Contract if it has first taken the steps required by that clause. Those steps serve to provide the State with an opportunity to cure any defect upon which the Builder may rely to exercise a right to terminate or suspend performance under the Construction Contract. One of the steps required of the Builder is that a State Cure Notice be given to the State. On receiving such a notice, the State may, but will not be obliged to, take steps to cure or remedy the Default Event. Unless the State notifies the Builder that it elects not to cure or remedy the Default Event, the Builder will effectively be precluded from suspending performance under or terminating the Construction Contract for at least 20 business days and possibly longer in relation to defaults which are not able to be cured in that period. The ways in which a

Default Event may be cured or remedied include the State paying compensation to the Builder and the State performing Project Co's obligations under the Construction Contract.

201 In the event of there being no Default Event (which is defined by reference to the Construction Contract), cl 7.4 provides that the Builder may only exercise a right to terminate or suspend the performance of its obligations under the Construction Contract, to the extent that Project Co is entitled to suspend its corresponding obligations under the Project Agreement. In the absence of a Default Event, the provision will have the effect of limiting the Builder's rights to terminate or suspend the performance of its obligations to those circumstances which would entitle Project Co to correspondingly suspend its obligations under the Project Agreement.

202 Unless the Builder takes the steps required by cl 7.2 and until the rights conferred upon the State to cure any defects are exhausted, pursuant to the Builder Direct Deed the Builder will be required to continue to provide the services the subject of the Construction Contract including where that contract would have otherwise entitled the Builder to suspend performance or terminate the contract. The right to insist upon performance by the Builder is a right which the clause confers upon the State and which will be enforceable by the State under the Builder Direct Deed, as the State's submissions rightly concede.

203 Clause 8 of the draft Builder Direct Deed deals with what are there called the "step in" rights of the State. A number of triggering events are identified by cl 8 which will crystallise the step in rights to be conferred upon the State. One such triggering event is the receipt by the State of a State Cure Notice. There are other triggering events but they need not be detailed. If any of the triggering events occur, the State will be able to appoint a Receiver over Project Co or any or all of its assets; itself enter into possession of any or all of the assets or any or all of the shares in Project Co; take any other action permitted by law subject to the terms of any Project Document; or by Notice to the Builder, procure a company wholly owned by the State to assume joint and several responsibility of Project Co's rights and obligations. During the "step in period", which the clause provides will commence upon the date that the Builder receives notice of the State's exercise of any of its step in rights, the State will (pursuant to clause 8.2) be entitled to exercise all or any of the powers of Project Co and perform the obligations of Project Co under or in relation to the Construction Contract, as if it were Project Co and do so to the exclusion of Project Co. The conferral of

those powers upon the State will include Project Co's power to require the provision of services by the Builder.

204 Reliance is also placed by the CFMEU on cl 9, which will provide the State with the right to require a novation of the Construction Contract upon the termination of the Project Agreement by the giving of a Notice of Novation to the Builder. If the State exercises its option to novate, the State will assume the obligations of Project Co under the Construction Contract in place before the giving of the Notice of Novation. The State will be given the rights and benefits of Project Co under the Construction Contract and the Builder will be bound by and will be required to comply with the provisions of the Construction Contract binding upon it, for the benefit of the State and as if the State were Project Co. At the request of the State, each party to the Builder Direct Deed may be required to enter into an agreement in form and substance to be approved by the State, reflecting the novation of the Construction Contract. Additionally, between the date of the Notice of Novation which may be given by the State and the date the Builder consents or is deemed to have consented to the novation, the Builder will be required to perform its obligations under the Construction Contract.

205 Clauses 7, 8 and 9 of the draft Builder Direct Deed are designed to provide the State with a capacity to insist on the continued performance by the Builder of its obligations under the Construction Contract, despite any right the Builder may have to suspend or terminate its performance of the Works. The capacity conferred is not unrestricted but neither is it insignificant. An ascending range of rights is to be conferred by the Builder directly upon the State. Provisions of this kind may be fairly described as provisions which ensure continuity of the provision of services: *Wallace-Smith v Thiess Infraco* (2005) 218 ALR 1 at [1] and [22] (French J).

206 There are a number of contentions raised by the State about the provisions of the Builder Direct Deed on which the CFMEU relies. I will deal first with cls 8 and 9 before turning to cl 7.

207 As to cl 8, the State contends that were the State to exercise its powers and perform the obligations of Project Co under, or in relation to, the Construction Contract in accordance with the Builder Direct Deed, the Builder would continue to provide services to Project Co under the Construction Contract. The State would not, by exercising its powers, or by

performing Project Co's obligations, become a party to or a principal under the Construction Contract. Further, the State contends that even if the State exercised its step in rights and elected to require a novation of the Construction Contract under cl 9, any services provided by the Builder would not be provided under the Builder Direct Deed or the Construction Contract but under a new contract between the State and the Builder, which may be evidenced by a Novation Deed, if requested by the State. The State says that even if such a Deed was a contract for services, at the present time, the State is not "proposing to enter into" a novated contract with the Builder within the meaning of Item 4.

208 I agree with the State's contention in relation to cl 9 that the State was not "proposing to enter into" a novated contract with the Builder. The contemplated right of the State to novate the Construction Contract is dependent upon the termination of the Project Agreement. The right is contingent in that respect. The existence of many contractual contingencies will not deny that a person is proposing to enter into a contract. However, when the contingent condition is a default under the primary contract, leading to an option for one of the parties to require the other to make a different contract in substitution, the position is different. In that case, I do not think it can be said the parties are proposing to enter into the substituted contract.

209 It might be said that the contingent nature of cl 8 raises similar difficulties for the CFMEU's contention. The "step in rights" there conferred are optional. Although the right to step in may be in contemplation, the fact that the State will step in is not being proposed other than as an available option that may only be exercised in limited circumstances which may never arise. In the context of the nexus required by Item 4, the contingent obligation which cl 8 of the Builder Direct Deed will impose upon the Builder to provide services is too remote to be characterised as a contractual requirement for the Builder to provide services under the Builder Direct Deed.

210 However, clauses 7.2 and 7.4 have a different character. The obligations upon the Builder to continue to provide the services that are the subject of the Deed are not contingent. The obligations will crystallise and will be enforceable by the State from the inception of the proposed contract. There will be nothing optional about these provisions. They will secure performance by the Builder, even when the terms of the Construction Contract would excuse the Builder from further performance. The source of these contractual obligations to continue

to provide the services will be the Builder Direct Deed. It is that Deed which will impose upon the Builder an on-going obligation, enforceable by the State, to provide services unless and until specified steps are taken or specified circumstances exist. To that extent, the draft Builder Direct Deed can, in my view, be characterised as a prospective "contract for services" within the meaning of Item 4, because it is a contract by which a principal is entitled to require the provision of services (including labour services), under a contract made with the provider of those services.

211 In reaching that conclusion, I have taken into account the State's contention that under cl 7 there are no "services" that the Builder would be obliged to provide to the State as principal. However, for the purposes of Item 4, it does not matter that the contractual right to require the provision of services is the right of a principal to require the independent contractor to provide the services to someone else (in this case Project Co). There is nothing in the text of Item 4 to support any limitation of that kind. Triangular relationships involving independent contractors are not uncommon. Contracts between an independent contractor and a labour hirer for the provision of services by the independent contactor to a third person with whom the labour hirer has contracted provide an obvious example. A relationship of this sort was recently the subject of consideration in *Informax*. There is no reason to suggest that independent contractors and their employees working under triangular or multi-lateral arrangements were not intended to fall within the remedial scope of s 340 of the FW Act.

212 For all of those reasons I find that since February 2012, the making of the Builder Direct Deed between the State and Lend Lease has been in prospect. That proposed contract includes provisions which will entitle the State to require the provision of services, including labour services, to a material extent. I am therefore satisfied that each of the relevant circumstances required by Column 1 of Item 4 of s 342(1) have been established and that in that respect, since February 2012, the State has been proposing to enter into a contract for services with an independent contractor, namely Lend Lease.

HAS THE STATE THREATENED TO REFUSE TO ENGAGE OR MAKE USE OF THE SERVICES OF LEND LEASE?

213 The phrase "refuse to employ" as found in the former s 298K(1) of the WR Act, was the subject of judicial consideration by Ryan J in *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* (2000) 101 IR 435 at 445-446. In that case, Ryan J considered whether

a prospective employer had refused to employ a prospective employee because the prospective employee was entitled to the benefit of an industrial agreement. Ryan J determined that a refusal to employ had occurred when the prospective employer decided to employ two other applicants in preference to the prospective employee on whose behalf the claim was brought. In the context of a selection process, Ryan J considered that when a person is passed over for selection there is a refusal to employ.

214 In coming to that view, Ryan J relied upon the judgment of Moore J in *Fletcher v Fraser Corporation Australia Limited* (1996) 70 IR 117 who at 121, concluded that the expression "refuse to employ" (which appeared in s 334(2) of the IR Act 1988) relates to a refusal by an employer to employ a person for a proscribed reason when employment would or might otherwise occur. The judgment of Ryan J was the subject of an appeal determined in *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440. The appeal succeeded but on a different issue. On the issue of the prospective employer's refusal to employ, Wilcox, Kiefel and Merkel JJ were not persuaded that Ryan J had erred in any respect (at [14]).

215 I think the State was correct to contend at trial that the selection process had not yet ended. The Exemplar Consortium had received an invitation to participate in the BAFO phase and before that phase was completed, it could not be said that Exemplar had been passed over in the selection process. As the evidence received on the re-opening showed, not only was Exemplar not passed over, it has now been successfully selected as the Preferred Respondent. That occurrence and the undertaking given by the State on 24 April 2013 removed as an issue for resolution whether any refusal to engage or make use of the services of Lend Lease had occurred, because the CFMEU thereafter did not press that claim. The CFMEU continued, however, to press its claim that the State had threatened to refuse to engage or make use of Lend Lease's services on the Project.

216 Section 342(2)(a) of the FW Act relevantly provides that adverse action includes "threatening to take action covered by the table" in s 342(1). Read with s 342(1), the provision includes in the action proscribed by the table, a threat made by a first person (in the circumstances identified in Column 1) to carry out any of the actions listed in Column 2. A first person "threatening to take" such action contravenes s 340.

217 Column 1 requires that the action taken by the first person be taken "against" a second person or in the case of Item 3 and Item 4 against one or more of the second persons there identified. The word "against" suggests that the adverse action, including any threatening of the adverse action, needs to be directed at a particular second person or at least the interests of such a person. That requirement can be traced back to s 340 itself, where the word "against" is also used in a manner which supports the conclusion that adverse action is action taken by one person which is directed against another. That is not to say that the action must be directed at a particular identified individual. As Black CJ, Ryan and Merkel JJ said of s 298K(1) of the WR Act at [21] of *Community and Public Sector Union v Telstra Corporation Limited* (2001) 107 FCR 93 ("*CPSU (No 3)*"):

> ...liability arises where the conduct is directed at a number of ascertainable [persons] as well as against a particular [person].

218 No issue was raised with the CFMEU's contention that if the adverse action was taken, it was taken against the employees of Lend Lease. That the action was taken against the employees, must also follow from the finding I later make that the action was taken because the employees of Lend Lease were entitled to the benefit of the Lend Lease Enterprise Agreement.

219 A contravention of s 340 may be 'threatened' because circumstances exist which make the contravention likely. However, the phrase "threatening to take action" suggests that threatening circumstances are not sufficient and that the communication of a threat must be part of the action taken by the first person. That view is consistent with the way in which the word "threatened", when used in a similar context in s 5(1A) of the C&A Act and s 298K of the WR Act, has been construed: *Gietzelt v Craig-Williams Pty Ltd (No 1)* (1959) 1 FLR 456 at 459 (Spicer CJ, with whom Dunphy J agreed) and at 461 (Morgan J); *Gietzelt v Craig-Williams Pty Ltd (No 2)* (1959) 1 FLR 465 at 466 (Spicer CJ), 467 (Dunphy J) and 468 (Morgan J); *Community and Public Sector Union v Telstra Corporation Limited* (2000) 99 IR 238 ("*CPSU (No 1)*") at [19] and [26] (Finkelstein J); *Community and Public Sector Union v Telstra Corporation Limited* (2000) 101 FCR 45 ("*CPSU (No 2)*") at [15]-[16] (Finkelstein J); *CPSU (No 3)* at [22] (Black CJ, Ryan and Merkel JJ).

220 That construction has recently been applied to s 342 by Katzmann J in *Construction, Forestry, Mining and Energy Union v Bengalla Mining Company Pty Ltd (No 2)* [2013] FCA 362 at [29].

221 The meaning to be given to the word "threaten" has been variously described in the authorities to which I have just referred. In *Gietzelt (No 1)* the majority view was that "threaten" is equivalent to the words "express an intention to" or "says he will" (see at 459). That view was repeated in *Gietzelt (No 2)* in the judgment of Spicer CJ at 466 and in the judgment of Dunphy J at 467. In *CPSU (No 1),* Finkelstein J considered that the meaning that should be given to "threaten" is "to menace or warn before hand of an intention to inflict harm" (at [19]). In *CPSU (No 2)*, Finkelstein J said at [15] that "'threaten' should be taken to mean a communicated intent to inflict harm". His Honour also expressed the view that it "is the essence of a threat that it be made for the purpose of intimidating a person", although I do not think his Honour was suggesting that a particular motive or purpose was a requisite element in establishing that a person had threatened another. In *CPSU (No 3),* the Full Court did not consider the meaning of "threaten" other than to indicate that it was inclined to agree with the view of Finkelstein J that the term "threatened" required a communication of a threat. In *Bengalla*, Katzmann J followed Finkelstein J's approach in *CPSU (No 2)*.

222 In the expression "threatening to take action covered by the table", the phrase "action covered by the table" identifies the harm which the threat must communicate. The words "threatening to take action covered by the table" seem to me to simply mean communicating an intention (by words or conduct) to take action covered by the table. Thus to give a simple example, all other requirements being satisfied, the communication by an employer of an intention to dismiss an employee because an employee intends to join a union will be sufficient to constitute threatening to take action of the kind specified by Item 1 of s 342(1). It is not necessary that such conduct be accompanied by some additional form of injurious intent or malicious purpose.

223 Having accepted that a communicated intent is necessary, it is also necessary to consider whether s 342(2)(a) requires that the intent be communicated to a particular person. In *Gietzelt (No 2)*, the Full Court of the Commonwealth Industrial Court was considering whether an employer who told a number of his employees that all employees were to be dismissed, threatened the dismissal of an employee not present when the communication was

made. Spicer CJ at 466 considered that the words communicated were capable of constituting a threat to the absent employee. Dunphy J at 467-468 dealt with the issue in more detail and said:

> To constitute a threat it is not necessary that the words complained of are uttered in the presence of the person threatened. "Using language in its ordinary sense it is difficult to see that an intimation ceases to be a threat because it is addressed to a third person." "If I threaten a man that I will bring an action against him I threaten him none the less because I address the intimation to a third person" (per *Bowen* L.J., *Skinner and Co. v Shew and Co* (1893) 1 Ch 413. In any event the words of the section are "An employer shall not threaten to dismiss an employee" and not "An employer shall not threaten an employee with dismissal".
>
> In my opinion it is not necessary under the section that the threat should be communicated to the person threatened. If, for instance, an employer said to a union secretary "I will dismiss any of my employees who proposes to join your union" a prosecution would lie if the employees never heard about the matter at all.

224 Finkelstein J in *CPSU (No 2)* at [12]-[17] considered *Gietzelt (No 2)*. His Honour did not think it necessary to decide the precise scope to be given to the observations made in *Gietzelt (No 2)*. The judge took the view that a communication intended to remain secret, for instance where a director of a one-man company tells his secretary that he intends to take action against the company's employees, could not constitute a threat. However at [15] his Honour accepted "that the communication need not be directly to the person threatened but could be just as effectively made if it is communicated to a person in circumstances where it is intended to or is likely to find its way to the person threatened".

225 No issue was taken in this case with the adequacy of the communication of the intent to harm which the CFMEU relies upon. If it had been necessary for me to decide, I would have followed the approach taken by Finkelstein J but with a reservation which has particular application to Items 3 and 4 of s 342(1). Unlike predecessor provisions to s 340(1) of the FW Act (like s 298K(1) of the WR Act, which Finkelstein J was considering in *CPSU (No 2)*), Items 3 and 4 are provisions which identify multiple potential targets against whom adverse action may be taken by the first person. However, action of the kind covered by Column 2 can only be directly taken against the independent contractor. It seems to me that in that case, a communication of a threat made in circumstances where it is intended to or likely to find its way to the independent contractor is a sufficient communication for the purposes of a threat to take the action that Items 3 and 4 of s 342(1) deal with.

226 It is not necessary for it to be established that the first person actually held an intent to harm. It is sufficient that an intent to take action of the kind covered by the table has been communicated. A communicated but hollow threat, may be just as effective as a threat made with a firm resolve. Both have the capacity to alter the conduct of the person threatened and deny the rights which s 340 seeks to protect. A union official who communicates an intention to black ban an employer from access to work because its employees are not union members, is "threatening to take action" whether or not the official intends to carry out the threat at the time it is communicated.

227 Threatening to take action may be conditional or not. As Morgan J said in *Gietzelt* at 461, conditional threats are common.

228 The State made two preliminary submissions in an attempt to resist a finding that it threatened to refuse to engage or make use of the services of Lend Lease. The first was that only conduct engaged in by the State on or after 20 September 2012 could be taken into account. That was said to be so because the workplace right relied on by the CFMEU did not come into existence until that day. Given that fact, so the argument went, the State could not have made a threat "because of" that workplace right, prior to 20 September 2012.

229 There are many difficulties with that contention. A threat may be on-going. It may be communicated today but continue to operate as a threat until such time as it has been renounced or otherwise made inoperative. There may be many reasons for an on-going threat and the reasons may change over time. If a threat is made in relation to a prospective entitlement to the benefit of an industrial instrument, once that entitlement crystallises, the reason for the ongoing threat may well become the entitlement itself. The existence of the prohibited reason under s 340 is not necessarily absent because the date the threat was first made predated the existence of the workplace right. Furthermore, a threat made generally may crystallise in relation to a particular person at a later time. For all those reasons I do not accept that the conduct engaged in by the State prior to 20 September 2012, is necessarily irrelevant to the existence of the threat for which the CFMEU contends. In any event, even if that submission had been accepted it would not provide a complete answer for the State because the post 20 September 2012 conduct relied upon by the CFMEU, to which I will shortly refer, would nevertheless establish the making of a threat to refuse to engage or make use of the services of Lend Lease.

230 The other submission the State relied upon to resist a finding that it made a threat, was based on the proposition that a step taken in accordance with an agreed process cannot constitute "threatening to take action" within the meaning of s 342(2). No authority in support of that proposition was cited.

231 The State contended that Lend Lease freely and voluntarily agreed to a process under which tenderers would be assessed against agreed criteria. The State says that the "performance of that process" cannot amount to a threat to take action.

232 There are a number of difficulties with this contention. First, the State's submissions never identified why a communication of an intent to harm was not a threat because the possibility of the threatened harm was contemplated by an agreed process. The notion of a threat is not confined to an intent to inflict harm which is unlawful or unjustified. The communication of an intent to exercise a legal right or entitlement (including an entitlement sourced in an agreement) can be a threat. A threat to sue is an obvious example. A threat to call the police is another. It may be that what the State had in mind was that a requisite component of "threatening to take action" is the presence of malice or some other injurious motive which is necessarily absent in an agreed process. If that were the case, it was never put. In any event, I do not consider that a malicious or injurious motive is a necessary element of "threatening to take action". The well intentioned are capable of contravening s 340. As Madgwick J said in *Australian Municipal, Administrative, Clerical and Services Union* at [93] in relation to s 298K of the IR Act, "it is of no necessary relevance that the infringer has trodden a road paved with good intentions".

233 Second, the State has not established that Lend Lease agreed to participate in a tendering process where non-compliance with the Code or Guidelines would necessarily lead to a refusal by the State to engage or use the services of Lend Lease on the Project. It is not clear to me what it is that the State says Lend Lease agreed to. Some parts of the State's submissions suggested that the State was contending that it was agreed that non-compliance would lead to exclusion. Other parts of the State's submissions said that in the tender process "compliance with the Guidelines was a relevant but not a determinative criterion". I think the latter contention was what was probably being relied upon. But if that is so, Lend Lease's agreement that Code compliance was a relevant but not a determinative criterion, is not to the point. The threat which the CFMEU relies upon is based upon non-compliance being a

determinative criterion. A condition which I have not been persuaded Lend Lease ever agreed to.

234 Third, the conduct of the State which is impugned by the CFMEU is action taken against the employees of Lend Lease. It is difficult to see how any agreement of Lend Lease can make the communication of the harm any less of a threat to the employees of Lend Lease. Even if consent by Lend Lease could change the character of the State's conduct towards it, what is in issue here is the State's conduct towards the employees of Lend Lease and there is no evidence of their consent or agreement.

235 Fourth, the whole idea that the consent of a person harmed or threatened with harm may negate culpability, runs counter to long-standing authority dealing with legislative protections of the kind provided in the FW Act. The protections conferred by s 340 have been conferred for reasons of public policy. In particular, the right given to those entitled to the benefits of an industrial instrument to be protected from injury, is fundamental to the scheme of the FW Act. As Madgwick J said at [78] of *Australian Municipal, Administrative, Clerical and Services Union*:

> An essential element of such a scheme is that awards and agreements are enforceable and effective, so that those who have participated in the scheme are able to enjoy the fruits of their participation and also so that the industrial peace made by settlements is maintained and preserved.

236 The obligations imposed by s 340 are imposed by statute and, as is the case with obligations imposed by industrial instruments made under the FW Act, it is not possible to either contract out of the obligations or waive their benefits: *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95 at [17]-[25] (French J); *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 250 at [25]-[35] (Goldberg J); *Ace Insurance Limited v Trifunovski* (2011) 200 FCR 532 at [135]-[142] (Perram J).

237 I do not accept the State's contention that its argument places no reliance on conduct which would enliven the legal principle to which I have just referred. The State says that it does not rely upon a consent to be threatened but that because there was consent there was no threat. This is a distinction without substance for the purpose of the principle here at play. Whether the consent is directed to avoiding the crystallising of an obligation, duty or

restriction imposed by the legislation or whether it is directed to avoiding the discharge of the obligation or duty or the evasion of the restriction, makes no difference. In each case, the principle operates to guard against the right conferred by statute for public policy purposes being defeated by contract, waiver or estoppel.

238 When leave to reopen was granted, further submissions were received on the issue of whether the State had threatened to refuse to engage or make use of the services of Lend Lease for the Project. As I understand the submissions of the CFMEU then made, it contended that although events earlier occurring are relevant, the threat of the State to refuse to engage or make use of the services of Lend Lease commenced on 19 November 2012. The period throughout which that conduct is alleged to have subsisted is not clear, although I presume that the CFMEU's allegation is that the conduct continued until 24 April 2013 when the State gave the undertaking described at [96].

239 I am satisfied that the CFMEU has established that the State threatened to take adverse action. In my view the "threatening to take action" subsisted between 19 November 2012 and 5 April 2013 when the Minister for Health publicly announced that the Exemplar Consortium was the Preferred Respondent for the Project.

240 Despite the attempts made by Lend Lease to convince the CCCU that the Lend Lease Enterprise Agreement was Code and Guidelines compliant, on 19 November 2012 Mr Hadgkiss of the CCCU communicated to Lend Lease that it was not compliant whilst the Lend Lease Enterprise Agreement continued to cover Victorian employees in its current form. The letter was confirmation by the State that the Code and Guidelines applied to Lend Lease and that the industrial agreement which Lend Lease was obligated to observe contained provisions that were not compliant.

241 The State's public position was that the Code and Guidelines applied to the Project and thus to the participants in the tender process including Lend Lease. That position was communicated by the State on a number of occasions. In the media release of 31 May 2012, the Minister for Health said of the Project that "the tender documents also require bidders to comply with the [Guidelines]". An Addendum to the RFP documents issued on 22 September 2012 required the Short-listed Respondents to complete a Compliance Schedule which required their acknowledgement that the Code and Guidelines apply to the Project. The

Compliance Schedule also required undertakings from the Short-listed Respondents that they and their related bodies will comply with the Code and Guidelines.

242 The consequences of a contractor's non-compliance with the Code and Guidelines were well known as at 19 November 2012. Again, those consequences had been publicly stated. They were spelt out in the Guidelines and repeated in the Compliance Schedule. The sanctions identified included exclusion from tendering for State Government work. That consequence and the State's resolve to apply the sanction of exclusion was the message which both the then Premier and the Victorian Treasurer had publicly communicated. The former Victorian Premier had said in unqualified terms that "if contractors don't comply with these Guidelines, then they won't be working on State Government projects". That position had not been retracted or resiled from as at 19 November 2012 and therefore was apt to be understood as the State's position.

243 Further, the draft Project Agreement which had been issued in May 2012 included provisions which made clear the State's intent that the Construction Contract would require that the Builder be compliant with the Code and Guidelines. It was apparent from the terms of the draft Project Agreement, that the State intended that only a Code compliant contractor could be awarded the Construction Contract.

244 To summarise, as at 19 November 2012, the State had communicated a position likely to be understood as requiring that:

- The tenderers for the Project and their related parties (which included Lend Lease) had to be compliant with the Code and Guidelines.
- The Builder to be appointed under the Construction Contract (which Exemplar proposed would be Lend Lease) would have to be compliant with the Code and Guidelines.
- Non-compliance by the proposed Builder would result in the exclusion of that contractor from being contracted to provide the Works. That would occur either because the consortium of which the Builder was a member would be excluded from selection or because the contractor (Lend Lease) would be ineligible to be awarded the Construction Contract.

- Lend Lease was not compliant with the Code and Guidelines whilst the Lend Lease Enterprise Agreement applied in its current form to employees in Victoria.

245 There can be no issue that each element of that position had been communicated to Lend Lease by 19 November 2012. On that basis, I am satisfied that as at 19 November 2012 the State had communicated to Lend Lease its intent to refuse to engage or make use of the services of Lend Lease to provide the Works for the Project so long as the Lend Lease Enterprise Agreement applied to Victorian employees and was assessed by the State as non-compliant with the Code and Guidelines.

246 The threat in existence as at 19 November 2012 was capable of being resiled from by the State.

247 In my view, between 19 November 2012 and 5 April 2013, the State did not resile from any of the elements which constituted the threat which I have described at [244]. To the contrary, two events occurred which confirmed the State's stated position. First, the Minister for Finance issued a media release on 27 December 2012 which stated that the tender documents for the project required bidders to comply with the Code and Guidelines. Second, on 21 January 2013, Lend Lease wrote to the Victorian Minister for Finance. Lend Lease offered to give the undertakings to which I have already referred and requested that the Minister exercise his authority, as contemplated under the Guidelines, to grant Lend Lease provisional or deemed compliance with the Guidelines for a transitional period to 30 June 2013. Whilst the exemption sought was not limited to the Project, it obviously included it. On 29 January 2013, the proposal made by Lend Lease was rejected as being not acceptable to the Victorian Government. Lend Lease was informed that the position expressed to it by the CCCU remained the position of the Government.

248 Of course, it was always possible that the State would not carry out its threat and resile from its stated position. It might be said that the State showed some equivocation in its resolve to require compliance with the Code and Guidelines by not excluding Exemplar from the tender process from shortly after 19 November 2012. However, that conduct would not have been perceived as negating the threat. It would probably have been regarded as the result of the further representations and negotiations taking place directly between Lend

Lease and the State and also through their lawyers, as to how compliance may be excused or achieved.

249 The deliberations of the Evaluation Panel, Steering Committee, Project Board and others involved in the Evaluation Process were not matters which the evidence suggests were known to Lend Lease, at least until the trial. Until made public, those matters had no capacity to alter the perceptions otherwise created by the State's conduct.

250 In my view, it was not until the announcement made by the State on 5 April 2013 that the Exemplar Consortium was the Preferred Respondent, that the threat was effectively negated. With that announcement, the State communicated its intent to finalise contractual negotiations with Exemplar, knowing that this involved the appointment of Lend Lease as the Builder that would provide the Works. In that context, it could no longer be said that the State was threatening to refuse to engage or make use of the services of Lend Lease to provide the Works.

251 In its written submission of 19 April 2013, the State raised the contention that the communications between the CCCU and Lend Lease concerning compliance with the Code and Guidelines were of general application and separate to the Evaluation Process for the Project. It contended that the communications "relate to the fact of non-compliance with the Code and Guidelines" and do not constitute a threat to exclude Lend Lease from the Project. The contention takes a blinkered approach. It may well be correct to say that the assessment of non-compliance by the CCCU on its own did not constitute a threat. However when combined with each of the other elements I have identified at [244], I am satisfied that the totality of the conduct of the State did constitute "threatening to take action" within the meaning of s 342(2).

WAS THE THREATENED REFUSAL BECAUSE THE EMPLOYEES OF LEND LEASE HAVE A WORKPLACE RIGHT?

252 The "workplace right" that the CFMEU relies upon is the right of employees of Lend Lease to the benefits of the Lend Lease Enterprise Agreement. It is not only the fact of the existence of that enterprise agreement but also the content of that enterprise agreement that may constitute a "workplace right" within the meaning of that expression in s 341(1) of the FW Act. As the CFMEU contended, the proper approach to the words "entitled to the

benefit" in s 341(1)(a) is that they protect against conduct motivated by the fact that an industrial instrument or order applies to the person against whom "adverse action" is taken, as well as where the motivation to engage in the "adverse action" arises because of the content of the instrument or order: *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232 (*"Greater Dandenong City Council"*) at [80] (Wilcox J); [123]-[131] (Merkel J); and [212] (Finkelstein J).

253 By its Statement of Claim, the CFMEU alleged that the State threatened to refuse to engage or make use of the services of Lend Lease for the Project because members of the CFMEU employed by Lend Lease were entitled to the benefit of the Lend Lease Enterprise Agreement. Once an allegation is made that the respondent has taken action for a prohibited reason, s 361 creates a presumption that the impugned action was taken for that reason. The onus is then cast on the respondent to prove otherwise: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 86 ALJR 1044 at [1] (French CJ and Crennan J); *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at [123] (Gaudron J); *David's Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108 at [109] (Wilcox and Cooper JJ); *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451 at [19]-[24] (Gray J).

254 To displace the presumption, the respondent must show that its conduct was not motivated in whole or in part by the prohibited reason: *Kelly v CFMEU* at 130 (Moore J); *Greater Dandenong City Council* at [91] (Wilcox J) and [176] (Merkel J); *Australian Municipal, Clerical and Services Union* at [35] (Madgwick J). Generally, this will be extremely difficult if no direct testimony is given by the decision-maker acting on behalf of the respondent: *Barclay* at [45] (French CJ and Crennan J); and see *General Motors-Holdens Pty Ltd v Bowling* (1976) 51 ALJR 235. As Gray J said in *National Tertiary Education Union* at [20], what the party seeking to rebut the presumption must do is to establish on the balance of probabilities that the alleged improper reason was not a reason for taking the action. A failure to displace the presumption enables the allegation by an applicant of a prohibited reason or purpose to stand as sufficient proof of the fact: *David's Distribution* at [109] (Wilcox and Cooper JJ); *Australian Municipal, Clerical and Services Union* at [37] (Madgwick J); and see *R v Hush; Ex parte Davanny* (1932) 48 CLR 487 at 507 (Dixon J).

255 In this case, as the submissions of the State acknowledge, no attempt was made by the State to discharge the onus. In the circumstances, section 361 operates to create a presumption that the action of the State, namely its threat to refuse to engage or make use of the services of Lend Lease, was taken for reasons including the reason that the employees of Lend Lease were entitled to the benefit of the Lend Lease Enterprise Agreement. On the basis of that presumption and the findings I have made, and assuming the constitutional validity of ss 340-342 (an issue to which I will next turn), the CFMEU has established that the threat to refuse to engage or use the services of Lend Lease for the Project was adverse action taken against the employees of Lend Lease because those employees had a workplace right to the entitlement of the benefits of the Lend Lease Enterprise Agreement.

DOES THE FAIR WORK ACT EXCEED THE CONSTITUTIONAL LEGISLATIVE CAPACITY OF THE COMMONWEALTH, BY REASON OF THE *MELBOURNE CORPORATION* LIMITATION?

256 The State contended that if, in selecting the consortium to design, build and operate the New Bendigo Hospital, the State would contravene ss 340-342 of the FW Act, the FW Act (to that extent) exceeds the constitutional legislative capacity of the Commonwealth by reason of the *Melbourne Corporation* limitation.

257 The *Melbourne Corporation* limitation has been the subject of consideration by the High Court in a number of judgments dealing with the predecessors to the FW Act including *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 and *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416 ("the Industrial Relations Act case"). More recently, the *Melbourne Corporation* limitation has also been extensively considered in *Austin v Commonwealth of Australia* (2003) 215 CLR 185 and *Clarke v Commissioner of Taxation of the Commonwealth of Australia* (2009) 240 CLR 272.

258 In *Austin* at [115], Gaudron, Gummow and Hayne JJ observed that the scope and content of the limitation is difficult to articulate other than in negative terms and at a high level of abstraction. With that reservation, their Honours at [115] expressed the limitation as being:

> [T]hat the Commonwealth's legislative powers do not extend to making a law which denies one of the fundamental premises of the Constitution, namely, that there will continue to be State governments separately organised.

259 The *Melbourne Corporation* limitation is an implication drawn from the federal structure of the Constitution. As Hayne J explained in *Clarke* at [95]:

> The root of the relevant principle is found in the proposition, often quoted from the reasons of Dixon J in *Melbourne Corporation*, that "[t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities." This proposition, and particularly the reference to the continued existence of independent polities, must be understood in the context of the reasons as a whole.
> [Footnote omitted.]

260 It had been the view that the *Melbourne Corporation* limitation consisted of two limbs or elements as follows:

(i) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and

(ii) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.

See *Queensland Electricity Commission v Commonwealth of Australia* (1985) 159 CLR 192 at 217 (Mason J).

261 The modern view as expressed by Gaudron, Gummow and Hayne JJ in *Austin* at [124] is that there is "but one limitation, though the apparent expression of it varies with the form of legislation under consideration". Their Honours continued at [124]:

> The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments". These criteria are to be applied by consideration not only of the form but also "the substance and actual operation" of the federal law. Further, this inquiry inevitably turns upon matters of evaluation and degree and of "constitutional facts" which are not readily established by objective methods in curial proceedings.
> [Footnote omitted.]

At [168] Gaudron, Gummow and Hayne JJ emphasised that any curtailment or interference to the exercise of a State's constitutional power needed to be significant for the limitation to be engaged. Their Honours said:

> There then is posed the "practical question" identified by Starke J in *Melbourne Corporation*. This, in the end, is whether, looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or interference with the exercise of State constitutional power.

[Footnote omitted.]

262 The State's argument that the FW Act exceeded the Commonwealth's constitutional power relied primarily on the application of the limitation by the majority (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) in *Re AEU* at 232-233 as follows:

> At this point it is convenient to consider South Australia's argument based on impairment of a State's "integrity" or "autonomy". Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government. It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question. There may be a question, in some areas of employment, whether an award regulating promotion and transfer would amount to an infringement. That is a question which need not be considered. As with other provisions in a comprehensive award, the answer would turn on matters of degree, including the character and responsibilities of the employee.
>
> In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, Ministers and judges are not employees of a State. [Footnote omitted.]

263 The State's contention was initially put in two ways. The first was that ss 340-342 of the FW Act would significantly interfere with the State's capacity to choose the identity of the consortium which the State wishes to engage to deliver major public health infrastructure, by constraining the factors which the State could take into account in determining the best 'Value for Money' proposition and by controlling the terms and conditions determined by the State to be necessary and appropriate in the public interest for that purpose. As the argument developed, the State's sole reliance on a broader approach (not dependent upon the capacity of the State to pursue value for money considerations) became apparent. Whilst the State accepted that not every function of government is protected by the *Melbourne Corporation* limitation, the State contended that critical to the State's capacity to function as a

government, is its capacity to determine how it goes about providing major public health infrastructure of the scale and significance of the New Bendigo Hospital and in particular, the terms on which it selects the major provider of that infrastructure. In support of that proposition, the State submitted that there is a "direct analogy" between the protection from Commonwealth legislative dictation of the identity and terms and conditions of senior public servants, judges, Ministers and advisors of the State (*Re AEU* at 233) and the protection from Commonwealth control of the identity and the terms and conditions which are to apply to an entity to be selected by the State to deliver major infrastructure.

264 The State contended that the selection of a corporation to design, construct and then facilitate the operation of a major hospital for a period of up to 25 years, is to be seen in the same light as the identification for selection of, and the terms and conditions of, the class of public officials described in *Re AEU* as at the 'higher levels of government'. It was said that the same sorts of considerations are brought to bear and that it is the essence of the function of government to select the corporation in the same way as it is to select senior government employees. The passage in *Re AEU* at 233 was said to apply *a fortiori*.

265 In the case of those persons employed by a State at the 'higher levels of government', *Re AEU* decided that it was critical to a State's capacity to function as a government that the State have an ability to determine the "number and identity of those it wishes to engage" and "the terms and conditions upon which those persons shall be engaged". This was an application of the *Melbourne Corporation* limitation, not an expression of it. There is no direct analogy to be drawn between this application of the limitation and that for which the State contends.

266 The *Re AEU* application of the limitation was, as the majority expressly identified, based on the Court's part-acceptance of the contention made by South Australia in that case, as explained in the following passage at 231:

> The Solicitor-General for South Australia contended that the implied limitation protects the integrity or autonomy of a State. In this respect he drew a distinction between external services (not protected) and internal services (protected). Internal services were said to include policy formulation, reporting to Parliament, the collection and administration of government revenue and the provision of services to Parliament and the judiciary. It was claimed that the protection would embrace, among others, the Treasury, the Attorney-General's Department, court staff and the police. It was conceded that the content of an award was a relevant consideration. Thus the Commission could regulate remuneration and disputes about remuneration

> and other payments to employees but it could not prescribe employment qualifications, eligibility and termination procedures. The latter, so the argument runs, would impair the integrity or autonomy of the State. It will be convenient to deal a little later with this argument which, in our view, has some force.

267 South Australia's argument was (as the majority further confirmed at 232, in the passage already cited), an argument based on the impairment of a State's "integrity" or "autonomy" which directed attention to the State's "capacity to function as a government". The *Re AEU* application of the limitation was not based on the protection of a State's capacity to exercise government functions. Such a basis for the limitation, on the facts of that case, was expressly rejected at 228-230.

268 The argument which the majority in *Re AEU* accepted and that which it rejected draws attention to a distinction often drawn between an interference with a State's capacity to function as a government and an interference with a function which a State government may undertake. Thus, in *Commonwealth v Tasmania* ("The Tasmanian Dam Case") (1983) 158 CLR 1 at 139, Mason J said:

> It is then suggested that the prohibition strikes down a Commonwealth law which inhibits, impairs or curtails any governmental function of a State in a material way. But this is to rewrite the principle. What it does is to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes. As Stephen J pointed out in *Koowarta*, the implication is derived from the federal nature of the Constitution and it is designed "to protect the structural integrity of the State components of the federal framework, State legislatures and State executives".
>
> To fall foul of the prohibition, in so far as it relates to the capacity of a State to govern, it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.
> [Footnote omitted.]

269 In *Queensland Electricity Commission* at 216-217, Mason J referred to his judgment in the Tasmanian Dam Case and also to that of Brennan J and reinforced the distinction between an impairment of the capacity of the State to function as a government, and an impairment of any function which a State Government undertakes.

270 Those judgments were relied upon by Gaudron, Gummow and Hayne JJ in *Austin* at [146]:

> Some guidance as to the content of the limited State immunity is provided by the later decisions in this Court. In *The Tasmanian Dam Case*, Mason J and Brennan J pointed out that the concern was with the capacity of a State to function as a government rather than interference with or impairment of any function which a State government may happen to undertake. Later, in the *Native Title Act Case*, it was said in the joint judgment of six members of the Court that the relevant question for the application of the *Melbourne Corporation* doctrine was not whether Commonwealth law effectively restricted State powers or made their exercise more complex or subjected them to delaying procedures. Their Honours continued:
>
> > "The relevant question is whether the Commonwealth law affects what Dixon J called the 'existence and nature' of the State body politic. As the *Melbourne Corporation Case* illustrates, this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it so requires."
>
> Later in that judgment, their Honours distinguished between a federal law which impaired capacity to exercise constitutional functions and one which merely affected "the ease with which those functions are exercised".
> [Footnotes omitted.]

271 The asserted impairment contended for by the State in this case, is an impairment of a function of the State of Victoria, namely, its function of providing major public health infrastructure. Even if such an impairment was made out, an impairment of that kind is not concerned with the capacity of a State to function as a government. The 'higher levels of government' application of the *Melbourne Corporation* limitation which the majority in *Re AEU* expressed, was directly concerned with the capacity of a State to function as a government. It was concerned with the machinery of government and in particular the critical personnel a State requires to function as an autonomous body politic. In my view, there is no analogy to be made between an impairment of a State's capacity to identify the vital personnel a State requires to function as an autonomous body politic and the capacity of a State to identify a private provider that will facilitate the provision of a government service, whether major or not.

272 Sections 340-342 of the FW Act are laws of general application. Neither by their terms nor by their operation, do those provisions single out or impose any special burden upon a State which is not imposed on persons generally. Insofar as ss 340-342 impair the

selection of a contractor which a State wishes to engage to provide governmental services to the general public, any such impairment is not likely to be directed to the capacity of the State to function as a government. The operation of the law in the context of the facts raised by this case, does not deprive the State of the services it requires to exercise its powers or otherwise curtail or interfere in a significant manner with the exercise of the State's constitutional power.

273 The evidence in this case does not establish any detrimental operational impact of the application of ss 340-342 to any functions of the State, whether governmental functions or not. In particular, the State's capacity to select the best available provider of the services it seeks is unaffected. The only detrimental operation of ss 340-342 upon the State which is suggested by the evidence, is upon the State's capacity to apply its preferred industrial relations policy. That a federal law has impinged upon a state policy which is in conflict with it, is not (of itself) an impairment or detriment for which the *Melbourne Corporation* limitation provides an immunity.

274 Whilst every case will need to be considered on its facts, the notion that the proscription of discrimination or other forms of adverse action on grounds like those dealt with by s 340 could, in the context of selection processes, impair the capacity of the State to govern is unappealing: *State of Victoria v Riordan* (Unreported, Industrial Relations Court of Australia, Wilcox CJ, Lee and Madgwick JJ, 330/1996, 26 July 1996) at 21 (the Court); *Greater Dandenong City Council* at [182] (Merkel J); *Australian Municipal, Administrative, Clerical and Services Union* at [120] (Madgwick J).

275 For those reasons, I reject the State's contention that the FW Act exceeds the constitutional legislative capacity of the Commonwealth by reason of the *Melbourne Corporation* limitation.

276 I have reached that view without it being necessary to fully consider the additional argument relied upon by the CFMEU that a complete answer to the contention of the State is provided by the fact that the State has, by the *Fair Work (Commonwealth Powers) Act 2009* (Vic), referred to the Commonwealth its power in relation to a broad range of industrial and employment subject matters upon which the enactment of ss 340-342 of the FW Act is based. Whilst I doubt the referral of power provides a complete answer, because each head of power

in s 51 of the Constitution (including s 51(xxxvii)) is granted "subject to this Constitution", the referral may well be relevant to determining whether any law based upon it, can be said to impermissibly burden the referring State. Given the conclusion I have already reached, it is not necessary that I determine the additional argument raised by the CFMEU.

ARE THE CODE AND THE GUIDELINES AN INVALID EXERCISE OF STATE EXECUTIVE POWER?

277 By its Reply, the CFMEU pleaded that the Code and Guidelines are beyond the executive power of the State and accordingly are invalid and of no effect. By consequential amendment to its Application, the CFMEU sought a declaration to that effect.

278 An interesting argument is raised by the pleading which does not appear to have received prior judicial attention. The argument appears to have two limbs. By the first limb, the CFMEU contends that the Code and Guidelines seek to regulate industrial relations in Victoria generally via the exercise of the State's executive power and in the absence of any legislative underpinning. The regulation of industrial relations is sought to be achieved, so it is said, by criteria that are legislative in character (if not in form), including by punishing those who offend. Punishment, so the CFMEU contends, is a matter exclusively in the realm of the legislature and in the absence of any legislative underpinning, the attempt to regulate must fail.

279 The second limb contends that by its executive power the State cannot achieve 'by the backdoor' that which it could not legislate to achieve. In relation to bargaining for and the making of industrial agreements, the CFMEU contends that the law in Victoria is contained in Pt 2-4 of the FW Act. That law applies to the State because it has been made under Victorian legislative capacity referred by Victoria to the Commonwealth. Section 109 of the Constitution ensures that the FW Act is paramount in Victoria in respect of a field upon which it operates. In that circumstance and in reliance upon statements made by members of the High Court in *Williams v Commonwealth* (2012) 86 ALJR 713, the CFMEU contended that if the State could achieve by promulgation of policy what it could not achieve by legislation, the operation of s 109 would be subverted. Accordingly, the CFMEU contended that the promulgation of the Code and Guidelines was beyond the executive power of the State.

280 Whilst the point raised may be interesting, the occasion for its determination does not arise. It is not clear to me how the CFMEU relies upon the argument as a shield against the *Melbourne Corporation* limitation case put against it by the State. Insofar as the argument is relied upon to that end, given the conclusions I have already reached, that reliance is unnecessary and I need not determine the issue. Insofar as the issue is relied upon to support the declaration sought, the CFMEU has failed to establish that the Court's power to make the declaration sought has been enlivened.

281 Section 21 of the *Federal Court of Australia Act 1976* (Cth) confers power on the Court to make "binding declarations of right". The Court's power to grant declaratory relief depends upon the existence of a justiciable controversy as to some immediate right, duty or liability to be established by the Court's determination: *Direct Factory Outlets Pty Ltd v Westfield Management Limited* (2003) 132 FCR 428 at [16] (Cooper J) citing *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 and 266-267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Fencott v Muller* (1983) 152 CLR 570 at 603 (Mason, Murphy, Brennan and Deane JJ); *Abebe v Commonwealth* (1999) 197 CLR 510 at 524 (Gleeson CJ and McHugh J), 555 (Gaudron J), 570 (Gummow and Hayne JJ) and 585 (Kirby J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 at [43], [48]-[50] (Gaudron J) and [154]-[155] (Kirby J).

282 The only right which the CFMEU could identify which it or those it represents has in relation to which a controversy has arisen is the right to the protection conferred by s 340 of the FW Act. However the right to the protection conferred by s 340 which the CFMEU asserts for employees of Lend Lease is not dependent upon the validity of the Code and Guidelines or any part or parts thereof. The absence of a justiciable controversy which engages the validity of the Code or Guidelines would defeat the CFMEU's claim for a declaration at the outset and makes it unnecessary to determine the contention raised in support of this claim.

RELIEF

283 In the light of the findings I have made, I will make a declaration that in contravention of s 340(1)(a)(i) of the FW Act, between 19 November 2012 and 5 April 2013, the State took adverse action against employees of Lend Lease by threatening to refuse to engage or make

use of the services of Lend Lease for the construction of the New Bendigo Hospital because those employees were entitled to the benefit of the Lend Lease Enterprise Agreement.

284 That leaves for further hearing and determination the orders sought by the CFMEU that a penalty be imposed upon the State for its contravention of s 340 of the FW Act. To facilitate the penalty hearing, I will direct the parties to consult and file with the Court minutes of proposed orders which address the filing and service of written submissions in advance of that hearing.

I certify that the preceding two hundred and eighty-four (284) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 17 May 2013