FEDERAL COURT OF AUSTRALIA

State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160

Citation:	State of Victoria v Construction, Forestry, Mining and Energy Union [2013] FCAFC 160
Appeal from:	Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2) [2013] FCA 446 Construction, Forestry, Mining and Energy Union v State of Victoria [2013] FCA 445 Construction, Forestry, Mining and Energy Union v State of Victoria (No 2) [2013] FCA 1034
Parties:	**STATE OF VICTORIA v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MCCORKELL CONSTRUCTIONS PTY LTD (ACN 094 764 584) and MINISTER FOR EMPLOYMENT** **STATE OF VICTORIA v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and MINISTER FOR EMPLOYMENT**
File numbers:	VID 436 of 2013 VID 437 of 2013
Judges:	**KENNY, BUCHANAN AND GRIFFITHS JJ**
Date of judgment:	19 December 2013
Catchwords:	**INDUSTRIAL LAW** – Whether appellant contravened s 343 of the *Fair Work Act 2009* (Cth) – Meaning of 'intent to coerce' – Elements required to establish requisite intent – Whether deliberate avoidance of a legislative policy may constitute 'illegitimate conduct' – Operation of statutory presumption raised by s 361 of the *Fair Work Act 2009* (Cth) – No contravention made out. **INDUSTRIAL LAW** – Whether appellant took adverse action in contravention of s 340(1)(a) of the *Fair Work Act 2009* (Cth) against employees of an independent contractor – Construction of Item 4 of s 342(1) of the *Fair Work Act 2009* (Cth) – Meaning of 'independent contractor' – Whether appellant 'proposed to enter into a contract for services' with independent contractor – No contravention

made out.

INDUSTRIAL LAW – Whether the *Fair Work Act 2009* (Cth) provides for the imposition of civil pecuniary penalties on the Crown – Whether the State of Victoria is a 'body corporate' within the meaning of that word in s 546(2) of *Fair Work Act 2009* (Cth) – Inapplicability of the proposition in *Cain v Doyle* (1946) 72 CLR 409 to determining amenability of the Crown to modern civil pecuniary penalties – Whether inappropriate as a matter of principle to impose a pecuniary penalty on the Crown – Crown amenable to civil pecuniary penalties - State of Victoria is a 'body corporate' in requisite sense.

PRACTICE AND PROCEDURE – Application by appellant to withdraw concession made at trial – Proposal to introduce "business records" within the meaning of s 69 of the *Evidence Act 1995* (Cth) to remedy evidentiary lacuna – Application refused.

CONSTITUTIONAL LAW – Whether appellant exceeded the limits of Victorian State executive power by "adopting and promulgating" code and policy for the Victorian building and construction industry – Nature of executive policy-making - Discussion of implication of *Williams v Commonwealth of Australia* (2012) 248 CLR 156 for exercise of executive power by States – Capacity of the executive branch of a State to enter into contracts.

PRACTICE AND PROCEDURE – Declaratory relief sought pursuant to ss 21 or 23 of the *Federal Court Act 1976* (Cth) that Victorian executive policies were invalid – "Adoption and promulgation" of policy did not give rise to justiciable controversy – No legal, equitable or statutory right affected – Relief refused.

Legislation:

Acts Interpretation Act 1901 (Cth), s 22
Constitution Act 1975 (Vic), s 65
The Constitution, ss 53, 61, 96, 109
Evidence Act 1995 (Cth), ss 59, 69
Fair Work Act 2009 (Cth), ss 37, 40A, 228, 336, 340, 341, 342, 343, 361, 546, 569, 570
Federal Court of Australia Act 1976 (Cth), ss 21, 23
Federal Court Rules 2011 (Cth)
Workplace Relations Act 1996 (Cth), s 170NC

Cases cited:

Abebe v The Commonwealth (1997) 197 CLR 510
Australian Competition and Consumer Commission v CG Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279

Berbatis Holdings Pty Ltd (2003) 214 CLR 51
Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 290 ALR 647; 220 IR 445
Cain v Doyle (1946) 72 CLR 409
Construction, Forestry, Mining and Energy Union v Eco Recyclers Pty Ltd [2013] FCA 24
Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2) [2013] FCA 446
Construction, Forestry, Mining and Energy Union v State of Victoria [2013] FCA 445
Construction, Forestry, Mining and Energy Union v State of Victoria (No 2) [2013] FCA 1034
Coochey v Commonwealth (2005) 149 FCR 312
Coulton v Holcombe (1986) 162 CLR 1
Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40
Croome v Tasmania (1997) 191 CLR 119
Direct Factory Outlets Pty Ltd v Westfield Management Ltd (2003) 132 FCR 428
Director of Animal and Plant Quarantine v Australian Pork Limited (2005) 146 FCR 368
Fair Work Ombudsman v National Jet Systems Pty Ltd [2012] FCA 243; (2012) 218 IR 436
Finance Sector Union of Australia v Commonwealth Bank of Australia (2000) 106 FCR 16
National Tertiary Education Industry Union v Commonwealth of Australia (2002) 117 FCR 114
New South Wales v Bardolph (1934) 52 CLR 455
Re Becker and the Minister for Immigration and Ethnic Affairs (1977) 15 ALR 696
Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (2001) 109 FCR 378
State of Victoria v Master Builders' Association of Victoria [1995] 2 VR 121
Stewart v Ronalds (2009) 232 FLR 331
Town Investments Ltd v Department of the Environment [1977] 1 All ER 813
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481
Wallis Nominees (Computing) Pty Ltd v Pickett [2013] VSCA 24
Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2010] FCA 754; (2010) 196 IR 365
Williams v Construction, Forestry, Mining and Energy Union [2009] FCA 223; (2009) 179 IR 44
Williams v The Commonwealth (2012) 248 CLR 156

Texts cited:	Lindell G, "The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case" (2013) 39(2) Monash University Law Review 1 Saunders C, and Yam KF, "Government regulation by contract: Implications for the rule of law" (2004) 15 Public Law Review 51
Date of hearing:	11, 12 and 13 November 2013
Date of last submissions:	18 November 2013
Place:	Melbourne
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	177
Counsel for the Appellant:	S Wood SC with P Willis and M Felman
Solicitor for the Appellant:	Ashurst Australia
Counsel for the First Respondent:	R Doyle SC with M Harding and Y Bakri
Solicitor for the First Respondent:	Slater & Gordon
In VID 436 of 2012, the Second Respondent submitted to any order the Court might make, save as to costs	
Counsel for the Minister for Employment (Intervener):	J L Bourke SC with M Follett
Solicitor for the Minister for Employment (Intervener):	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION VID 436 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	STATE OF VICTORIA **Appellant**
AND:	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION **First Respondent**
	MCCORKELL CONSTRUCTIONS PTY LTD **(ACN 094 764 584)** **Second Respondent**
	MINISTER FOR EMPLOYMENT **Intervener**

JUDGES:	KENNY, BUCHANAN AND GRIFFITHS JJ
DATE OF ORDER:	19 DECEMBER 2013
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal against the judgment given on 17 May 2013 (which was the subject of leave granted on 11 November 2013) be allowed.
2. The appeal against the judgment given on 11 October 2013 in VID 10 of 2013 be allowed; and orders 1 and 2 made that day in that proceeding be set aside.
3. There be no order as to costs.

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 437 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**STATE OF VICTORIA** **Appellant**
AND:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **Respondent**
	MINISTER FOR EMPLOYMENT **Intervener**
JUDGES:	**KENNY, BUCHANAN AND GRIFFITHS**
DATE OF ORDER:	**19 DECEMBER 2013**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal against the judgment given on 17 May 2013 (which was the subject of leave granted on 11 November 2013) be allowed.

2. The notice of cross-appeal filed on 13 August 2013 be treated as duly filed and served and, to the extent of any non-compliance with the *Federal Court Rules 2011* (Cth), the requirements of those Rules be dispensed with.

3. The cross-appeal be dismissed.

4. The appeal against the judgment given on 11 October 2013 in VID 1097 of 2012 be allowed; and orders 1 and 2 made that day in that proceeding be set aside.

5. There be no order as to costs.

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 436 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: STATE OF VICTORIA
Appellant

AND: CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
First Respondent

MCCORKELL CONSTRUCTIONS PTY LTD
(ACN 094 764 584)
Second Respondent

MINISTER FOR EMPLOYMENT
Intervener

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION VID 437 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: STATE OF VICTORIA
Appellant

AND: CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Respondent

MINISTER FOR EMPLOYMENT
Intervener

JUDGES: KENNY, BUCHANAN AND GRIFFITHS JJ
DATE: 19 DECEMBER 2013
PLACE: MELBOURNE

REASONS FOR JUDGMENT

KENNY J:

INTRODUCTION

1 These appeals arose out of the adoption by the State of Victoria of 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 Code and the Guidelines are policy documents. They are not legislative instruments. Broadly speaking, the Code and the Guidelines set out policy announced at the political level. Overall responsibility for implementing the Code and the Guidelines is at the Ministerial level. Within the Department of Treasury and Finance, the Construction Code Compliance Unit ("CCCU") was established to monitor compliance and receive reports of alleged breaches of the Guidelines.

2 Being statements of policy, the Code and the Guidelines do not bind the Executive Government to act in any particular way; and they do not of themselves authorise, forbid, or mandate any particular conduct by anyone. In this instance, the policies set out in the Code and the Guidelines have no authorising statute; and, unlike many policies that touch matters arising in this Court, they are not formulated to inform the exercise of a statutory discretion. Rather, the policy with which these appeals are concerned were relevantly formulated to govern or affect the power of the Executive to make building and construction contracts. In this respect, as statements of policy by the Executive Government, the Code and the Guidelines provided a framework both for the general exercise of the Government's contract-making and services procurement and, in some respects, for how that policy was to be implemented: compare *Re Becker and the Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696 at 701 (Brennan J).

THE ECO APPEAL ON LIABILITY

3 In its originating application and pleading in this Court, the Construction, Forestry, Mining and Energy Union ("CFMEU") relevantly alleged that, in breach of s 343(1)(a) of the *Fair Work Act 2009* (Cth) ('FW Act'), the State of Victoria ("the State") acting through Ms Catherine Cato, the Assistant Director of the CCCU at the relevant time, took action with intent to coerce Eco Recyclers Pty Ltd ("Eco") and its employees to vary an enterprise agreement to which Eco and the CFMEU were parties ("the Eco agreement") so as to comply

with the Guidelines. The Eco enterprise agreement had been approved by the Fair Work Commission on 26 October 2012.

4 On 17 May 2013, the primary judge delivered a judgment in relation to Eco, pursuant to which the CFMEU's claim was upheld ("the Eco judgment'). The State appealed, with leave, against the Eco judgment and a subsequent judgment given on 11 October 2013 with respect to penalty ("the Eco penalty judgment"). Critically for the outcome of the appeal against the Eco judgment, the State relied on the evidence of Ms Cato to displace the presumption created by s 361 of the FW Act.

5 I have had the benefit of reading in draft the reasons for judgment prepared by Buchanan and Griffiths JJ with respect to the appeals in VID 436 of 2013 (and the appeals and cross-appeal in VID 437 of 2013: see below). Substantially for the reasons stated by their Honours, I agree that:

(a) when Ms Cato's evidence is considered by itself and in the context of the evidence as a whole, it is sufficient to displace the presumption in s 361 of the FW Act; and

(b) the submissions made with respect to the Eco judgment on behalf of the Commonwealth Minister for Employment, intervening pursuant to s 569(1) of the FW Act, should be rejected.

6 It follows that, for these reasons, I too would allow the appeal against the Eco judgment, on the basis that the evidence established on the balance of probabilities that Ms Cato did not intend to exert pressure on Eco such that Eco had no choice but to vary the Eco agreement. That is, the first element of "intent to coerce" in s 343(1) was not made out.

7 The CFMEU also argued that the conduct of the State was unlawful and illegitimate and, therefore, the second element of intent to coerce was made out. As explained in the reasons for judgment prepared by Buchanan and Griffiths JJ, I accept that there is a second element in "intent to coerce", which requires that the conduct in question be relevantly "unlawful, illegitimate or unconscionable".

8 In this case, however, since the first element of "intent to coerce" was not established, it is difficult, in my respectful opinion, to discuss the second element because that discussion lacks the necessary factual basis. Further, it seems to me that, if the first element of "intent to coerce" were established, the second element might, in some circumstances at least, be satisfied by a finding that the relevant pressure was applied in order to circumvent or defeat the law, whether common law or statutory, by conduct that was not otherwise unlawful. If this were so, it may be that, in some circumstances, a particular legislative policy might constitute a criterion for treating otherwise lawful conduct as nonetheless illegitimate, for the purpose of finding an "intent to coerce". It is, however, unnecessary to discuss this point further since I agree that, in so far as the Eco appeal is concerned, the first element of "intent to coerce" was not made out.

THE LEND LEASE APPEAL ON LIABILITY

9 In its further amended originating application and pleading in this Court, the CFMEU relevantly alleged that, in breach of s 340(1)(a) of the FW Act, when the State threatened to refuse to accept a tender by a consortium that included Lend Lease Project Management & Construction (Australia) Pty Limited ("Lend Lease") on the basis that the enterprise agreement to which Lend Lease and the CFMEU were parties ("the Lend Lease agreement") failed to comply with the Guidelines, the State took adverse action within the meaning of item 4 of the table in s 342(1) of the FW Act. The Lend Lease agreement had been approved by the Fair Work Commission on 13 September 2012.

10 On 17 May 2013, the primary judge delivered a judgment in relation to Lend Lease, pursuant to which the CFMEU's claim was upheld ("the Lend Lease judgment"). The State appealed, with leave, against the Lend Lease judgment and a subsequent judgment given on 11 October 2013 with respect to penalty ("the Lend Lease penalty judgment").

11 In the Lend Lease proceeding, the State conceded at the trial that, if the other elements of the case against it were established, it would not contend that the presumption in s 361 of the FW Act had been displaced. I agree, for the reasons stated by Buchanan and Griffiths JJ, that the State should not have leave to withdraw this concession.

12 Further, substantially for the reasons stated by their Honours, I agree that, whilst Lend Lease was an independent contractor within the meaning of item 4 of the table in s 342(1) of the FW Act, there was in the Lend Lease matter no "propos[al] to enter into a contract for services" with Lend Lease. Such a contract with Lend Lease was necessary to attract item 4 of the table in s 342(1). Accordingly, like their Honours, I would allow the appeal against the Lend Lease judgment.

THE CROSS-APPEAL

13 By its cross-appeal the CFMEU sought, in substance, a declaration pursuant to either s 21 or s 23 of the *Federal Court of Australia Act 1976* (Cth) ('Federal Court Act') that the Code and Guidelines are "invalid and of no effect". The terms of the proposed declaration were framed in three different ways, but it is unnecessary to discuss these different ways because none of them can be made in this case, as outlined below.

14 The CFMEU argued that the Code and the Guidelines, as adopted and promulgated by the State, lacked a valid foundation in executive power and should, therefore, be declared to be of no force and effect. I agree with Buchanan and Griffiths JJ that, as stated in their reasons for judgment, the cross-appeal cannot succeed in the form that it has been brought to this court. I wish, however, to add the following to their Honour's analysis on the jurisdiction of the Court and on the the significance for the cross-appeal of *Williams v The Commonwealth* (2012) 248 CLR 156 ('*Williams*').

15 As Buchanan and Griffiths JJ identify, the court is empowered only to grant relief under s 23 in the event that the CFMEU has identified some "right, whether legal, equitable or statutory, to base entitlement to the order": see, for example, *Director of Animal and Plant Quarantine v Australian Pork Limited* (2005) 146 FCR 368 ('*Australian Pork*') at 387 [84]-[85] (Heerey and Lander JJ) and 390 [103] (Branson J). There is the same requirement with respect to s 21: see, for example, *Direct Factory Outlets Pty Ltd v Westfield Management Ltd* (2003) 132 FCR 428 at 433 [16] (Cooper J). That there must be a justiciable controversy, in the sense that there must be an immediate right, duty, liability or obligation requiring the court's determination, before the court can grant declaratory relief is a concomitant of the need for a "matter" for the exercise of federal jurisdiction, and the centrality of the determination of rights, duties, liabilities or obligations to the constitutional notion of a

"matter": *Abebe v The Commonwealth* (1997) 197 CLR 510 at 523-4 [24]-[25] (Gleeson CJ and McHugh J).

16 In this case, however, the CFMEU did not identify any right, duty, liability or obligation that might entitle it to the declaration it sought. In written submissions, the CFMEU contended that the relevant right in issue before the primary judge (and thus on appeal) was "the right of the CFMEU's members to enjoy the bargaining rights conferred by Part 2-4 of the FW Act to the exclusion of inconsistent State regulation pursuant to the Code and the Guidelines which lacked any valid or proper foundation in executive power".

17 Putting aside for a moment whether or not the Code and Guidelines lacked proper foundation, the question is whether indeed the Code and Guidelines, of themselves, challenged any supposed right of enjoyment of bargaining rights. At the hearing of the appeal, senior counsel for the CFMEU argued that they did, explaining that the argument on:

> ... the cross-appeal ... hasn't focussed on the contract, because it's fairly and squarely an argument that the Code and the Guidelines are far more than an announcement of proposed or preferred contractual terms. They are, effectively, a statement of norms that look and feel a lot like regulation or legislation, but are called policy. They purport to bind people broadly across an industry, they purport to have the force of sanctions standing behind them, so they exhibit features of coercive power. So they are both broad and coercive in their nature, and our attack in the cross-appeal is on the outer limits of executive power. To adopt a policy that does those things, we say, offends the outer limits of executive power on the part of the State.

18 The CFMEU argued that the norms (to which reference was made in the above passage) were to be realised in the State's construction industry by means of the scheme created by the Code and the Guidelines; and that this scheme contemplated the imposition of sanctions (including exclusion from tendering for certain government work) by the Minister for Finance (acting in consultation) and by compliance monitoring and breach reports, review or investigation by the CCCU. At its highest, the CFMEU's argument was that, upon their publication, the Guidelines threatened that non-conformity exposed industry members to a risk of adverse action by the State's executive branch.

19 The difficulty with the CFMEU's argument is, however, that the Code and the Guidelines are statements of policy only; they are not statements of law. The Code and the Guidelines do not of themselves give rise to any relevant right or obligation. As stated at the

outset of these reasons, the Code and the Guidelines do not themselves authorise, forbid, or mandate any particular conduct by anyone. The Code and the Guidelines do not operate directly or indirectly to impose any sanctions for non-compliance. Rather, they notify what the CCCU is tasked to do and the nature of the adverse action that might be taken in the event of non-compliance. The policy within the Code and the Guidelines may also be given effect, as the CFMEU said, "through contracts"; but, as these appeals illustrate, given the ultimate success of the consortium to which Lend Lease belonged, the Code and the Guidelines did not (and do not) bind the executive arm of the State to act in any particular way.

20 In any event, the CFMEU re-iterated that the cross-appeal should be decided on the basis of a challenge to the adoption and promulgation of the Code and the Guidelines; not on the basis of a challenge to any specific conduct undertaken, or to be undertaken, by the State on the basis of the Code and Guidelines. As statements of policy by the executive branch of the State, the Code and the Guidelines can do no more than guide the general exercise of the executive's contract-making and services procurement and, in some other respects, how the policy is to be implemented. The Code and the Guidelines are simply not analogous to an existing legislative provision, which of itself imposes a liability, confers a benefit, or invests action pursuant to it with legal force (even if that liability etcetera remains unenforced): cf *Croome v Tasmania* (1997) 191 CLR 119.

21 As Buchanan and Griffiths JJ hold, and as the primary judge also concludes, the CFMEU's challenge to the adoption and promulgation of the Code and Guidelines is not, in the circumstances of this case, subject matter over which the power in either s 21 or s 23 of the Federal Court Act to grant declaratory relief can be exercised. This is because the Code and the Guidelines did not themselves create any rights, duties, liabilities or obligations; hence none such fall for the court's determination. There is therefore no justiciable controversy to found declaratory relief.

22 For these reasons, the cross-appeal should be dismissed.

23 Further, even if there was a justiciable controversy, the decision of the High Court in *Williams* would provide little support for the CFMEU's submissions on the cross-appeal. First, the issue that fell for determination in *Williams* was qualitatively and significantly different from that which arises in this cross-appeal. Whilst the cross-appeal challenges the

validity of the adoption and promulgation of *policy* by the *State*'s executive branch, *Williams* concerned a challenge to the validity of a *contract* ('the funding agreement') between the *Commonwealth* executive arm and a private entity (and the validity of the payments under it) made for the purpose of providing chaplaincy services to a Queensland State school. Whether the Commonwealth's action revealed in some sense a "clash of culture or ideology" as the senior counsel for CFMEU said, is beside the point because the challenge in *Williams* was not at this level, but focussed instead on the power of the Commonwealth's executive branch to contract as it had done and to make payments under that contract to fund the Commonwealth's chaplaincy program in Queensland State schools. Thus, putting aside constitutional differences between the Commonwealth and the State, the discussion on the nature of executive power to contract in *Williams* and to make contractual payments does not assist in the cross-appeal, which was said to be solely concerned with the adoption and promulgation of policy. Even if, as the CFMEU said, by the Code and the Guidelines, the State's executive sought to "add to" the regulation of industrial relations in Victoria in a manner inconsistent with "an extant federal legislative regime", the State did not relevantly *do* any such thing merely by announcing the policy. That is, *merely* by announcing the policy, the State did not interfere with any rights, liabilities or obligations under the FW Act. This was simply not a case where, as senior counsel for the CFMEU sought to argue, the protection of s 109 of the Commonwealth Constitution was being circumvented: cf *Williams* at 353 [522] (Crennan J).

24 Further, it cannot be supposed that the differences between the Commonwealth and State constitutional contexts are insignificant. *Williams* was primarily concerned with the executive power of the Commonwealth in s 61 of the Commonwealth Constitution. In particular, the Court determined whether the funding agreement and the payments made under it exceeded the Commonwealth's executive power because the funding agreement was not of a kind that the Commonwealth was constitutionally empowered to make independently of statute. The nature of this inquiry is underscored by the inquiry in the reasons of Hayne J, of Kiefel J and of Heydon J, in dissent, as to whether or not the executive's actions in this regard could have been authorised by legislation passed by the Federal Parliament: see *Williams* at 280-281 [286] (Hayne J), 333 [441] (Heydon J), 367-368 [574]-[575] (Kiefel J). There is no equivalent to s 61 in the Constitution of the State and the executive power of the State is not referable to limits like those with respect to the Commonwealth arising from the

specific heads of legislative power. Furthermore, whilst the reasons of French CJ, of Gummow and Bell JJ and of Crennan J disclose a different analysis, they too had regard to federal considerations affecting the distribution of power that are inapplicable in the case of the State. Thus, French CJ referred to the "consequences for the federation which flow from attributing to the Commonwealth a wide executive power to expend moneys", and a concern not to diminish the authority of the States (at least not in a practical way): *Williams* at 192-193 [37], 216-217 [83] (Gummow and Bell JJ); Geoffrey Lindell, "The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case" (2013) 39(2) Monash University Law Review 1 at 23. A number of their Honours considered the operation of s 96 of the Commonwealth Constitution from the federal perspective: *Williams* at 234 [143] (Gummow and Bell JJ), 347-348 [501]-[503] (Crennan J) and 373 [593] (Keifel J). These kinds of concerns are not capable of ready translation to consideration of the State's executive power. Gummow and Bell JJ also drew attention, in the Commonwealth constitutional context, to the nature of representative and responsible government, especially having regard to the Senate and its inability to amend appropriation for the ordinary annual services of government under s 53 of the Commonwealth Constitution, notwithstanding the power of the Senate to reject supply and its ability to propose the amendment of money bills: *Williams* at 232-233 [136] (Gummow and Bell JJ). A different constitutional regime governs the Legislative Council under the State Constitution: see *Constitution Act 1975* (Vic), s 65. There is no necessary correspondence between the limits on Commonwealth executive power and the State's executive power.

25 The foregoing strongly indicates that it cannot be supposed that the decision in *Williams* would provide direct authoritative guidance for the outcome of the cross-appeal, even if there were a justiciable controversy. In so far as *Williams* would provide any guidance in this instance, it would do so in a limited way only. This limited guidance may indicate that an application of the Guidelines may be vulnerable to attack on another occasion in a differently constituted case. Thus, there is an acknowledgement in *Williams* that the use of government contracts "to impose conditions of a regulatory or public policy nature on private parties ... has implications for the principles and practices of public law": see Cheryl Saunders and KF Yam, "Government regulation by contract: Implications for the rule of law" (2004) 15 Public Law Review 51 at 52; and see *Williams* at 213-214 [77] (French CJ). These implications may prove important on a later occasion. It may be that implications about

parliamentary accountability similar to those referred to by Crennan J in *Williams* (at 351 [516]) will be drawn from provisions of the State Constitution; and that these implications may impact on the outcome of another case concerning the application of the Code and Guidelines. These State constitutional provisions were not the subject of argument on the cross-appeal; and it is unnecessary to consider them here.

26 It should also be borne in mind that their Honours reasons for judgment in *Williams* do not provide unequivocal support for the State's submissions on the cross-appeal concerning the authority of *New South Wales v Bardolph* (1934) 52 CLR 455 ('*Bardolph*'), which held that it is unnecessary for an appropriation to be passed *before* a contract can be entered into for the expenditure of money; and until *Williams* was also taken to mean that the executive had a general power to contract. Since *Williams*, however, this latter proposition is sustainable only with respect to a contract "in the ordinary course of administering a recognised part of the government of the states": see *Williams* at 211-212 [74] (French CJ), 255-260 [208]-[221] (Hayne J), 342 [484], 354 [529] (Crennan J). This indicates that *Bardolph* is not to be taken as authority for the proposition that the State's executive branch has general contracting power with respect to any subject matter: see especially *Williams* at 256 [209], 257 [212] (Hayne J). This further indicates that, in so far as the State submitted to the contrary in answer to the CFMEU's cross-appeal, its submissions paid insufficient regard to the effect of the discussion of *Bardolph* in *Williams*. Furthermore, the statements made by Gummow and Bell JJ in *Williams*, which distinguished governmental power to contract from a private person's power to contract because the public money expended by government requires that "questions of contractual capacity are to be regarded 'through different spectacles'" is applicable not only to the Commonwealth but also to the States: see *Williams* at 236 [151].

27 The aspects of *Williams* mentioned in the above paragraph strongly indicate that there are important synergies between the constitutional considerations that affect the contract-making power of the Commonwealth executive and that which affect the contract-making power of the State. Further, using policy as a "regulatory tool" in the manner the State has done in this case has risks, including risks for the proper operation of State constitutional principles, such as principles of representative and responsible government, which should not be ignored. Simply because some of these principles are not expressly stated in State

constitutions does not mean they do not exist and can be safely disregarded: see, for example, *Stewart v Ronalds* (2009) 232 FLR 331 at 343-344 [35] to [36] (Allsop P).

28 As constituted, however, the cross-appeal should be dismissed, for the reasons stated above.

APPEALS AGAINST PENALTIES

29 For the reasons stated by Buchanan and Griffiths JJ, I would agree that none of the grounds relied on in the appeals against the Eco penalty judgment and the Lend Lease penalty judgment were made out. Since, however, the Court would uphold the appeals against both the Eco judgment and the Lend Lease judgment on the basis that the CFMEU failed to make out its cases of breach of s 343(1)(a) of the FW Act by Eco and of breach of s 340(1)(a) of the FW Act by Lend Lease, there is no basis for the penalty orders made by the primary judge in the Eco penalty judgment and the Lend Lease penalty judgment. Accordingly, I would also allow the appeals against the Eco penalty judgment and the Lend Lease penalty judgment and further order that Orders 1 and 2 of the orders made by the primary judge on 11 October 2013 in both matters be set aside.

DISPOSITION

30 For the reasons stated, I agree that, with respect to the appeals and cross-appeals, the following orders should be made.

VID 436 of 2013:

1. The appeal against the judgment given on 17 May 2013 (which was the subject of leave granted on 11 November 2013) be allowed.
2. The appeal against the judgment given on 11 October 2013 in VID 10 of 2013 be allowed; and orders 1 and 2 made that day in that proceeding be set aside.
3. There be no order as to costs.

VID 437 of 2013:

1. The appeal against the judgment given on 17 May 2013 (which was the subject of leave granted on 11 November 2013) be allowed.

2. The notice of cross-appeal filed on 13 August 2013 be treated as duly filed and served and, to the extent of any non-compliance with the *Federal Court Rules 2011* (Cth), the requirements of those Rules be dispensed with.

3. The cross-appeal be dismissed.

4. The appeal against the judgment given on 11 October 2013 in VID 1097 of 2012 be allowed; and orders 1 and 2 made that day in that proceeding be set aside.

5. There be no order as to costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate: 

Dated: 18 December 2013

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

FAIR WORK DIVISION VID 436 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	STATE OF VICTORIA **Appellant**
AND:	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION **First Respondent**
	MCCORKELL CONSTRUCTIONS PTY LTD **(ACN 094 764 584)** **Second Respondent**
	MINISTER FOR EMPLOYMENT **Intervener**

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

FAIR WORK DIVISION VID 437 of 2013

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	STATE OF VICTORIA **Appellant**
AND:	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION Respondent
	MINISTER FOR EMPLOYMENT Intervener
JUDGES:	KENNY, BUCHANAN AND GRIFFITHS JJ
DATE:	19 DECEMBER 2013
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

BUCHANAN AND GRIFFITHS JJ:

Background

31 These appeals concern orders made against the State of Victoria ("the State") for breach of s 343 and s 340 of the *Fair Work Act 2009* (Cth) ("the FW Act") arising from two civil construction projects commissioned by the State. In orders which accompanied judgments handed down on 17 May 2013 (*Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* [2013] FCA 446 ("Circus Oz judgment") and *Construction, Forestry, Mining and Energy Union v State of Victoria* [2013] FCA 445 ("Bendigo Hospital judgment")), the primary judge made declarations of breach of s 343 and s 340 respectively of the FW Act by the State. In orders which accompanied a subsequent judgment handed down on 11 October 2013 (*Construction, Forestry, Mining and Energy Union v State of Victoria (No 2)* [2013] FCA 1034), the primary judge imposed pecuniary penalties of $28,000 and $25,000 respectively for the breaches found proved, but suspended any obligation of payment pending the outcome of the present appeals.

32 Although the findings of breach turned on facts specific to each case, there were some common matters which were addressed in each case, including that the breaches found had their origins in policies adopted by the State to guide decisions about the selection of contractors for State-sponsored public works.

33 The two projects in question concerned the refurbishment of a building intended to become the new premises for Circus Oz, and the development and construction of the New Bendigo Hospital, intended to become Victoria's largest regional hospital.

34 Each project required decisions to be made about which principal contractor should be engaged for the project in question. In each case a tender process was used. In each case the successful tenderer needed to engage other contractors to perform particular work. It was at this level of engagement that attention was focussed in the two trials before the primary judge.

35 In the case of the Circus Oz project, the successful tenderer was McCorkell Constructions Pty Ltd ("McCorkell"). One company which wished to contract to McCorkell for work on the project was Eco Recyclers Pty Ltd ("Eco"). On 26 October 2012, an enterprise agreement ("the Eco Agreement") to which Eco and the respondent, the Construction, Forestry, Mining and Energy Union ("CFMEU"), were parties was approved by the Fair Work Commission ("FWC"), which is established under the FW Act. The Eco Agreement came into operation on 2 November 2012 and had a nominal expiry date of 31 March 2015. The terms of the Eco Agreement are at the foundation of the finding of breach by the State of s 343 of the FW Act in one matter.

36 In the case of the New Bendigo Hospital project, the successful tenderers were a consortium of companies which included Lend Lease Project Management & Construction (Australia) Pty Limited ("Lend Lease"). The consortium was known as "Exemplar". It was intended by the State that a head contract would be awarded to a company established to oversee the project, with whom the State would contract directly. The actual construction work would be done by a member of the consortium. Exemplar intended that this company would be Lend Lease.

37 On 13 September 2012, the FWC approved, under the FW Act, an enterprise agreement to which Lend Lease and the CFMEU were both parties ("the Lend Lease Agreement"). The terms of the Lend Lease Agreement were at the foundation of the findings of breach by the State of s 340 of the FW Act in the other matter.

38 Each of the Eco Agreement and the Lend Lease Agreement contained provisions which were assessed by an operational unit within the Victorian Department of Treasury and Finance as not meeting the requirements of certain guidelines promulgated by the executive government of the State. The operational unit was known as the Construction Code Compliance Unit ("CCCU"). The Director of the CCCU at the relevant time was Mr Nigel Hadgkiss. The Assistant Director was Ms Catherine Cato.

39 The guidelines were called the Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry ("the Guidelines"). As their name suggests, the Guidelines were connected with the policies stated in the Victorian Code of Practice for the Building and Construction Industry ("the Code"). Neither the Code nor the

Guidelines has a legislative foundation. Their origins and interaction with a "National Code of Practice for the Construction Industry" were described in greater detail in the judgments under appeal, and it is not necessary for the purpose of the appeals to repeat all that is there said.

40 At the heart of the Code and the Guidelines is the premise that workplace arrangements, whether incorporated in the terms of legally binding workplace agreements such as the Eco Agreement or the Lend Lease Agreement or not, should not permit a range of restrictions or practices identified in broad terms by the Guidelines.

41 One sanction approved by the State's executive government for non-compliance with the Code and the Guidelines is the exclusion of contractors, and of head contractors who engage them or are related to them, from the opportunity to be engaged for public projects sponsored by the State.

42 The consequence for the Circus Oz project, and for Eco, of the fact that the Eco Agreement was assessed by the CCCU to be non-compliant with the Guidelines was that Eco was said to be excluded from the Circus Oz project. Eco was not in fact selected by McCorkell as a subcontractor.

43 The consequence for the New Bendigo Hospital project, until 5 April 2013, was that Exemplar (and Lend Lease) risked being excluded from the New Bendigo Hospital project. However, on 5 April 2013, despite the adverse assessment made by the CCCU about the terms of the Lend Lease Agreement, Exemplar was in fact announced as the successful consortium, with Lend Lease as a participant as Exemplar had proposed.

44 Before the facts are further explored, it will be useful to outline the statutory scheme under which proceedings against the State were taken.

The statutory scheme

45 The FW Act contemplates that employers and unions (or employers and employees) may make "enterprise agreements" which will be legally enforceable. Part 3-1 of the FW Act states some "general workplace protections". Amongst them are protections concerning

"workplace rights" (Division 3 of Part 3-1) and amongst the identified workplace rights is a protection against "adverse action" (s 340). The breaches alleged against the State in the proceedings at first instance were that the State had taken adverse action against employees of Eco and Lend Lease and, in the case of Eco, that the State had acted with intent to coerce Eco and its employees to vary the Eco Agreement (s 343(1)(a) of the FW Act).

46 Section 336 states the objects of Part 3-1 of the FW Act:

> **336 Objects of this Part**
>
> 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.

47 Section 340(1) of the FW Act provides:

> **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).

48 Relevantly for present purposes, s 341 of the FW Act provides:

> **341 Meaning of *workplace right***
>
> *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
>
> ...
>
> *Meaning of* ***process or proceedings under a workplace law or workplace instrument***
>
> (2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:
>
> ...
>
> (e) making, varying or terminating an enterprise agreement; ...

49 Section 342(1) of the FW Act takes the form of a table. In the table, item 4 is relevant for the present appeals. Item 4 provides for the meaning of adverse action in particular circumstances. As relevant to the present appeals, s 342(1) and item 4 provide:

> **342 Meaning of *adverse action***
>
> (1) The following table sets out circumstances in which a person takes **adverse action** against another person.
>
> ...

Meaning of *adverse action*		
Item	**Column 1** ***Adverse action* is taken by ...**	**Column 2** **if ...**
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	the principal: (a) refuses to engage the independent contractor; or ...

Meaning of *adverse action*		
Item	**Column 1**	**Column 2**
	Adverse action **is taken by ...**	**if ...**
	contractor	

50 Section 342(2) of the FW Act provides:

> **342 Meaning of *adverse action***
>
> ...
>
> (2) **Adverse action** includes:
>
> (a) threatening to take action covered by the table in subsection (1); and
>
> (b) organising such action.

51 Section 343(1)(a) of the FW Act provides:

> **343 Coercion**
>
> (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
>
> (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or ...

52 The allegation against the State under s 343(1)(a) in relation to Eco was that the State (through Ms Cato) took action with intent to coerce Eco and its employees to vary the Eco Agreement to make it comply with the Guidelines.

53 The allegation made against the State under s 340(1)(a) in relation to Lend Lease was that, when (and for so long as) it threatened to refuse to accept the Exemplar tender on the basis that the Lend Lease Agreement was non-compliant with the Guidelines, it took adverse action against the employees of Lend Lease.

54 In the case of each of the allegations, s 361(1) of the FW Act applied:

> **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. ...

55 In relation to allegations concerning Eco, under s 343, the State relied on the evidence of Ms Cato to rebut the presumption created by s 361. In relation to the allegations concerning Lend Lease, the State accepted at trial that, if other elements of the case against it were established, it would not contend that the presumption in s 361 had been displaced. At the hearing of the appeals, the State sought leave to withdraw this concession. For reasons given in due course, we are not prepared to grant that leave.

The Circus Oz project

56 McCorkell is a construction company, which in 2012 tendered for a contract with the State to refurbish the building intended to become the new premises for Circus Oz. The contract included the demolition of existing buildings. McCorkell, in turn, put the demolition work out to tender as part of preparing its own tender.

57 Eco operates a demolition business. It had previously performed work for McCorkell. On 30 July 2012, Eco tendered for the demolition work. Other demolition contractors also tendered to McCorkell for the demolition work; some at about that time and others later.

58 On 2 August 2012, McCorkell submitted its tender for the Circus Oz project. McCorkell was advised on 3 October 2012 by letter from the Premier of Victoria (who was also Minister for the Arts) that its tender was successful but that the contract with the State was contingent on providing a Workplace Relations Management Plan accepted by the CCCU.

59 Detailed discussions ensued between representatives of McCorkell and of the CCCU, including Ms Cato. During the same period, McCorkell pursued its discussions with potential subcontractors, including Eco. The primary judge concluded that "Eco was effectively one of McCorkell's preferred tenderers and a short-listed contender for the demolition work" (at [45] of the Circus Oz judgment).

60 On 26 October 2012, the Eco Agreement was approved by the FWC and, as earlier stated, was to come into operation on 2 November 2012. On 2 November 2012 also, the State made a contract with McCorkell. The contract required McCorkell to comply with the Code and the Guidelines, and to ensure that its subcontractors did also.

61 On about 9 November 2012, there were discussions between representatives of McCorkell and CCCU about whether the Eco Agreement complied with the Code and the Guidelines. The CCCU advised McCorkell that it did not. McCorkell then advised Eco, on about 12 November 2012, that it could not accept Eco's tender.

62 On 13 November 2012, representatives of Eco met directly with representatives of the CCCU, including Ms Cato. Eco was told that the Eco Agreement did not comply with the Code and the Guidelines. The primary judge was satisfied that, whether it was said directly or not, Eco would have understood from that meeting that if it wished to be considered for State government work it would need to take steps to have the Eco Agreement varied so that it complied with the Code and the Guidelines.

63 Eco then sought advice from the Master Builders Association of Victoria about what needed to be done to vary the Eco Agreement so that it became compliant. Eco also communicated with the CFMEU. The primary judge was satisfied that the CCCU was aware of those deliberations and the reasons for them. In early December 2012, Eco proposed a variation of the Eco Agreement to its employees so that the Eco Agreement would comply with the Code and the Guidelines. All employees voted in favour of the proposed variation. An application to vary the Eco Agreement was then made to the FWC.

64 On 14 January 2013, the CFMEU commenced proceedings in this Court and sought interim orders restraining the FWC from approving the proposed variation. The primary judge did not restrain the FWC from dealing with the application to vary the Eco Agreement (*Construction, Forestry, Mining and Energy Union v Eco Recyclers Pty Ltd* [2013] FCA 24). Any need for orders of that kind (if otherwise appropriate) appears to have been obviated by two matters – first, McCorkell and the State gave undertakings that, pending hearing and determination of the application by the CFMEU, Eco would not be precluded from acceptance as a tenderer on other projects by reason of the fact that the Eco Agreement did

not comply with the Code or the Guidelines and, secondly, that a hearing for final relief would be expedited.

65 On 7 February 2013, Eco discontinued its application for variation of the Eco Agreement. Eco was not awarded a contract by McCorkell. It has not been suggested in the present appeal that McCorkell or the State have breached the undertakings given to the primary judge.

66 In the judgment concerning the Circus Oz project, and the rejection of Eco as a tenderer to McCorkell, the primary judge found that McCorkell had breached s 340(1)(a)(i) of the FW Act. To reach that conclusion the primary judge found that McCorkell, when it refused to engage Eco, was "proposing" to do so (within the meaning of "adverse action" provided for in item 4 of the table in s 342(1)). The finding that McCorkell was "proposing" to engage Eco was based on findings by the primary judge that Eco was a "short-listed tenderer" and a "potential contractor".

67 McCorkell did not appeal. No penalty was, in due course, imposed on it. It is therefore not necessary to decide whether the primary judge was correct to find that McCorkell was proposing to engage Eco within the meaning of item 4 of s 342(1) of the FW Act. However, for clarity we make it clear that the proposition is contestable and we do not intend this judgment to be taken to endorse it. That is a matter which would need to be debated in a case where the issue arose directly for consideration. For the reasons we have stated, it does not arise for decision in these appeals.

The Eco appeal

68 The appeal concerning the Circus Oz project arises from the findings of the primary judge that the State acted in breach of s 343 of the FW Act. The findings of the primary judge depend to a degree upon the operation of s 361, to which we shall turn shortly, but first it is necessary to deal with a submission made by the Federal Minister for Employment ("the Federal Minister") who intervened in the proceedings by right pursuant to s 569(1) of the FW Act.

69 The Federal Minister submitted that the primary judge was in error to have accepted that proof of an intent to coerce, within the meaning of s 343 of the FW Act, required that two elements be established, as a number of cases in this Court have held.

70 The primary judge accepted, we think correctly, that the meaning of the term "intent to coerce" as used in s 343 of the FW Act (and earlier in s 170NC of the *Workplace Relations Act 1996* (Cth)) had become "settled". That is certainly so in the sense that a number of judges sitting at first instance in this Court, or as a member of an appeal bench of this Court, have repeatedly subscribed to the meaning accepted by the primary judge.

71 One of the clearest statements of the elements to be established is that by Merkel J in *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 at 388 [41], where his Honour said:

> 41 The above cases establish that there must be two elements to prove "intent to coerce" under s 170NC(1). First, it needs to be shown that it was intended that pressure be exerted which, in a practical sense, will negate choice. Secondly, the exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable.

72 The two elements of the test accepted by the primary judge have their origins in the legal meaning of the concepts of coercion and duress in the common law (see the discussion by Gyles J in *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16 and Buchanan J in *Fair Work Ombudsman v National Jet Systems Pty Ltd* [2012] FCA 243; (2012) 218 IR 436 ("*National Jet Systems*")). For reasons which are further developed below, we reject the Federal Minister's criticism of the primary judge's approach with respect to this issue.

The first element of 'intent to coerce'

73 Assessment of the first element by the primary judge involved consideration by him of the evidence of Ms Cato and application of the terms of s 361 of the FW Act, which his Honour referred to unremarkably and correctly as raising a "presumption". At [232]-[233] in the Circus Oz judgment, the primary judge said:

> 232 As to the question of its state of mind, the State sought to discharge its onus by calling Ms Cato, the Assistant Director of the CCCU. There may be a

> real question as to whether the evidence from Ms Cato alone was capable of discharging the State's onus. The conduct alleged and which I have found occurred, was that of requiring that variations to a contractor's non-compliant agreement be made as a condition of the contractor being eligible to be awarded State Government building work. That requirement is arguably, at least in part, made by the Guidelines themselves. If that is so, what may have been called for is an examination of the intention of the maker of the Guidelines.
>
> 233 However, the CFMEU did not contend that the onus upon the State could not be discharged through the evidence of Ms Cato alone. In that circumstance it is appropriate that I proceed on the basis that the only relevant state of mind inquiry which needs to be made is the reasons and intentions which actuated Ms Cato in her capacity as the most senior officer of the CCCU dealing with Eco.

74 Accordingly, in this particular case, it was by reference to Ms Cato's intentions that the first element was to be assessed. That is, in this case, if the State was to be found to have a particular intent, it was because Ms Cato possessed that intent and she was the human agent of the State for that purpose.

75 The character of the first element to be established was referred to in a passage quoted by the primary judge from Weinberg J in *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114 ("*NTEIU*") at 143 [103]:

> 103 The approach to the expression "intent to coerce" taken in each of the authorities set out above makes it clear that what is required is an intent to *negate* choice, and not merely an intent to influence or to persuade or induce. Coercion implies a high degree of compulsion, at least in a practical sense, and not some lesser form of pressure by which a person is left with a realistic choice as to whether or not to comply.
>
> (emphasis in original)

76 The primary judge found that Ms Cato did possess an intent which satisfied the first element but, with respect, we do not agree with his Honour's analysis of that issue. No question of Ms Cato's credit is involved; and we are obliged to form our own view of the effect of her evidence about that matter.

77 In the following passages (also set out in the Circus Oz judgment), Ms Cato gave the following evidence-in-chief about the meeting on 13 November 2012, which had, in fact, been sought by Eco so that it might be directly informed about the question of compliance with the Code and the Guidelines:

In engaging in those communications, what was your intention? --- My intention was to provide a stakeholder with information about its compliance or otherwise, and, you know, to respond to them as best I could within the scope of the role of the unit.

In the claim in this proceeding, the applicant alleges that the State had an intention to coerce, and there are a number of elements that I will have to put to you. So the State had an intention to coerce, firstly Eco; secondly, Eco's employees, to exercise their workplace right to vary the Eco agreement, or to vary the Eco agreement in a particular way to make it compliant with the Victorian code and guidelines; do you understand that allegation? --- I do.

Yes. What do you say as to that allegation? --- That's not true.

78 In cross-examination, Ms Cato gave the following further evidence:

And what I'm suggesting to you is that for Eco to continue in the tender, and/or to win the tender, it needed to demonstrate it was code compliant and guidelines compliant; do you accept that? --- Yes.

And I want to suggest to you that after 9 November the only way Eco could render itself code and guideline compliant was to vary its certified agreement? --- Unless there's another way that I don't know about under the Fair Work Act, yes, that's correct.

...

And you've agreed with me that, in fact, the only way Eco could render itself Code and Guidelines complaint was to vary it's [sic] agreement in order to better reflect the issues raised in the chart we looked at? --- Yes.

Can I suggest to you then, Ms Cato, that when you say you provided a stakeholder with information about compliance, in fact, what you did was you conveyed to Eco the fact that it needed to vary its agreement in order to render itself Code complaint and Guideline complaint? --- Well, no, I don't agree with that.

But nevertheless you agree it's the only thing they could do to achieve that outcome? --- Yes. But I don't agree that I linked the two together.

...

... Can I suggest to you, Ms Cato, when you say that you are providing a stakeholder with information about compliance or otherwise, that this is to omit a consideration of how that advice might operate on the mind of the listener. What I'm suggesting to you is in the mind of the listener, namely Eco, they could only have understood that they needed to leave that meeting and change their agreement; do you accept that? --- Or not tender for government work.

79 Evidence was also given by Ms Marina Ward, Business Development Manager at Eco, about what was said at the meeting as follows:

So then if we – that's on 12 November, now then focus your mind back on the meeting of 13 November, during that meeting, what did Ms Cato or Ms Drennan say about the topic of code compliance or Eco's agreement? --- There are a number of clauses within that EBA which were deemed to be non-compliant with the

guidelines.

Were you told which clauses? --- Yes, I was handed a table ... a table which showed the clauses.

...

Was there discussion concerning that chart? --- There was a brief discussion.

And do you recall what you were told during that discussion? --- I can't recall entirely, no.

All right. Did you say anything during the meeting in relation to the topic of compliance or non-compliance? --- Yes, we were just trying – Toby and myself were trying to ascertain where the EBA was non-compliant and how the guidelines affected the Eco Group.

Did the meeting come to a resolution, was there any plan of action agreed in the meeting or stated in the meeting? --- I can't recall entirely.

...

Sticking with the CCCU, what, specifically, had they told you about the significance of code compliance? --- The significance was that any project that had government funding, Eco Group would be unable to undertake demolition works.

80 In an email to Ms Ward on 19 November 2012, Ms Cato said:

... I understand that you have been advised by the MBAV [Master Builders Association of Victoria] that in the circumstances of achieving compliance with the Code, the CCCU is the appropriate body to negotiate on your behalf with the CFMEU.

I would like to clarify, and have sent a similar email to the MBAV, that the CCCU's role is to monitor compliance with the Guidelines and report breaches to the Minister for Finance. The CCCU may provide stakeholders with information about non-complaint clauses where appropriate but it is not the CCCU's role to represent stakeholders in negotiating their workplace arrangements.

In these circumstances, I suggest that you talk further with the MBAV about the next step to take.

If you need to discuss this issue further, please don't hesitate to contact me.

81 When the evidence is considered as a whole, it seems clear that there was no evidence of any direct statement by Ms Cato to the effect that she wished Eco to vary the Eco Agreement, much less that she set out to achieve that result by prevailing over Eco to achieve it.

82 The assessment made by the primary judge was that, when Ms Cato's evidence was assessed for what it did and did not say, the statutory presumption in s 361 was not displaced.

Contrary to the submission of the Federal Minister, we do not agree or accept that the primary judge exhibited any misunderstanding of the nature and effect of s 361, or any error of principle in its application. However, in our view the evidence to which we have referred was sufficient to discharge the onus on the State of showing that Ms Cato (and thus the State) did not have an intent to negate choice in relation to the question of whether the Eco Agreement should be varied. In our view, the evidence showed that Ms Cato had in fact no position about that issue.

83 Neither, with respect, do we agree that any appreciation by Ms Cato, that it was probable that Eco would attempt to address this issue of non-compliance by attempting to secure a variation of the Eco Agreement, meant that Ms Cato intended that such steps should be taken, much less that she intended that Eco should have no practical choice about the matter.

84 At [242] of the Circus Oz judgment, the primary judge concluded that Ms Cato "wanted to see the Eco Agreement varied". In our respectful view, the evidence falls short of sustaining that conclusion. The primary judge also reasoned (at [243]-[246]) that Ms Cato must be taken to have intended that Eco would take steps to vary the Eco Agreement because she should be taken to have intended the likely consequences of her actions. In our respectful view, this approach to the ascertainment of Ms Cato's motivation, and the attribution to her of an intent thereby to coerce Eco and its employees, was also erroneous. The search was for Ms Cato's real or actual intent or intents (see *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; 220 IR 445). The State bore the onus of displacing the presumption put in place by s 361 of the FW Act, but it was not required to displace an attributed intent derived from presumptions of a different kind.

85 Finally, on the issue of intent, the primary judge stated (at [247]) that he would, in any event, have found that "the State was motivated to take the action it did, including because it desired that Eco and its employees take steps to vary the Eco Agreement". This finding does not seem to be based on Ms Cato's conduct but is apparently related to the possibility, mentioned by his Honour (at [233], set out above) but left unexplored in this case, that, since the State was the alleged contravener, the evidence regarding intent to coerce might have extended beyond Ms Cato. In the present case, however, bearing in mind the way the case

was run, the evidence does not support this finding about the State's intent independently of Ms Cato's conduct. We consider that such a finding would be contrary to the accepted position recorded earlier by the primary judge (at [233], set out above).

86 As a result, we are not satisfied that the first element of a breach of s 343 was established; indeed we are satisfied that it was not. That finding is sufficient to uphold the State's appeal in the Circus Oz matter, but it is desirable that we address some remarks to the second element also.

The second element of 'intent to coerce'

87 The CFMEU alleged that the conduct of the State was unlawful and illegitimate, and that the second element of an intent to coerce was therefore established. The primary judge concluded that the conduct of the State was not unlawful (at [248]), but that it was illegitimate because, as the CFMEU contended, it constituted an "interference with free bargaining" and served to "undermine the scheme [or purposes] of the FW Act" (at [254]-[257]) and to "defeat" the "workplace rights" and the "scheme for agreement making" provided by the FW Act (at [254] and [256]).

88 The primary judge summarised his findings to that effect (at [255]-[257]) as follows:

> 255 The FW Act permits parties to decide for themselves the content of the enterprise agreements they make within the parameters dictated by the 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). Conduct which seeks to dictate different parameters within which industrial parties may agree for themselves the content of their enterprise agreements, serves to undermine the purposes of the FW Act.
>
> 256 The Guidelines impose parameters for the allowable content of enterprise agreements different to those provided for by the FW Act. In many respects the differences are stark. The exertion of economic pressure upon industrial parties for the purpose of limiting or restricting their freedom to bargain within the parameters established by the FW Act is, in my view, illegitimate because it serves to defeat the scheme for agreement making prescribed by [the] FW Act.
>
> 257 The impugned conduct of the State in this case involved the application of economic pressure on parties to an enterprise agreement and was driven by parameters for bargaining and agreement making contained in the Guidelines. It therefore involved a purpose and effect which served to undermine the scheme of the FW Act. For that reason, it seems to me that the conduct was illegitimate conduct and that the second element required to prove an "intent to coerce" is established.

89 The CFMEU argued that the primary judge's findings could be upheld, and should be, because, even though it was generally open to the State to adopt a policy on the terms upon which it would enter into contracts, the policy interferes with a right (freedom to bargain) established by the FW Act.

90 In our view, the proper approach, and one which applies in the present case, was stated by Weinberg J in *NTEIU* (at 145 [116]-[118]):

> 116 ... Coercion requires conduct which is relevantly unlawful, illegitimate or unconscionable. The implementation of policy by a democratically elected government, however contentious in political or moral terms that policy may be, is not easily translated into conduct which is in any relevant sense "illegitimate" or "unconscionable".
>
> 117 I have no doubt that within the academic community, and beyond, a substantial body would hold that the criteria contained in the Guidelines are, in a political sense, both illegitimate and unconscionable. It must be remembered, however, that some of those criteria reflect Government policy towards higher education not just since 1996, when the Howard Government was elected, but since the late 1980s and the era of the so-called "Dawkins reforms". Governments, both Labor and Liberal, have long acted in the belief that exposing the higher education sector to increased competitive pressures would enhance its efficiency and productivity. That approach may be misconceived. Many would say that it has led to a serious decline in the quality of higher education in this country, a view that has been the focus of attention in recent times. Many would also say that it has undermined academic freedom, and has had a profoundly negative effect upon staff morale. However, whatever view one takes with regard to these matters, that can have no relevance to the determination of the legal issues raised in this proceeding.
>
> 118 I am conscious of the fact that the terms "illegitimate" and "unconscionable" are not the words of a statute, but rather represent judicial exegesis upon a very different expression. Nonetheless, these terms capture one or more of the requirements which must be proved in order to establish the contravention of the penalty provision in question in this case. They are not to be understood as connoting mere disagreement, however strongly felt, with Government policy.

91 In *National Jet Systems*, Buchanan J discussed the common law origins of the second element of the torts of coercion and duress which has been adopted by judges of this Court as an element of an "intent to coerce", and which was (with respect correctly) applied by the primary judge. As Buchanan J pointed out in *National Jet Systems* (at 443 [24]), McHugh J said in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (at 46):

> Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. ...

92 In that passage, McHugh J folded the category of illegitimate conduct into the other two categories of unlawful or unconscionable conduct. Neither of those descriptions apply to the conduct of the State in this case, bearing in mind the finding of the primary judge (that the conduct was not unlawful) and the legal content of the notion of unconscionable conduct (see *National Jet Systems* at 443-444 [26]-[27] quoting *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 62-63 [7], 64 [11] and 77 [56]).

93 In *National Jet Systems*, Buchanan J referred to two judgments of Jessup J, which were referred to again in argument on the appeals (*Williams v Construction, Forestry, Mining and Energy Union* [2009] FCA 223; (2009) 179 IR 441 and *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754; (2010) 196 IR 365). Each of those cases concerned conduct by a union organiser who organised stoppages of work. In the second of those cases, Jessup J found that the conduct in question was unlawful, as being directly in contravention of a statutory prohibition. In the first of the cases, Jessup J found the conduct constituted an interference ("in a business if not a legal sense", at [109]) with the terms of the contracts between a contractor and subcontractors. His Honour found, further, that the conduct was not "legitimised" by concerns about safety. His Honour appeared, therefore, to regard the conduct as illegitimate because it constituted, at least in a practical sense, an interference with contractual relations and with the normal expectation that subcontractors would perform their works without outside intervention. There was no appeal.

94 Whilst we appreciate that that case was mentioned in argument as illustrative of the concept of illegitimacy, its circumstances were entirely different from those in these appeals and it has no relevant parallels with the present case. It is not desirable that we attempt to forecast how a circumstance of that kind might be viewed in any future case, or whether in some future case the same view would be taken about what might constitute illegitimate conduct which might evidence an intent to coerce. It is sufficient to concentrate on the facts of the present case.

95 It is well accepted that even overwhelming economic pressure is not, without more, illegitimate. A party is not required to forego its advantages, or compromise its position, merely because it can negotiate from an unassailable position. It is also important, in our view, that for the purpose of the analysis of this issue it must be accepted that the conduct of the State was lawful, that the adoption and implementation of the Code and Guidelines was within power and that no breach of the FW Act was thereby involved. In that context, it is necessary to closely examine the significance of, and foundation for, the findings of the primary judge that the State was attempting to interfere with free bargaining or undermine the purpose of the FW Act.

96 Conclusions of this kind appear to us, with respect, to reflect value judgments rather than legal conclusions, although we readily accept that judgments of this kind are sometimes made where questions of statutory construction arise. It is often necessary, and completely in accord with principle, to identify the purpose of a statutory scheme in order to decide which, of competing statutory constructions of a provision, should be accepted. However, the purposes of a statutory scheme do not provide a criterion against which to assert a freestanding or general restraint on otherwise lawful conduct. Particular conduct is either in breach of a statutory restriction or prohibition, or it is not. It is not, in our respectful view, appropriate to stigmatise otherwise lawful conduct as "illegitimate" because it does not conform to a perceived legislative "policy". That is particularly so in the case of a separate polity which may not embrace the perceived legislative policy and may wish to give effect, so far as it may lawfully do so, to its own legislative and commercial objectives.

97 More particularly, in the circumstances of the present case, we do not agree that the State interfered with "free bargaining". That term is not used in the FW Act, although Division 8 of Part 2-4 establishes a series of "good faith bargaining requirements" (see especially s 228 of the FW Act). Those good faith bargaining requirements were not relevant in the present case.

98 The publication and use of the Code and Guidelines was not (if within power) "illegitimate". For that reason, the second element necessary to establish an intent to coerce was not established.

99 In our view, the findings of the primary judge, to the effect that the State engaged in illegitimate conduct, should be set aside. That affords an independent reason why the State's appeal, against the finding that it contravened s 343 of the FW Act, succeeds.

100 For that reason, and the reasons given earlier, the appeal by the State in the Circus Oz matter must therefore be upheld.

The New Bendigo Hospital project

101 The New Bendigo Hospital project involves an investment by the State of about $630 million. The move towards selecting a successful tenderer as head contractor for the project began formally in September 2011 when the State issued invitations for expressions of interest from which it was proposed to select a short-list of interested parties. The State proposed to select a preferred tenderer from this short-list and then to finalise contractual arrangements. Those arrangements were envisaged to involve at least a head contract with a specific project company ("Project Co"), a construction contract between Project Co and a nominated builder and a deed (the "Builder Direct Deed") containing certain covenants between the State and the builder. Provision was also to be made for collateral deeds with financiers and service providers.

102 As a result of expressions of interest provided to the State, two groups (each a consortium) were short-listed. They were known as Exemplar and InteCare. In the Exemplar consortium, the proposed builder was Lend Lease. In the InteCare consortium, it appears that the proposed builder was a Thiess company.

103 The next step envisaged was the Request for Proposal ("RFP") phase. The invitation for expressions of interest describe the RFP process, in part, as follows:

> **Phase 2: RFP Phase**
>
> The second stage of the Procurement Process will involve the release of a RFP to the Short-listed Respondents.
>
> The RFP will require Short-listed Respondents to submit fully costed binding offers based on the requirements outlined in the RFP.
>
> ...
>
> Based on the responses received from the RFP Phase and following detailed evaluation of the Proposals, a Preferred Respondent may be selected to negotiate

with the State for the provision of the Project.

104 Participation in the RFP phase required execution of a Probity and Process Deed Poll ("the Deed Poll") by each member of a short-listed consortium. Each member of the Exemplar consortium, including Lend Lease, executed the Deed Poll in early February 2012. The Deed Poll assured confidentiality of information provided by the State. It also reserved an "absolute discretion" to the State to select the successful tenderer and to impose conditions.

105 The RFP documentation was provided to the Exemplar consortium in May 2012. Numerous criteria were identified, against which any proposal would be tested. One such criterion was as follows:

> **10.6 Evaluation Criterion H6: Workplace Relations Management Plan**
>
> **The State will evaluate the Respondent's approach to workplace relations and workplace safety and the extent of the Respondents [sic] compliance with the Victorian Code of Practice and the *Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry*.**
>
> In evaluating this criterion the key issues that will be considered include:
>
> - the Respondent's Workplace Relations Management Plan (WRMP) and whether it complies with the requirements of *Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry*;
> - the systems, processes and procedures it has in place to achieve the objectives of the Victorian Code and deliver the Project on time and within budget; and
> - the Respondent's track record in delivering projects on time and on budget.
>
> (emphasis in original)

106 In September 2012, an additional requirement was added requiring completion of a "Compliance Schedule" in a particular form which included the following:

> **1. Compliance schedule**
>
> **Primary acknowledgments and undertakings**
>
> 1.1 By completing this Compliance Schedule and submitting an expression of interest or tender response, Project Co:
>
> (a) acknowledges that the Victorian Government's Code of Practice for the Building and Construction Industry (Victorian Code) and the Victorian Government's Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry

(**Victorian Guidelines**) apply to the project the subject of this tender;

(b) undertakes that it, and its related entities (as defined (for the purposes of Section 1.1 to 1.11 of this Compliance Schedule) in the Victorian Guidelines, and including for the avoidance of doubt the Builder), will comply with the Victorian Code and Victorian Guidelines on:

(i) the project the subject of this tender;

(ii) any privately and publicly funded building and construction work to which the Victorian Guidelines apply, on and from the date of submitting this tender response (if not already required to comply on such privately and publicly funded projects);

(c) confirms that it and its related entities have complied with:

(i) the Victorian Code and Victorian Guidelines on all its other projects to which the Victorian Guidelines apply or have applied; and

(ii) all applicable legislation, court and tribunal orders, directions and decisions, and industrial instruments;

(d) confirm that, where it and its related entities are, or have been, required to comply with the National Code of Practice for the Construction Industry (**National Code**) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry as amended from time to time (**National Guidelines**), they have done so; and

(e) confirms that neither it, nor any of its related entities, are subject to a sanction or other circumstance that would preclude Project Co from submitting a tender response, or, if successful, being awarded the tender.

and

Privately funded work

1.10 Project Co acknowledges and agrees that in respect of its privately funded building and construction work (to which the Victorian Guidelines apply) it, **and its related entities**, will:

(a) comply with the Victorian Code and Victorian Guidelines;

(b) maintain adequate records of compliance with the Victorian Code and Victorian Guidelines (including by contractors);

(c) allow Victorian Government authorised personnel to:

(i) access the sites and premises;

(ii) monitor and investigate compliance with the Victorian Code and Victorian Guidelines;

(iii) inspect any work, material, machinery, appliance, article, or

> facility;
>
> (iv) inspect and copy any record relevant to the project; and
>
> (v) interview any person;
>
> (vi) as is necessary to demonstrate compliance with the Victorian Code and Victorian Guidelines; and [sic]
>
> (d) ensure contractors and consultants similarly do, or allow, for each of these obligations.
>
> (emphasis added)

107 The draft Project Agreement also contained provisions which, if executed by Project Co and the builder, would require Project Co to ensure that the builder, and any subcontractor to the builder, complied with the Code and the Guidelines.

108 The Lend Lease Agreement came into force on 20 September 2012, having been approved by the FWC on 13 September 2012. It had a nominal expiry date of 31 March 2016.

109 On 10 September 2012, Mr Hadgkiss, the Director of the CCCU, wrote to Lend Lease indicating that the proposed agreement would be "seriously non-compliant" with the Guidelines. Lend Lease sought meetings. The Department of Health was advised of Mr Hadgkiss' view that the Lend Lease Agreement was non-compliant.

110 Lend Lease did not accept that the Lend Lease Agreement was not compliant, but offered various undertakings to address the issue pending a variation to the Lend Lease Agreement. These undertakings were not accepted by Mr Hadgkiss who responded to that offer on 19 November 2012. On the same day, he advised the Department of Health that the agreement was not compliant in its current form.

111 Separately, an evaluation panel assessed the Exemplar proposal as "materially ahead" of the competing proposal from the other consortium. On 21 December 2012, a "Project Board" established by the State recommended a six week "Best and Final Offer" process involving both of the competing tender groups. That approach was approved by the Victorian Minister for Health on 24 December 2012.

112 Lend Lease made further suggestions to overcome the issue of non-compliance with the Code and the Guidelines, but they were not acceptable to the State.

113 On 28 February 2013, each consortium submitted a revised proposal. In the evaluations which followed, Exemplar's bid continued to be ranked ahead of its competitor and the CCCU maintained its position that the Lend Lease Agreement did not comply with the Code and Guidelines.

114 Notwithstanding that perceived difficulty, and the indicated tender requirements to which we have referred, on 5 April 2013 the Premier and the Minister for Health announced publicly that the project would be awarded to Exemplar.

115 Meanwhile, the CFMEU had commenced proceedings against the State in the New Bendigo Hospital matter, hearings had been conducted and judgment was reserved on 27 March 2013. To that point, the CFMEU's case was that the State had "refused to engage" Lend Lease. When the project was awarded to Exemplar, the CFMEU applied to re-open and amend its case to allege that, between 19 November 2012 (when Mr Hadgkiss wrote to Lend Lease rejecting its proposed undertakings) and 5 April 2013 (when Exemplar was announced as the successful tenderer), the State had threatened to refuse to engage Lend Lease.

116 In his judgment leading to the conclusion that the State had threatened to refuse to engage Lend Lease, the primary judge was required to address a number of issues of statutory construction. We shall identify those with significance for the appeal in due course.

117 The primary judge considered that Lend Lease was an independent contractor, within the meaning of s 342 of the FW Act, with whom the State was proposing to enter into a contract for services, and that the State threatened to refuse to engage Lend Lease because Lend Lease employees were entitled to certain of the rights given by the Lend Lease Agreement. In the course of the analysis leading to those conclusions, the primary judge acted upon a concession by the State that, if other elements of the case against it were proved, it did not suggest that the presumption created by s 361 had been displaced. It is relevant to note, in that connection, that Mr Hadgkiss did not give evidence.

The Lend Lease appeal

118 The CFMEU's case was that adverse action had been taken by the State against the employees of Lend Lease because the State proposed to enter into a contract for services with Lend Lease, but then threatened to refuse to engage Lend Lease because Lend Lease employees had certain workplace rights under the "non-compliant" provisions of the Lend Lease agreement.

119 The State argued that its conduct did not offend the provisions of s 340(1) of the FW Act for a number of reasons. Some concerned the proper construction of s 342 of the FW Act; some concerned the character of the conduct of the State.

120 As a matter of statutory construction, the State argued first that the reference to independent contractors in s 342 should be taken to be a reference only to such contractors who might be seen as analogous to employees – i.e. individuals (perhaps partnerships also) who offered their labour directly, rather than "a large organisation with many employees" such as Lend Lease. In our view, this argument has no substance. First, no such limitation is expressed in, or arises naturally from, the text. Secondly, in referring to independent contractors *and their employees* in items 3 and 4 of the table in s 342, the statutory text itself indicates that the organisational arrangements of "employees" may differ, significantly, from those of "independent contractors"; and that there is no limitation, express or implied, on the 'size' of the independent contractor and/or the number of employees employed by that contractor. This is consistent with a reading of the expression "independent contractor" as applying to independent contractors such as Lend Lease . Thirdly, the protections given by s 340 are clearly intended to extend to the conduct of all parties to workplace agreements, including employers who are independent contractors. We see no reason why the conduct of a person who offers a contract for the provision of services to a large corporate independent contractor, and then refuses to engage the independent contractor unless the employees of that contractor are adversely affected in some way, should be regarded as exempt from the operation of s 340. That is what the State's submission would entail. We therefore reject the submission that Lend Lease was not a contractor to which s 342 of the FW Act applied.

121 However, that does not mean that the other elements of s 342 were engaged in this case. In particular, it is necessary to assess whether the State proposed to enter into a contract

with Lend Lease and then threatened to refuse to engage Lend Lease. It must be borne in mind that item 4 of the table in s 342(1), which is the relevant item here, applied only if there was a "propos[al] to enter into a contract for services with an independent contractor".

122 In the examination of those issues, it is necessary first to make a distinction between whether the State at any relevant time proposed to award a head contract to Exemplar (or more accurately to a project company – "Project Co" – to be utilised if the tender succeeded) and whether the State proposed to enter into a contract with Lend Lease itself.

123 It is apparent from the factual findings made by the primary judge (which were not relevantly challenged on the appeal) that from an early time the Exemplar consortium was regarded as the most attractive possibility for the construction of the New Bendigo Hospital and that the prospect of Lend Lease undertaking the construction work was thought to hold the greatest promise in cost benefits for the State. That assessment was not contradicted by the fact that the Lend Lease Agreement did not comply with the Guidelines. Nor it seems was it sufficiently qualified to seriously deflect the desire at senior levels of the executive government that Exemplar be awarded the contract. The competing consortium, i.e. the only other one short listed, included a Thiess company as a participant. That company was also regarded as involved in non-compliance with the Guidelines. In due course, Exemplar was awarded the contract despite the fact that the Lend Lease Agreement did not comply with the Guidelines.

124 We are prepared to accept it was open to the primary judge to conclude, as he did, that it was proposed, from as early as December 2012, that the contract for the New Bendigo Hospital would be awarded to the Exemplar consortium, and that Lend Lease would perform the construction work on the project, even though the announcement that Exemplar was awarded the contract was not made until 5 April 2013. We accept also that it was open to the primary judge to find that the State, through its human agents including Mr Hadgkiss, threatened to refuse to engage the consortium from some time in December 2012 (at least) until 5 April 2013.

125 It is not necessary to examine those matters in greater detail because those findings do not mean that the State breached s 340. Such a conclusion would require a finding that the State proposed to contract with Lend Lease (i.e. directly) to provide services to it and then

threatened to refuse to "engage" Lend Lease to provide those services. In our view, the State did not at any relevant time propose to contract with Lend Lease in that way, threaten to refuse to so engage it, or later so engage it.

126 The State proposed to make its head contract with a project company, not Lend Lease. It was the project company which would make the construction contract with Lend Lease. The only legally enforceable agreement that the State proposed to make with Lend Lease was a "Builder Direct Deed". We do not agree with the primary judge that the Builder Direct Deed was a contract for the provision of services by Lend Lease to the State or that the State threatened to refuse to "engage" Lend Lease to provide services to it.

127 The primary judge focused on clauses 7.2 and 7.4 of the draft Builder Direct Deed (which formed part of the tender documents) in determining that there was in fact a proposal by the State to enter into a contract for services with Lend Lease. Those clauses were proposed to be as follows:

> **7.2 Termination or suspension with cause**
>
> The Builder may only exercise a Power to terminate, rescind, accept the repudiation of, or (subject to clause 7.3) suspend the performance of any or all of its obligations under the Construction Contract if:
>
> (a) the Builder has given to the State prior notice setting out details of the Default Event giving rise to that proposed exercise in accordance with clause 7.5 (**Default Event Notice**);
>
> (b) the Power of the Builder to terminate, rescind, accept the repudiation of, or suspend the performance of any of its obligations under the Construction Contract is subject to any right of a Financier to cure or remedy the Default Event and the cure or remedy period available to the Financiers in respect of the Default Event under any Finance Document to which the Builder is a party has expired without a cure or remedy being achieved;
>
> (c) the Builder has given notice to the State (**State Cure Notice**) confirming that, either:
>
> (i) the requirements of clause 7.2(b) are satisfied; or
>
> (ii) the Builder's Power to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the Construction Contract is not subject to any right of the Financiers to cure or remedy the Default Event; and
>
> (d) where:

(i) the Default Event is capable of cure or remedy within 20 Business Days (or such longer period as is permitted under the Construction Contract) - that Default Event has not been cured or remedied within 20 Business Days (or such longer period as is permitted under the Construction Contract) after the date on which the State received the State Cure Notice;

(ii) the Default Event is not capable of cure or remedy within 20 Business Days (or such longer period as is permitted under the Construction Contract) but is nevertheless reasonably capable of cure or remedy - the State (or an Additional Obligor or Receiver appointed under clause 8) has not commenced curing or remedying the Default Event within 20 Business Days after the date on which the State received the State Cure Notice and has not continued to diligently pursue that cure or remedy;

(iii) the Default Event is not reasonably capable of cure or remedy and the Default Event Notice contains a claim for reasonable compensation for the Default Event - Project Co or the State (or another person on behalf of either of them) has not paid or otherwise provided that compensation:

A. if a dispute in relation to the amount of compensation claimed in the Default Event Notice as reasonable compensation has been referred to expert determination under clause 10, within 20 Business Days after that dispute is resolved; or

B. if there has been no such referral, within 20 Business Days (or such longer period as is permitted under the Construction Contract) after the date on which the State received the State Cure Notice;

(iv) the Default Event is not reasonably capable of cure or remedy and the Default Event Notice does not contain a claim for reasonable compensation for the Default Event - the State (or an Additional Obligor or Receiver appointed under clause 8) does not commence and continue to perform Project Co's obligations under the Construction Contract within 20 Business Days (or such longer period as is permitted under the Construction Contract) after the date on which the State received the State Cure Notice; or

(v) the State notifies the Builder that it elects not to cure or remedy, or procure the cure or remedy of, the Default Event.

...

7.4 Termination or suspension without cause

If there is no Default Event, 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. ·

(emphasis in original)

128 The effect of those provisions was that Lend Lease (if a party to a construction contract with Project Co) would be restricted by a collateral restraint on its ability to terminate or suspend its obligations of performance to the project company with whom it had made the construction contract. Although this collateral restraint involved the State, we disagree with the primary judge that those collateral covenants represented an obligation to provide services under contract to the State, or would represent an engagement by the State to provide services of that kind. That view is confirmed by recitals in the draft Builder Direct Deed which stated:

> **Background**
>
> ...
>
> B. Project Co and the Builder are or will become parties to the Construction Contract.
>
> C. The Builder has agreed to grant to the State certain rights in relation to the Construction Contract. ...

129 It is also confirmed by the character of acknowledgements in cl 4 of the Builder Direct Deed in the following terms:

> **4.2 By Builder and Builder Guarantor concerning State's rights**
>
> (a) (**State's rights**): The Builder and the Builder Guarantor each acknowledges the State's rights under Clauses 6.5 [Access and inspection by the State], 45 [Emergency events], 46 [Defaults, Major Defaults and Default Termination Events], 47 [State's rights to cure defaults], 48 [Termination] and 58.6 [Probity Investigations] of the Project Agreement and the other relevant clauses listed in Clause 38.3(c)(i) [Requirements for Subcontracting] of the Project Agreement.
>
> (b) (**Facilitation of rights**): The Builder agrees with the State that it will exercise its rights under the Construction Contract in a way which facilitates the effective exercise by the State of the rights referred to in clause 4.2(a) and will on reasonable notice permit the State or a State Associate to have access to, and take copies of, the records, reports, documents and other papers to which the State is entitled to have access pursuant to the State's rights referred to in clause 4.2(a).
>
> (c) (**Continued performance**): During the period in which the State is exercising a right referred to in clause 4.2(a) the State may in accordance with the Project Agreement and the Construction Contract, require the suspension or the continuation of performance by the Builder of its obligations under the Construction Contract and if it does so, the Builder agrees that it will comply with this requirement and with all reasonable directions of the State or a State Associate in relation to the performance of the Construction Contract

by the Builder during such period.

(d) (**State not liable**): The requirement of the State that the Builder suspend or continue to perform its obligations under the Construction Contract and the giving of any direction under clause 4.2(c) by the State will not be construed as an assumption by the State of any obligations of the Builder under or in relation to the Construction Contract.

and

4.4 Construction Contract and Builder Guarantee

Project Co, the Builder and the Builder Guarantor each acknowledges and agrees that:

...

(b) to the extent permitted by Law, neither the State nor any State Associate will have any Liability to the Builder, Builder Guarantor or any Builder Associate, nor will the Builder, Builder Guarantor or any Builder Associate be entitled to make, continue or enforce any Claim against, or seek, pursue or obtain an indemnity against or contribution to Liability from the State or any State Associate arising out of or in respect of or in connection with:

...

(ii) any reference to the State in the Construction Contract or Builder Guarantee; or

(iii) any review of, comments on, or approval of the form or substance of the Construction Contract or Builder Guarantee by the State;

(c) where the Builder is expressed in the Construction Contract to have a right (or possible right) to compensation or relief which is dependent on or determined by reference to the Project Agreement:

(i) this does not of itself expand Project Co's rights, or the State's liability, under the Project Agreement to include the compensation or relief to which the Builder is or may become entitled under the Construction Contract; and

(ii) Project Co's rights, and the State's liability, under the Project Agreement will be determined solely in accordance with the terms of the Project Agreement;

(d) as between the State (on the one hand) and Project Co, the Builder and the Builder Guarantor (on the other hand), Project Co, the Builder and the Builder Guarantor accept and will bear the risk of any ambiguity, discrepancy or inconsistency between the terms of the Construction Contract and the Project Agreement; and

(e) notwithstanding anything to the contrary in the Construction Contract, neither the Builder nor the Builder Guarantor has any right to deal directly with the State or participate in any meeting, consultation or process (including negotiation or dispute resolution) unless:

(i) expressly provided to the contrary in the Project Agreement; or

(ii) the State consents.

130 Under cl 8 of the proposed Builder Direct Deed the State included "step-in" rights in the event of default by the project company. We agree with the primary judge (at [209]) that the possibility that the State might exercise such a right is "too remote to be characterised as a contractual requirement for the Builder to provide services under the Builder Direct Deed". Indeed, if services were provided to the State pursuant to any "step-in" right, it is clear from the terms of cl 8 that the services would be provided under the construction contract originally made with the project company.

131 Similarly, as the primary judge found (at [208]), the option given to the State by cl 9 of the proposed Builder Direct Deed to require a novation of the construction contract did not signify that the State proposed to require novation of the construction contract or thereby to enter into a contract with Lend Lease for the provision of services under the construction contract.

132 The proposed Builder Direct Deed was the only foundation for the findings by the primary judge that the State proposed to enter into a contract for services with Lend Lease and that it threatened to refuse to engage Lend Lease to provide services to it. In our view, the terms of the Deed do not fall within the operation of s 342 of the FW Act.

133 As a result, we do not agree with the primary judge that those essential elements arising from s 342 of the FW Act were satisfied by the CFMEU in its case against the State under s 340 of the FW Act, so far as the New Bendigo Hospital project was concerned.

134 The appeal by the State in the New Bendigo Hospital matter must therefore be upheld.

The State's concession

135 The primary judge recorded in his reasons for judgment in the Lend Lease matter at [253] and [255] in the Bendigo Hospital judgment:

> 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. ...
>
> ...
>
> 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. ...

136 The State initially denied the existence of a prohibited reason for its conduct by paragraph 30 of its defence. In written contentions in advance of the trial, the State expressly abandoned paragraph 30 of the defence. The case for the CFMEU was thereafter opened and conducted by reference to, and in reliance upon, that stated position. There can be no doubt that the State's position reflected proper and adequate instructions. The contrary has not been suggested.

137 At the hearing of the appeal, the State sought to withdraw the concession and rely on documentary evidence to discharge its onus under s 361. The documentary evidence in contemplation was the Code, the Guidelines and the communications that related to their publication said to show the purpose of the Code and Guidelines. In written submissions, the State maintained that its policies and purposes "have been stated in public documents", which "speak for themselves and should be taken at face value". The State stated that it sought to withdraw its concession at trial and to submit that the representations in these various public documents sufficiently proved that its reasons for publishing the Guidelines did not include any reason which engaged the operation of s 340(1) of the FW Act. In that connection, the State indicated that it wished to invoke the exception to the "hearsay rule" in s 59 of the *Evidence Act 1995* (Cth), which is given in the case of "business records" by s 69 of that Act, so that representations in the documents might be (the State argued that they must be) accepted as proof of facts asserted by them.

138 It is not necessary to decide in this case whether the State could have discharged its onus in the way it suggested – by relying only on representations in published documents and press releases. That is so for two reasons.

139 First, for the reasons already given, the State's appeal succeeds despite the concession.

140 Secondly, we would not allow the State to withdraw its concession. No satisfactory case was made out for the grant of the leave sought. It is very well established that no departure from the conduct of a trial will normally be permitted on appeal where there is any possibility that the point could have been prevented from succeeding by potential evidence. The principle applies to an intermediate court of appeal (*Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; see also *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284). The CFMEU frankly acknowledged that it could not be known with certainty how the trial would have been conducted if the State had relied on the documentary evidence to discharge its onus under s 361. It added, however, that it may have argued the matter differently and may have cross-examined Mr Flynn – the only witness called by the State – in a different manner on the subject of prohibited intention. We accept that these possibilities, which are not implausible, are sufficient to hold the State to its concession (see *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483 and *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013] VSCA 24 at [76]-[77]).

141 We therefore refuse leave to the State to withdraw its concession.

The cross-appeal

142 The CFMEU's cross-appeal contended that the "adoption and promulgation" of the Code and Guidelines were invalid and of no effect because they exceeded the power of the executive government of the State. The CFMEU sought declaratory relief pursuant to ss 21 and 23 of the *Federal Court of Australia Act 1976* (Cth) ("Federal Court Act"). It was not necessary for the primary judge to deal with the question of the validity of the Code and the Guidelines in light of his findings against the State under s 343 and s 340 in the Circus Oz and New Bendigo Hospital matters respectively.

143 In light of our conclusions about the appeals by the State relating to those two matters, it is necessary, however, that the issues raised by the cross-appeal now be decided.

144 The CFMEU's case relied heavily on the principles to be distilled from the various judgments in *Williams v Commonwealth of Australia* (2012) 248 CLR 156 ("*Williams*"). That case concerned the validity of a Commonwealth government project to provide chaplaincy Services to State schools through a funding arrangement with third parties. In particular, it concerned the validity of the funding agreement and of payments made under it.

145 Those features of *Williams* draw attention to a difficulty for the CFMEU in its cross-appeal. The cross-appeal sought to attack the unilateral adoption and announcement of executive government policy (in the form of the Code and Guidelines), but the argument was not able to be focussed on particular conduct (e.g. an agreement or payments or other action), except to the extent represented by the matters which relied directly on the asserted breaches of the FW Act. There was no specific conduct of which it might otherwise have been said that the State executive government had acted invalidly or in a way which exceeded the powers available to a State executive government. As the Full Court stated in *Director of Animal and Plant Quarantine v Australian Pork Ltd* (2005) 146 FCR 368 at 386-387 [84]-[85] per Heerey and Lander JJ, relief under s 23 of the Federal Court Act is only available if there is some right, whether legal, equitable or statutory. Accordingly, it was held that declaratory relief did not lie in respect of a non-statutory policy determination which did not authorise anything and did not affect anyone's rights or impose obligations. The proper course in such a case is to challenge the validity of an action which affects rights taken under such a non-statutory instrument. Those comments apply with equal force to the Court's power to make binding declarations of right under s 21 of the Federal Court Act.

146 Another difficulty for reliance on *Williams* is that it dealt with limitations on the authority of the Commonwealth executive, arising from the terms of the *Constitution*, rather than limits on the authority or power of a State executive. We do not suggest that *Williams* has no implications for State executive power, but it provides no support for the CFMEU's challenge in this case to the validity of the Code and Guidelines (see Geoffrey Lindell, *The Changed Landscape of the Executive Power of the Commonwealth after the Williams Case*, (2013) 39 Monash University Law Review 1 at 37-38).

147 In *Williams*, Heydon J pointed out (in a dissenting judgment but uncontroversially) that (at 315 [393]):

> [393] ... Any inconsistency between exercises of State executive power and Commonwealth executive power can be terminated by the Commonwealth enacting legislation which regulates or abolishes State executive power. That is so whether the source of the State executive power is non-statutory (in the prerogative or elsewhere) or in legislation. In the former case the Commonwealth legislation will prevail over non-statutory law; in the latter it will prevail by virtue of s 109 of the *Constitution*.
>
> (citation omitted)

148 The cross-appeal raises no issue concerned with the operation of s 109 of the *Constitution*. Neither does it contend (independently of the appeals themselves) that the adoption and commencement of the Guidelines was contrary to the FW Act. Rather, the cross-appeal seeks to argue for a general limitation on the power of the executive government of a State not to undermine or interfere with the operation of Federal statute law.

149 The first thing that may be said is that no restriction of this kind arises, in terms, from the *Constitution* and none is necessary for the reasons expressed by Heydon J. Secondly, we see nothing in *Williams*, with respect, which states such a proposition, even obliquely. If anything, the contrary is the case.

150 A number of the judgments in *Williams* refer to *New South Wales v Bardolph* (1934) 52 CLR 455 ("*Bardolph*"). *Bardolph* concerned, in part, the source of power of a State executive government to authorise contracts. That case remains clear authority for the proposition that the executive government of a State has the power "to make a contract in the ordinary course of administering a recognised part of the government of the State" (per Dixon J at 508; see also per Rich J at 496, per Starke J at 503), without the need for special legislation (see also *Williams* per French CJ at 211 [74], per Hayne J at 255-256 [208]-[209], per Crennan J at 353-354 [527]-[529]).

151 The purposes being pursued by the State in the adoption and promulgation of the Code and the Guidelines were, from the perspective of the executive government of the State, important public and legitimate purposes for the executive government to pursue. It was open to the State to specify the conditions upon which it would consider tenders for each of the projects at issue in the present proceedings and to make contracts including those conditions. The contrary has not been suggested.

152 In *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, the Victorian Court of Appeal gave attention to the efforts of the executive government of the State to deal with collusive practices in the building and construction industry in Victoria. The method chosen was to sanction contractors by adding their names to a blacklist and excluding them from government contracts. Although the precise administrative methods chosen were struck down for lack of procedural fairness (a circumstance which does not arise in the present case), it was accepted by the Court of Appeal that pursuit of the objectives, and the use of coercive sanctions, was part of a legitimate public purpose (see per Tadgell J at 138, 140; per Ormiston J at 164).

153 Assessment of the policies and purposes to be pursued by the executive government of a State involves political judgments and consideration of broad matters of public policy. Unless some breach of the law is involved, that is not within the province of the Courts. In our view, there is no basis for any declaration that the policies, or proposed contractual conditions, adopted or announced by the State were invalid, whether by reference to concepts of "responsible government" or otherwise. The cross-appeal must be dismissed.

The appeal on penalty

154 In light of our conclusions that the appeals by the State should be upheld, and the cross-appeal by the CFMEU dismissed, we may deal relatively briefly, and only for the sake of completeness, with the appeals by the State against the penalties imposed on it.

155 There were two aspects to the appeal against the penalties of $28,000 and $25,000 respectively for breach by the State of ss 343 and 340 of the FW Act in relation to the Circus Oz and New Bendigo Hospital projects. The first was that the FW Act did not permit the imposition of a civil penalty on the State. The second was that the imposition of civil penalties was unnecessary, and an error in the exercise of the primary judge's discretion. Neither argument should be accepted.

156 Section 37 of the FW Act provides:

> **37 Act binds Crown**
>
> (1) This Act binds the Crown in each of its capacities.
>
> (2) However, this Act does not make the Crown liable to be prosecuted

for an offence.

157 At the outset, the express exemption of the Crown from prosecution for an offence, but not proceedings for a civil penalty, makes it less likely than not that exemption from civil penalties was intended. Other considerations tend in the same direction.

158 Section 40A of the FW Act has the effect that provisions of the *Acts Interpretation Act 1901* (Cth) as in force at 25 June 2009 apply to the construction of the FW Act. Section 22(1)(a) of the *Acts Interpretation Act* (as in force on 25 June 2009) provided:

> **22 Meaning of certain words**
>
> (1) In any Act, unless the contrary intention appears:
>
> (a) expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual; ...

159 This provision is apt to apply to s 340 and s 343 of the FW Act, each of which prohibit specified conduct by "a person".

160 Section 546(1) of the FW Act provides:

> **546 Pecuniary penalty orders**
>
> (1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.
>
> Note: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

161 As a matter of construction, the liability of the State to the imposition of a pecuniary penalty for breach of either s 340 and s 343 appears undeniable. However, the State argued to the contrary for two specific reasons.

162 First, s 546(2) provides:

> **546 Pecuniary penalty orders**
>
> ...

Determining amount of pecuniary penalty

(2) The pecuniary penalty must not be more than:

(a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or

(b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

163 The State argued that it was neither an individual nor a body corporate and, therefore, no penalty applied to it. Secondly, the State argued that a principle of immunity stated by the High Court in *Cain v Doyle* (1946) 72 CLR 409 applied to it.

164 We turn to the first question. Does the State fall within the term "body corporate" in s 546(2) for the purpose of identifying what penalty may apply to it for breach of a civil remedy provision in the FW Act?

165 In *Coochey v Commonwealth* (2005) 149 FCR 312, Madgwick J held that the Commonwealth was a body corporate for the purpose of the imposition of a pecuniary penalty under s 178 of the *Workplace Relations Act 1996* (Cth), the predecessor to the FW Act. Madgwick J said (at 327 [67]):

> 67 ... As a matter of ordinary language and legal possibility, a body politic may also be a body corporate or be equated to such: they are not mutually exclusive categories. A body corporate may have a governmental character: various types of local government bodies both here and elsewhere in countries of the common law tradition are examples of this, as are some instances of specific-purpose, trading corporations set up by governments. There is no reason why a body politic, in the sense of an organised State or part of a State, might not also be a body corporate. A State legislature could proclaim local government entities as bodies politic and bodies corporate. Undoubtedly, the Commonwealth is a body politic. However, it appears to me that, by virtue of the Constitution and the legislation to which I have referred, there is no reason why it cannot be regarded as a body corporate for the purposes of s 178 of the Act. By the use of the term "body corporate", a wider class of entities than merely trading corporations was clearly envisaged. It would be entirely consistent with s 6 of the Act to regard the term as including entities with a governmental character, provided they also have the necessary corporate character. In my opinion, the Commonwealth has such a corporate character.

166 In *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813; [1978] AC 359, the House of Lords dealt with the status of the Crown as tenant of premises. Lord Diplock referred (at 820; 384) to:

> ... the Crown which is in law a corporation sole.

167 Lord Simon said (at 833; 400):

> If such terms as 'aspects of the Crown' or 'emanations of (or from) the Crown' or 'participants on royal authority' are considered to be too cloudy for legal usage, the legal concept which seems to me to fit best the contemporary situation is to consider the Crown as a corporation aggregate headed by the Queen. The departments of state including the Ministers at their head (whether or not either the department or the Minister has been incorporated) are then themselves members of the corporation aggregate of the Crown. But on this approach two riders must be added. First, the legal concept still does not correspond to the political reality. The legal substratum is overlaid by constitutional convention. The Queen does not now command those legally her servants who are heads or subordinate members or subject to the control of the departments of state. On the contrary She acts on the formally tendered collective advice of those Ministers who constitute the Cabinet. Secondly, when the Queen is referred to by the symbolic title of 'Her Majesty' it is the whole corporation aggregate, the Crown, which is generally indicated. This distinction between 'The Queen' and 'Her Majesty' reflects the ancient distinction between 'the King's two bodies', the 'natural' and the 'politic': see *Duchy of Lancaster Case* [(1567) 1 Plowden 212, 213].

168 We are not here concerned with which of those two characterisations (corporation sole or corporation aggregate) might be preferred in any particular situation. The question is whether the term "body corporate" in s 546(2) is inapt to refer to the State or indicates an intention that the State is statutorily exempt from payment of a pecuniary penalty for breach of the FW Act. In our view, the State is not exempt; subject to any question of immunity it is exposed to the same penalty as other corporate bodies; it is not inapt to refer to it for this purpose as a body corporate.

169 The proposition based on *Cain v Doyle* is directly contrary to the effect of the statutory provisions to which we earlier referred, which render the State subject to the FW Act, including the civil penalty regime. In any event, we do not accept that *Cain v Doyle* is authority for the proposition that the Crown is not to be treated as amenable to modern civil pecuniary penalties, as was advanced by the State. In *Cain v Doyle*, the passages relied upon by the State as supporting this proposition are in the judgment of Dixon J (with whom Rich J agreed) (at 425) as follows:

> [the] principle is that the Crown is not liable to be sued criminally for a wrong, and only civilly by modern statute ...
>
> ...The principle that the Crown cannot be criminally liable for a supposed wrong, therefore, provides a rule of interpretation which must prevail over anything but the clearest expression of intention.

170 These passages do not make the point suggested. They do not deny the effect of the statutory provisions to which we have referred, and could not do so.

171 Latham CJ said (at 417):

> It has long been an established principle that the Crown is not liable for a civil wrong unless made liable by statute.
>
> (citations omitted)

172 Starke J said (at 420):

> Sovereign bodies may create rights and obligations against themselves and submit the determination of those rights and obligations to the jurisdiction of the Courts and provide means for enforcing them. Indeed the Commonwealth has given the subject the same rights of action against it in contract and in tort as he would have against another subject ...
>
> (citations omitted)

173 Williams J said (at 428):

> ...It is clear that the Crown must be expressly named or a necessary implication to that effect must appear in a statute before it can be bound in respect of its prerogatives, rights, immunities or property. It is equally clear from the reiteration in the definitions of "employer" that the draughtsman of the *Re-establishment and Employment Act*, whatever its other shortcomings may be, fully appreciated the significance of this principle of construction and intended to involve the Crown up to the hilt.
>
> (citations omitted)

and (at 432):

> The plain literal and grammatical meaning of the definitions in each division in Part II. of the *Re-establishment and Employment Act* is that the Crown, whether in right of the Commonwealth or of a State, is to be included in the employers, subject to the duties, remedies, penalties, and obligations to make compensation described in the division. There is no scintilla of indication of any intention in the Act that the Crown should be subject to the obligations of an employer but not liable to the express statutory remedies for breach. Such an intention would produce the effect that the Crown could not be convicted of an offence and the employee could not recover compensation.

174 There is therefore no respectable support in any of the judgments in *Cain v Doyle* for the argument which was advanced on this point, including that *Cain v Doyle* should naturally govern the statutory interpretation of s 546 in so far as it provides for the imposition of pecuniary penalties.

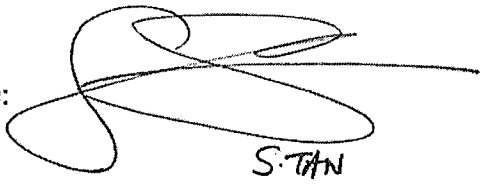
175 Had we upheld the findings of the primary judge concerning the liability of the State under s 343 and s 340 of the FW Act, we would not have been satisfied that it was inappropriate as a matter of principle to impose pecuniary penalties on the State for breaches of those civil penalty provisions. Nor would we have been satisfied that there was any discernible error in the exercise of the discretion of the primary judge in fixing those penalties.

176 Our conclusion, that no breach of a civil penalty provision was proved, makes it unnecessary to deal further with those issues.

Conclusion

177 At the commencement of the hearing on 11 November 2013, the Court granted leave to appeal in VID 436/2013 and VID 437/2013 in respect of both the proposed appeals in both matters. These two appeals were the judgments in which the primary judge made declarations that the State had contravened s 340(1)(a)(i) and s 343(1)(a) of the FW Act. These two appeals by the State should be upheld. At the hearing we also treated the cross-appeal as being regularly instituted. To this end, we would order that the notice of cross-appeal filed by the CFMEU on 13 August 2013 be treated as duly filed and served and that any non-compliance with the *Federal Court Rules 2011* (Cth) as to the institution of a cross-appeal, including its filing and service, be dispensed with. The cross-appeal should be dismissed. In the light of our conclusion that the appeals concerning liability should be upheld, the appeals against penalty in both VID 436/2013 and VID 437/2013 should also be upheld. No party has sought costs (see FW Act, s 570).

I certify that the preceding one hundred and forty-seven (147) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Buchanan and Griffiths.

Associate: 

Dated: 18 December 2013