

Employment Alert

Under pressure: Organising unprotected industrial action gives rise to general protections liability

Esso Australia Pty Ltd v The Australian Workers' Union [2015] FCA 758
(24 July 2015)

WHAT YOU NEED TO KNOW

- The *Fair Work Act 2009* contemplates that the organisation and taking of industrial action will be permitted and "protected" if particular requirements imposed by the Act are satisfied.
- If industrial action is protected, the persons and organisations who organise or participate in that action are immune from many legal claims that could otherwise be brought against them. The immunity does not apply if the industrial action is unprotected.
- This decision demonstrates that it is possible that the organising or taking of unprotected industrial action can result in the organisers of that action contravening the general protections provisions of the Act.
- It also serves as a reminder of the importance of ensuring that, when seeking orders to prevent or stop unprotected industrial action, the proposed orders identify with some specificity the relevant forms of unprotected industrial action. Failure to do so can result in the orders being invalid.
- There remains some doubt regarding the consequences of a bargaining representative's failure to comply with orders made in relation to bargaining for an enterprise agreement. In particular, it is not clear whether such a failure will prevent the bargaining representative from organising or taking future industrial action in respect of the same bargaining process. We expect that this issue will shortly be considered by the Full Court of the Federal Court of Australia.

WHAT YOU NEED TO DO

- Carefully consider whether any form of industrial action notified by employees or their union representatives as protected industrial action is, in fact, protected.
- Seek advice if there is any ambiguity regarding the description of the industrial action contained in the notification.
- Obtain advice about the available legal options and strategies for preventing or stopping any unprotected industrial action.

Background

Summary

Esso operates three onshore facilities in the Gippsland region of Victoria and a number of offshore oil platforms in the Bass Strait.

Since about June 2014, Esso and the Australian Workers' Union have been engaged in bargaining for

new enterprise agreements to cover employees based at those onshore facilities and offshore oil platforms.

During February and March 2015, the AWU organised industrial action at Esso's Longford facility.

On 16 March 2015 Esso instituted proceedings in the Federal Court alleging that certain industrial action that had taken place at Longford was unprotected and that the taking of that action was adverse action

contravening various general protections provisions contained in the Act. Esso obtained an interim injunction restraining the AWU from organising further industrial action at Longford pending the hearing and determination of the proceeding.

The matter was heard in the Federal Court by Jessup J.

History of industrial action at the Longford facility

Esso's operations at its Longford facility involve the processing of highly toxic, volatile, pressurised and flammable products. Due to the risk of fire or explosion, Esso has implemented a number of safety measures to control those risks. A particular control measure implemented by Esso requires that equipment is "de-isolated" before it can be put back into normal operation.

Between January and March 2015, the AWU issued eight notices of intention to take particular forms of protected industrial action.

One of those notices, issued on 3 February 2015, included an indefinite ban on the "de-isolation of equipment".

On 4 March 2015, as part of a major shutdown at the Longford facility, Esso began preparations for the de-isolation of an oil fractionator tower. Around this time, the AWU informed Esso of its position that the ban on de-isolation work included a ban on the conduct of air freeing, leak testing and equipment testing.

On 5 March, Esso applied to the Fair Work Commission (the **Commission**) under section 418 of the Fair Work Act for orders stopping the ban on air freeing, leak testing and equipment testing on the basis that those activities did not constitute the "de-isolation of equipment" and were therefore not protected industrial action. The Commission determined that those activities did not fall within the meaning of "de-isolation of equipment" and issued orders in broad terms requiring the cessation of unprotected industrial action at the Longford facility. The orders did not specifically identify the forms of unprotected industrial action that had been taken.

On 7 March 2015 employees at Longford, based on advice and direction from the AWU, refused to manipulate bleeder valves on items of plant as part of air freeing or leak testing because they regarded that task as forming part of the "de-isolation of equipment".

On 16 March 2015, Esso commenced proceedings in the Federal Court alleging that:

- the industrial action that had taken place, namely the ban on air freeing, leak testing, equipment testing and bleeder valve manipulation, was unprotected industrial action; and

- in organising such unprotected industrial action, the AWU had taken action against Esso in breach of the general protections provisions.

Key issues determined by Jessup J

Interpretation of the term "de-isolation of equipment"

A threshold issue for determination was whether the ban on the "de-isolation of equipment" encompassed bans on air freeing, leak testing, equipment testing and the manipulation of bleeder valves.

Esso submitted that the term "de-isolation" was defined in Esso's relevant safety system documentation in a manner which made clear that it was a substantively different to "air freeing", "leak testing" and "equipment testing" which were separately defined.

The AWU contended that there was an accepted and well understood meaning of the term "de-isolation of equipment" at the workplace level which encompassed those activities.

In interpreting the words "de-isolation of equipment" Jessup J made several important observations about the interpretation of notices of intention to take protected industrial action issued under the Fair Work Act. In particular:

- The purpose of such notices is to enable the party who would be adversely affected by the intended action to take appropriate defensive action;
- The notices should enable the recipient to understand what functions and operations will, *and will not*, be touched by the industrial action;
- As the purpose of such notices is to convey information, the question for the Court to decide is *what the recipient would reasonably have understood from the terms used in the notice*, not the intentions of the author.

Applying those principles, Jessup J decided that the expression "de-isolation of equipment" would have reasonably been understood by Esso as referring to the specific function of "de-isolation" as described in Esso's safety system documentation. The expression would not have been understood as encompassing air freeing, leak testing, equipment testing or the manipulation of bleeder valves associated with those activities. Consequently, the ban on those activities was unprotected industrial action.

Contravention of section 418 orders

Esso contended that the AWU had contravened a number of orders made by the Commission stopping the organising and taking of unprotected industrial action. This argument was made in support of Esso's broader position that the AWU should, by virtue of section 413(5) of the Fair Work Act, be prevented

from organising or taking any further industrial action in relation to bargaining for the replacement Esso agreements.

The AWU contended that the Commission exceeded its power in making some of the section 418 orders and that those orders were therefore invalid. Specifically, the AWU argued that some of the orders were not confined to *the* industrial action that the Commission had found to be happening, being organised or being threatened. Esso argued that the orders were not beyond power and, alternatively, that they could be read down.

The Court held that the section 418 orders made by the Commission on 5 March 2015 had no valid operation as they did not identify the industrial action that was happening, threatened or being organised. Rather, they prohibited unprotected industrial action of any description falling within the definition in section 19 of the Act without further specificity. In spite of the permissive words of section 418(3), it remains necessary to identify in some way *the* industrial action determined to be happening, threatened or organised, and therefore prohibited.

However, Jessup J found that the Commission's orders of 6 March 2015 were valid and that the AWU had contravened those orders due to it having organised bans on:

- air freeing, leak testing and equipment testing on 6 and 7 March 2015; and
- bleeder valve manipulation from 7 March 2015 to 17 March 2015.

Impact of contravention of Commission's orders on the taking of future industrial action

Esso contended that as the AWU had contravened section 418 orders made by the Commission, no further industrial action organised by the AWU as part of bargaining for the replacement Esso agreements could be protected industrial action under the Act.

In making that submission Esso relied on section 413(5) of the Act which imposes one of the common requirements that must be satisfied in order for industrial action to be protected. In summary, section 413(5) relevantly provides that a bargaining representative for an agreement must not have contravened any orders "that apply to them" and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement.

The AWU contended that section 413(5) is limited to circumstances in which the relevant bargaining representative is in contravention of an order at the time of taking industrial action that is claimed to be protected. It relied on the recent Federal Court decision in *Australian Mines and Metals Association Inc v The Maritime Union of Australia* [2015] FCA 667. In

that case, Barker J held that section 413(5) only refers to orders that would apply to the bargaining representative or employee at the time the industrial action is proposed, and not to other orders made during the bargaining process which may have been contravened.

While Jessup J was not persuaded by Barker J's interpretation of section 413(5), his Honour considered it appropriate to follow the *AMMA* decision because it was not plainly or clearly wrong.

However, his Honour was able to distinguish the *AMMA* case on the basis that it was concerned with orders made by the Commission which required compliance by a particular date and time. By contrast, in the *Esso* case the section 418 orders of 6 March 2015 were open-ended in their identification of the time for compliance. As a result, Jessup J found that:

- the 6 March orders remained operative up to 6pm on 20 March, at which time they ceased to operate in accordance with their terms; and
- as a result of the AWU breaching the 6 March orders, all of the industrial action that was organised by the AWU during the period 7 to 20 March 2015, including industrial action that was authorised by a protected action ballot and notified to Esso in accordance with the requirements of the Act, was unprotected.

Jessup J also noted that:

- if the AWU had organised protected industrial action after the section 418 order ceased to operate, that is after 6pm on 20 March, he would have been required to apply the *AMMA* decision and find that section 413(5) did not prevent the AWU from organising that action; but
- he was "provisionally attracted" to the argument that, in those circumstances, section 413(5) should prevent the AWU from organising any further industrial action as part of bargaining for the replacement Esso enterprise agreements.

The *AMMA* decision has been appealed to the Full Court of the Federal Court. We expect that the appeal will require the Court to decide which of the competing interpretations of section 413(5) articulated by Barker and Jessup JJ is to be preferred.

General protections claims against the AWU

Esso also sought and obtained declarations that the AWU had contravened the following sections of the Fair Work Act:

- section 343 - by unlawfully coercing Esso to exercise its workplace rights. Specifically, the AWU organised industrial action at the Longford facility with intent to coerce Esso into making an enterprise agreement, or to make an agreement on terms acceptable to the AWU;

- section 348 - by organising or taking action against Esso with intent to coerce Esso to engage in industrial activity, namely to make an enterprise agreement or make it in a particular way. Esso relied on the definition of industrial activity contained in section 347(b)(iv) which provides that a person engages in industrial activity if the person does or does not comply with a lawful request made by, or requirement of, a union;
- section 346 - by taking adverse action against Esso because it engaged in industrial activity by refusing to comply with the AWU's request to make an enterprise agreement. In this regard, Esso relied on the definition of adverse action in section 342(1) of the Act which includes a union organising industrial action against a person.

Sections 343 and 348

Jessup J decided that:

- Esso was in a vulnerable position as a result of the industrial action occurring during a major shutdown at the Longford facility;
- that vulnerability motivated the AWU to "ramp up" industrial activity;
- the AWU had organised the industrial action so as to apply direct pressure on Esso to act otherwise than in the exercise of its own free choice, namely by agreeing to certain claims advanced by the AWU during bargaining despite not wanting to do so and to drop or modify claims which Esso was pursuing; and
- that application of pressure was illegitimate as the bans involved refusals by employees to perform some aspects of their required and customary duties pursuant to their contracts of employment.

Accordingly, the Court found that the AWU's organisation of the industrial action that took place on and from 7 March 2015, including the banning of air freeing, leak testing, equipment testing and manipulation of bleeder valves, contravened section 343.

By reference to the same reasoning, Jessup J found that the AWU had also contravened section 348.

Section 346

Jessup J held that the AWU's organisation of bans on air freeing, leak testing, bleeder valve manipulation and other industrial action on and after 7 March 2015, constituted adverse action taken against Esso because of Esso's refusal to make an enterprise agreement. As a result, his Honour was satisfied that the AWU had contravened section 346.

Alleged contravention of section 340

Esso unsuccessfully argued that the AWU breached section 340 of the Act by taking adverse action against it because it had exercised a workplace right by initiating and participating in the hearing before the Commission on 6 March 2015.

Jessup J considered that this allegation was not supported by the evidence.

Implications for employers

This decision serves as a reminder for employers:

- to carefully consider whether any form of purportedly protected industrial action notified by employees or their union representatives is, in fact, protected industrial action;
- to seek advice if there is any ambiguity regarding the description of the industrial action contained in the notification;
- to confer with legal advisors about options and strategy for preventing or stopping unprotected industrial action, having regard to potential legal claims that may be available in the circumstances;
- that particular care needs to be taken when seeking orders to prevent or stop unprotected industrial action and that a failure to draft proposed orders with precision, such as by not identifying the industrial action to be prohibited, can result in such orders being invalid; and
- subject to final determination by the Full Court of the Federal Court in the *AMMA* case, it is reasonably likely that protected industrial action by a union will be ruled out in a bargaining process if the union has failed to comply with a Commission order relating to that process even if the time for compliance has expired.

MAKING THE CASE: Insights from Geoff Giudice

This decision highlights the technical nature of the protected action provisions:

- The Court took a strict approach in considering whether all of the industrial action taken was authorised by the protected action ballot.
- A union which takes unprotected industrial action is likely to contravene a number of the adverse action provisions in the Act, such as sections 343, 346 and 348.
- Other industrial action which would otherwise have been protected, may become unprotected as a

consequence of taking unprotected action.

- Section 418 orders must be carefully drafted so as to capture and prohibit the unprotected action.

The financial consequences for the AWU and Esso are at this stage unknown because the Court is yet to consider what penalties to impose for the contraventions and what compensation, if any, the AWU must pay to Esso.

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