Article Information

Authors: Tim Capelin, David Ey
Service: Employment & Labour

It's now more difficult to be protected: The High Court's latest ruling on protected industrial action, bargaining-related orders and unlawful coercion

In Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd [2017] HCA 54, the High Court of Australia was called upon to determine two important questions relating to protected industrial action:

In Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd [2017] HCA 54, the High Court of Australia was called upon to determine two important questions relating to protected industrial action:

1. *1. whether a union that contravenes a Fair Work Commission (**FWC**) order with respect to a matter relating to enterprise bargaining is prohibited from taking protected industrial action for the entire bargaining process, even after the relevant order ceases to operate; and*
2. *2. when unprotected industrial action can constitute unlawful 'coercion' for the purposes of sections 343 and 348 of the Fair Work Act 2009 (Cth) (**FW Act**).*

***David Ey, Partner, and Irene Nikoloudakis, Law Graduate,** explain the decision and its impact on employers engaging in enterprise bargaining.*

What is protected industrial action?

Under Division 2 of Part 3-3 of the FW Act, it is possible for employees, unions and employers to engage in protected industrial action. Among other things, this includes action taken or organised by employees or their bargaining representative(s) for the purpose of supporting or advancing claims with respect to a proposed enterprise agreement that will cover them. There are also six common requirements that must be satisfied under section 413 for the industrial action to be protected which includes, for example, that the parties involved in the industrial action must genuinely be trying to reach an agreement.

What distinguishes protected industrial action from action that is unprotected is that the former provides immunity from civil liability (with some exceptions). This means that parties that engage in protected industrial action are not exposed to various tort and statutory liabilities that could arise if the action were not protected.

Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd involved two appeals that required the High Court to determine the ability of unions to engage in protected industrial action when negotiating for enterprise agreements.

Facts

Esso and the Australian Workers' Union (**AWU**) on behalf of its members were bargaining for new enterprise agreement(s) to cover Esso's oil and gas operations in Bass Strait. As part of the bargaining process, the AWU organised various forms of industrial action against Esso, including bans on equipment testing, air freeing and leak testing. Esso obtained an order from the FWC under section 418 that this action cease, but the AWU contravened that order by continuing to organise the proscribed action. The FWC's order ceased to operate on 20 March 2015.

Esso v AWU: the scope of section 413(5) of the FW Act

Section 413 of the FW Act stipulates a number of requirements that must be satisfied for industrial action to be protected. One such requirement, in section 413(5), is that the relevant bargaining representatives and employees *"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…"*

Esso commenced proceedings in the Federal Court of Australia seeking, among other things, a declaration that because the AWU had contravened the FWC order, any further industrial action the AWU organised, even if it occurred at a time when the FWC's order no longer applied, could not be protected because it failed to satisfy section 413(5). The AWU disagreed with Esso's interpretation of the provision, submitting that section 413(5) is limited to contraventions of orders that apply to the specified persons in operation at the time the industrial action was proposed to be taken. In this case, the order ceased to operate on 20 March 2015 and so the AWU argued that its contravention of the FWC order should not bar it from engaging in protected industrial action after that date.

At first instance, Justice Jessup dismissed Esso's application, as did the Full Court of the Federal Court on appeal. Justice Buchanan, who delivered the leading judgment in the Full Court, held that section 413(5) refers only to such orders that are in operation at the time of the proposed industrial action, with the further qualification that the orders must relate to the proposed industrial action in question.

Esso appealed to the High Court, contending that 'contraventions of orders to which s 413(5) refers are not limited to orders in operation at the time of the proposed protected industrial action, still less to contraventions of orders committed in the course of organising or engaging in the proposed industrial action.' The AWU submitted that Esso's interpretation of section 413(5) would lead to 'capricious and unjust' results. For example, if a bargaining representative contravened an order, no matter how minor and insignificant the order or the nature of the contravention, the bargaining representative would thereafter be precluded from engaging in protected industrial action in relation to the proposed agreement. The AWU also argued that if the Court were to uphold Esso's interpretation, then it would result in 'double punishment' — potential liability to a civil penalty for contravening the order coupled with the deprivation of a 'right' to engage in protected industrial action.

The majority of the High Court, with Justice Gageler dissenting, held that there is nothing in the language of section 413(5), its legislative history or context to suggest 'that the order must be one that continues in operation at the time of the proposed industrial action, or with which it is still possible to comply at that time'. Further, the Court regarded the AWU's contention that Esso's interpretation of section 413(5) would lead to 'capricious and unjust' results as unpersuasive because the FWC has broad powers under section 603 of the FW Act to vary or revoke orders, including the power to vary or revoke orders retrospectively. The Court also held that Esso's construction of section 413(5) would not have the effect of doubly punishing those who contravene a relevant order because such persons would not be deprived of a right to engage in protected industrial action. Rather, section 415 provides a privilege to engage in industrial action that might otherwise be unlawful.

The Court therefore agreed with Esso's broad interpretation of section 413(5), which narrows the circumstances in which industrial action following a breach of an order may be protected. Prior to Esso the case law had established that the orders that 'apply', for the purposes of section 413(5), were only those in operation at the time of the proposed industrial action and that related to that action. Thus, the High Court's decision may incentivise unions to comply with bargaining-related orders to preserve their ability to qualify for protected industrial action in the future. It also incentivises employers to seek bargaining-related orders (particularly orders that impose ongoing requirements on employees and their unions) as well as carefully monitor and record any non-compliance, because contraventions of these orders during the bargaining process will strip a union of its ability to engage in protected industrial action.

AWU v Esso: 'coercion' for the purposes of sections 343 and 348 of the FW Act

In the same proceedings, the AWU appealed findings of the Full Court of the Federal Court that it had unlawfully coerced Esso to enter into the proposed enterprise agreement on the terms stipulated by the AWU. Sections 343 and 348 prohibit a person from organising, taking or threatening to take any action against another person with intent to coerce the other person to:

- exercise or not exercise, or propose to exercise or not exercise, a 'workplace right', which includes the right to make, vary or terminate an enterprise agreement;
- exercise, or propose to exercise, a workplace right in a particular way; or
- engage in 'industrial activity', which includes, for example, complying with a lawful request to enter into an enterprise agreement.

For the relevant conduct to amount to 'coercion', it must be 'unlawful, illegitimate or unconscionable'. The High Court in this case was required to determine whether it is necessary for the person organising, taking or threatening the action to

know, and therefore intend, that the action is or will be unlawful, illegitimate or unconscionable.

It was not in dispute that the AWU banned the performance of equipment testing, air freeing and leak testing with the intent to influence Esso to enter into an agreement on the terms stipulated by the AWU. However, the AWU argued that its relevant officers were not aware that their bans were not protected industrial action and, as such, could not have acted with intent to engage in acts that were 'unlawful, illegitimate or unconscionable'.

The High Court rejected the AWU's contentions, stating that to establish coercion under sections 343 or 348 it is irrelevant that the person organising, taking or threatening the action does so with intent that the action be unlawful, illegitimate or unconscionable. What is required is that the person takes or threatens to take action with intent to negate the other person's choice. In any case, the High Court held the AWU could not prove that the relevant officers lacked knowledge that the bans on equipment testing, air freeing and leak testing were not protected industrial action. The AWU's industrial action was accordingly found to constitute unlawful coercion and its appeal was dismissed.

Employers, therefore, should be aware that unions that have engaged in unprotected industrial action, even if under the belief that the action is 'protected', may be liable for breach of sections 343 or 348 of the FW Act.