Court of Appeal
Supreme Court

New South Wales

Case Name:	Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary
Medium Neutral Citation:	[2018] NSWCA 39
Hearing Date(s):	14 November 2017
Date of Orders:	14 March 2018
Decision Date:	14 March 2018
Before:	Bathurst CJ at [1]; Gleeson JA at [164]; Simpson JA at [165]
Decision:	(1) Grant leave to appeal. (2) Order the appeal be allowed. (3) Set aside the orders of the primary judge and in lieu thereof impose a penalty of $25,000.
Catchwords:	INDUSTRIAL LAW – New South Wales – Industrial Relations Commission – Industrial Relations Act 1996 (NSW) s 137(1)(a) – whether Commission has power to make orders against an industrial organisation directing it to cease organising industrial action and to not induce, encourage or direct its members to take industrial action INDUSTRIAL LAW – New South Wales – Industrial Relations Act 1996 (NSW) s 139(3)(e) and s 139(4) – whether multiple contraventions occurred during course of conduct extending over multiple days – whether penalty imposed was manifestly excessive
Legislation Cited:	Government Sector Employment Act 2013 (NSW) Industrial Arbitration (Amendment) Act 1918 (NSW)

Industrial Arbitration (Amendment) Act 1959 (NSW)
Industrial Arbitration Act 1901 (NSW)
Industrial Arbitration Act 1912 (NSW)
Industrial Arbitration Act 1940 (NSW)
Industrial Disputes Act 1908 (NSW)
Industrial Relations Act 1991 (NSW)
Industrial Relations Act 1996 (NSW)
Supreme Court Act 1970 (NSW)

Cases Cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Engineering Union [2018] HCA 3
Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd (2006) 151 IR 153; [2006] NSWIRComm 71
Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd (2006) 151 IR 153; [2006] NSWIRComm 71
Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2
Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union (No 2) [2005] NSWIRComm 210
BlueScope Steel (AIS) Pty Ltd v Australian Workers' Union, New South Wales (2006) 153 IR 176; [2006] NSWIRComm 149
Bluescope Steel Ltd v Australian Workers' Union, New South Wales (2004) 137 IR 176; [2004] NSWIRComm 222
Davids Distribution Pty Ltd v National Union of Workers, New South Wales Branch (1995) 60 IR 285
Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54
Director of Public Prosecutions (Cth) v De La Rosa (2010) 79 NSWLR 1; [2010] NSWCCA 194
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25
McKernan v Fraser (1931) 46 CLR 343
National Union of Workers, New South Wales Branch v Industrial Court of New South Wales (1996) 70 IR 80
Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57

	R v Pham (2015) 256 CLR 550; [2015] HCA 39 Sydney Water Corporation v Australian Services Union (NSW and ACT Branch) (2005) 146 IR 388; [2005] NSWIRComm 305 SZTAL v Minister for Immigration and Border Protection (2017) 91 ALJR 936; [2017] HCA 34 Transport Workers' Union of New South Wales v Australian Industrial Relations Commission (2008) 166 FCR 108; [2008] FCAFC 26 Williams v Construction, Forestry, Mining and Energy Union (2009) 179 IR 441; [2009] FCA 223
Texts Cited:	C P Mills, Industrial Laws: New South Wales (Butterworths, 4th ed, 1977)
Category:	Principal judgment
Parties:	Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (appellant) Industrial Relations Secretary (respondent)
Representation:	Counsel: M Gibian (appellant) N Hutley SC with R Ranken (respondent) Solicitors: Haywards Solicitors (appellant) Crown Solicitor's Office (respondent)
File Number(s):	2017/134334; 2017/233994
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Common Law
Citation:	[2017] NSWSC 71 [2017] NSWSC 430
Date of Decision:	09 February 2017
Before:	Fagan J

File Number(s): 2017/38081
2017/40552

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales represents employees of the New South Wales government. This includes employees who provide disability services operated by the Department of Family and Community Services. Some of these are carers who assist people with disabilities in their day-to-day lives. A dispute between the Union and the Department arose about the terms and conditions of employment for the carers during the transfer of these carer services to a non-government provider.

The Union notified the Department on 16 January 2017 that it had resolved to take industrial action for 24 hours commencing on 14 February 2017. It also posted a flyer on its website notifying its members of the time and date of the proposed industrial action and encouraging its members to participate. The Industrial Relations Secretary filed a dispute notification with the Industrial Relations Commission on 23 January 2017. After an attempted conciliation, the Commission made dispute orders on 2 February 2017 under s 137(1)(a) of the *Industrial Relations Act 1996* (NSW). The orders directed the Union to "cease organising and refrain from taking any form of industrial action" and to not "induce, advise, authorise, encourage, direct, aid or abet" its members to organise or take further industrial action. After the dispute orders were made, the Union continued to display the flyer on its website, and posted a further bulletin which stated that the Union would continue with the industrial action and stated its willingness to "cop a fine" for a contravention of the dispute orders.

The Industrial Relations Secretary commenced proceedings in the Supreme Court alleging that the Union had contravened the dispute orders by continuing to display the flyer and bulletin on its website. The primary judge commenced hearing the matter on 8 February 2017 and delivered a judgment on 9 February 2017. The primary judge found that the Union had contravened the dispute orders, but reserved its decision on the penalty to be imposed to allow the Union an opportunity to comply with the dispute orders before the industrial action occurred. However, the Union continued to display the flyer and the bulletin on its website and around 544 employees of the Department participated in the industrial action on 14 February 2017. After a further hearing on the amount of the penalty to be imposed, the primary judge delivered a final judgment on 12 April 2017 and imposed a penalty of $84,000 on the Union.

The main issues on appeal were:

1. Whether the Industrial Relations Commission had the power to make the dispute orders which it made in relation to the Union under s 137(1)(a) of the *Industrial Relations Act 1996* (NSW), such that the Union was liable to a penalty for contravening those dispute orders (Grounds 1-2);

2 Whether the Supreme Court erred in determining the penalty by failing to impose a total penalty that was "just and appropriate having regard to the nature and circumstances of the contravention" (Ground 3);

3 Whether the penalty imposed by the Supreme Court was manifestly excessive (Ground 6);

The Court (Bathurst CJ, Gleeson and Simpson JJA) held, allowing the appeal:

Section 137(1)(a) of the Industrial Relations Act 1996 (NSW) (Grounds 1-2)

(i) Section 137(1)(a) permits the Industrial Relations Commission to make dispute orders against an industrial organisation ordering it to "cease or refrain" from causing its members to take industrial action. This extends to making dispute orders which order an industrial organisation to refrain from directing its members to engage in industrial action or to refrain from organising industrial action. A contravention of such dispute orders is not conditional on the

industrial action actually occurring: [124]-[125] (Bathurst CJ); [164] (Gleeson JA); [165] (Simpson JA).

Sydney Water Corporation v Australian Services Union (NSW and ACT Branch) (2005) 146 IR 388; [2005] NSWIRComm 305; *BlueScope Steel (AIS) Pty Ltd v Australian Workers' Union, New South Wales* (2006) 153 IR 176; [2006] NSWIRComm 149, considered.

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Engineering Union [2018] HCA 3; *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* (2008) 166 FCR 108; [2008] FCAFC 26, referred to.

(ii) Therefore, the primary judge did not err in imposing a pecuniary penalty on the Union for each day on which it contravened the dispute orders but on which the Union or its members took no industrial action: [132] (Bathurst CJ); [164] (Gleeson JA); [165] (Simpson JA).

Determination of a total penalty that was "just and appropriate" (Ground 3)

(iii) The principle of totality in sentencing is only applicable to the approach to be adopted by a court in sentencing for separate offences or contraventions. The Union engaged in a course of conduct which constituted a single contravention of the dispute orders over a period of 14 days. The principle of totality did not apply: [149]-[150] (Bathurst CJ); [164] (Gleeson JA); [165] (Simpson JA).

Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57, referred to.

(iv) Therefore, it would not be appropriate in the present case to impose a penalty for each day that the contravention occurred. A single penalty was required to be determined by instinctive synthesis having regard to the maximum penalty as a "yardstick" along with other relevant factors: [150] (Bathurst CJ); [164] (Gleeson JA); [165] (Simpson JA).

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, referred to.

Manifest excess in sentencing (Ground 6)

(v) The penalty imposed by the primary judge was manifestly excessive. It was relevant that the conduct of the Union was mostly "passive" and that the penalty imposed was significantly higher than the range of penalties previously imposed for a contravention of dispute orders made by the Industrial Relations Commission. A penalty of $25,000 ought to be imposed instead: [153]-[161] (Bathurst CJ); [164] (Gleeson JA); [165] (Simpson JA).

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45; *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2; *R v Pham* (2015) 256 CLR 550; [2015] HCA 39; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194, referred to.

JUDGMENT

1 **BATHURST CJ:** This is an appeal from an order of the primary judge imposing a monetary penalty in the sum of $84,000 on the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (the appellant) for a contravention of orders made by the Industrial Relations Commission of New South Wales (the Commission) pursuant to s 137(1)(a) of the *Industrial Relations Act 1996* (NSW).

Factual background

2 The appellant represents employees of the New South Wales government. This includes employees who provide disability services operated by the Department of Family and Community Services (the Department). Some of these employees are carers who assist people with disabilities in their day-to-day lives. The origin of the dispute giving rise to these proceedings was a proposal by the New South Wales government to transfer these carer services to non-government providers. The appellant, as representative of the New South Wales government employees who provide the carer services, sought to secure favourable terms and conditions of employment for these employees which would protect them after the transfer had occurred. In the absence of such terms and conditions, the appellant opposed the transfer.

3 On 16 January 2017, the General Secretary of the appellant notified the Department by letter that the appellant's delegates had "resolved to take industrial action for 24 hours starting on 14 February 2017" due to the

"unilateral decisions and inflexible and arrogant nature of the Government" in relation to the transfer. The letter stated that the appellant would formally notify its members of the industrial action and would instruct "all members not to attend work, commencing at the start of the first day shift on 14 February 2017 for 24 hours".

4 On 23 January 2017, the Industrial Relations Secretary (the respondent), who is taken to be the employer of New South Wales government employees for the purpose of industrial proceedings under s 50 of the *Government Sector Employment Act 2013* (NSW), filed a dispute notification in the Commission under s 130(1)(a) of the *Industrial Relations Act 1996* (NSW) (the IR Act) in relation to the industrial action proposed by the appellant.

5 At some time prior to 2 February 2017, the appellant put up on its website an information flyer (the Flyer). The Flyer contained the following statement:

> "'STRIKE
>
> The PSA directs all members in disability services across NSW to strike for 24 hours from the start of day shift on Tuesday, 14 February 2017.
>
> Join the strike & fight for your rights.'"

6 On 2 February 2017, Commissioner Newall issued a certificate of attempted conciliation under s 135 of the IR Act and made dispute orders under s 136(1)(c) and s 137(1)(a) of the IR Act (the dispute orders). The dispute orders were relevantly in the following terms:

> "A. Pursuant to s.136(1)(c) and s.137(1)(a) of the *Industrial Relations Act 1996* the Commission makes the following Orders:
>
> 1. The Public Service Association of NSW ('the Association'), its officers, employees and members employed, for the purposes of s. 50 of the *Government Sector Employment Act 2013*, by the Industrial Relations Secretary, are hereby ordered immediately to cease organising and refrain from taking any form of industrial action in the area of disability services operated by the Department of Family and Community Services, including any strike, stop work meeting, ban, relieving ban, limitation or restriction on the performance of work and must not recommence, engage in or threaten to engage in industrial action while these orders are in force.
>
> 2. The Association and its officers, employees and agents must not induce, advise, authorise, encourage, direct, aid or abet members of the Association to organise or take further industrial action in the area of disability services operated by the Department of Family and Community Services while these Orders are in force.

3. These orders shall come into effect on and from 16:00 on 2 February 2017 and shall remain in force until 16:00 on 2 April 2017."

7 On 3 February 2017, undeterred by these dispute orders, the appellant placed on its website a bulletin entitled "Disability Services Strike Action Proceeding" (the Bulletin). The Bulletin contained the following comments:

> "Instead of agreeing to a path to resolution, the Department has sought and received orders from the Industrial Relations Commission to stop the strike.
>
> **The PSA however will proceed with the 24-hour strike on Tuesday, 14 February 2017, even if it means the union cops a fine for sticking up for the employment interests of our members.**
>
> The decision to continue with the strike action was made in response to the NSW Government's refusal to negotiate proper equitable transfer arrangements.
>
> …
>
> However, to ensure no client is placed at risk, we have agreed to direct members to give seven days notice (where possible) of their unavailability to work on 14 February.
>
> …
>
> Don't be ripped off. Don't be intimidated. The PSA has got your back.
>
> Stand with the PSA on Valentine's Day and fight for a better deal.
>
> Click **HERE** for details of all strike day information and venue."
>
> (emphasis in original)

8 The word "HERE" in the Bulletin contained a link to the Flyer which I have extracted at [5] above.

9 Both the Bulletin and the Flyer remained on the appellant's website from 3 February 2017 until at least 15 February 2017.

10 The strike took place on 14 February 2017. Approximately 544 employees of the Department participated in the strike. These included 427 employees who were rostered to provide care services. The strike commenced at the start of the day shift at 7:00am on 14 February 2017 and continued until 7:00am on 15 February 2017.

11 By a summons filed on 6 February 2017 and amended on 10 February 2017 (the amended summons), the respondent claimed that the appellant contravened order A1 of the dispute orders on 2 February 2017 "by continuing to organise industrial action" while the dispute orders were in force. The

particulars of that contravention relied on those parts of the Flyer and the Bulletin to which I have referred above.

12 The amended summons also claimed that the appellant contravened order A2 of the dispute orders on 3 February 2017 "by encouraging its members to engage in further industrial action in the area of disability services" while the dispute orders were in force. The Bulletin and the Flyer were both particularised as the relevant contraventions.

The relevant legislation

13 Prior to examining the reasoning of the primary judge and the submissions of the parties, it is convenient to summarise the relevant provisions of the IR Act.

14 Section 3 sets out the objects of the IR Act. So far as relevant in these proceedings, it provides as follows:

> "**3 Objects**
>
> The objects of this Act are as follows:
>
> (a) to provide a framework for the conduct of industrial relations that is fair and just,
>
> (b) to promote efficiency and productivity in the economy of the State,
>
> (c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,
>
> (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,
>
> (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
>
> …
>
> (g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality …"

15 Section 6 contains a definition of "industrial matters". It defines industrial matters as "matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry".

16 Part 1 of Chapter 2 deals with awards. Section 10 provides that awards made by the Commission are to set "fair and reasonable conditions of employment". Section 14 requires awards to contain dispute resolution procedures, which

must include procedures for the involvement of industrial organisations. An industrial organisation is defined by the Dictionary to the IR Act to include an "industrial organisation of employees" registered under Chapter 5 of the IR Act. The appellant is such an organisation.

17 Chapter 3 deals with industrial disputes. The Dictionary to the IR Act defines "industrial dispute" in the following terms:

> "***industrial dispute*** means a dispute (including a question or difficulty) about an industrial matter, and includes the following:
>
> (a) a demarcation dispute,
>
> (b) a threatened or likely industrial dispute,
>
> (c) a situation that is likely to give rise to an industrial dispute if preventative action is not taken."

18 The Dictionary also defines "industrial action" as follows:

> "***industrial action*** means a strike by employees or a lock-out by an employer, and includes:
>
> > (a) a practice relating to the performance of work, adopted in connection with an industrial dispute, that restricts, limits or delays the performance of work, or
> >
> > (b) a ban, limitation or restriction affecting the performance of work, or the offering or acceptance of work, that is adopted in connection with an industrial dispute, or
> >
> > (c) any failure or refusal in connection with an industrial dispute to attend for work or to perform work,
>
> but does not include any action taken by employees with the agreement of their employer or any action taken by employers with the agreement of their employees."

19 Part 1 of Chapter 3 deals with conciliation and arbitration of industrial disputes. Section 130(1)(a) empowers an industrial organisation of employers or employees to notify the Commission of a dispute. Section 132 provides for compulsory conferences for the purpose of resolving a dispute, whilst s 133 provides that the Commission must first attempt to resolve the dispute by "conciliation". The IR Act does not define "conciliation". Section 134 confers certain powers on the Commission to facilitate the conciliation process.

20 Sections 135 and 136 deal with the arbitration process which occurs after an attempted conciliation. They are in the following terms:

> "**135 Arbitration after attempted conciliation**

(1) The Commission is to deal with an industrial dispute by arbitration only if it is not resolved by conciliation.

(2) Arbitration by the Commission is not to proceed until the Commission has issued a certificate that reasonable attempts have been made to resolve the industrial dispute by conciliation (***certificate of attempted conciliation***).

(3) A certificate of attempted conciliation is to be provided to the Chief Commissioner unless the Commission is constituted by the Chief Commissioner.

(4) When determining whether to issue a certificate of attempted conciliation, the Commission must consider the effect that any industrial action in connection with the industrial dispute is having on the parties and the public generally. In particular, the Commission must give urgent consideration to the effect of industrial action in connection with a demarcation dispute.

(5) A certificate of attempted conciliation may be issued on the Commission's own initiative or on application by any person authorised to notify the Commission of the industrial dispute.

(6) The Commission must, without delay, issue a certificate of attempted conciliation on the application of any such person if the person satisfies the Commission that there is no reasonable likelihood that the dispute will be resolved by conciliation.

(7) The Commission must, without delay, issue a certificate of attempted conciliation if the Commission decides that industrial action or duress necessitates the exercise of its arbitral powers.

(8) The parties to the proceedings are to be provided with a copy of any certificate of attempted conciliation.

(9) Nothing in this Act prevents the exercise of conciliation powers merely because arbitration powers have been exercised under this Act.

136 Arbitration of dispute

(1) The Commission may, in arbitration proceedings, do any one or more of the following:

(a) make a recommendation or give a direction to the parties to the industrial dispute,

(b) make or vary an award under Part 1 of Chapter 2,

(c) make a dispute order under Part 2,

(d) make any other kind of order it is authorised to make (including an order made on an interim basis).

(2) Any such action may be taken by the Commission on its own initiative or on application by any person authorised to notify the Commission of the industrial dispute."

21 Part 2 of Chapter 3 deals with dispute orders. Sections 137 and 138 provide as follows:

"**137 Kinds of dispute orders**

(1) The Commission may make the following kinds of dispute orders when dealing with an industrial dispute in arbitration proceedings:

(a) The Commission may order a person to cease or refrain from taking industrial action.

(b) The Commission may order an employer to reinstate or re-employ any one or more employees who were dismissed in the course of the industrial dispute or whose dismissal resulted in the industrial dispute.

(c) The Commission may order an employer not to dismiss employees in the course of the industrial dispute if the employer has threatened to do so.

(d) The Commission may order a person to cease a secondary boycott imposed in connection with the industrial dispute.

(2) If employees are taking industrial action in connection with the industrial dispute, the Commission may order the employees to cease taking that industrial action before it makes any other kind of dispute order against the employer.

(3) A dispute order may not provide for the payment of compensation, lost remuneration or any other amount.

138 Making of dispute orders

(1) A dispute order may be made only against:

(a) a party or likely party to the industrial dispute, or

(b) a member, officer or employee of an industrial organisation that is such a party or likely party, or

(c) a person engaged, or likely to be engaged, in a secondary boycott in connection with the industrial dispute.

(2) A dispute order:

(a) must clearly identify the persons against whom the order is made and who are bound by the order, and

(b) must state a time within which the order is to be complied with or state a period during which it remains in force, and

(c) may be varied or revoked by the Commission at any time.

(3) If an employee is reinstated or re-employed under this Part, the Commission may order that the period of employment of the employee with the employer is taken not to have been broken by the dismissal."

22 Section 139 confers powers on the Supreme Court to impose penalties for contraventions of dispute orders. Relevantly, the section provides as follows:

"**139 Contravention of dispute order**

(1) The Supreme Court, on application, must deal expeditiously with an alleged contravention of a dispute order. The application may be made by the person who applied for the order or any other person who was authorised to apply for the order.

(2) Before dealing with an alleged contravention of the order, the Supreme Court is required to summon the person alleged to have contravened the order to show cause why the Supreme Court should not take action for the contravention.

(3) The Supreme Court may, after hearing any person who answered the summons to show cause and considering any other relevant matter, do any one or more of the following:

(a) dismiss the matter if it finds that the dispute order was not contravened or if it finds that the circumstances were such that the Supreme Court should take no action on the contravention,

(b) cancel the approval of an enterprise agreement,

(c) suspend or modify for any period all or any of the entitlements under an industrial instrument,

(d) cancel the registration of an industrial organisation or take any other action authorised by Division 2 of Part 3 of Chapter 5,

(e) impose a penalty on an industrial organisation or an employer as provided by subsection (4),

(f) make any other determination that the Supreme Court considers would help in resolving the industrial dispute.

(4) The maximum penalty that may be imposed on an industrial organisation or employer is:

…

(b) if a penalty has previously been imposed on the industrial organisation or employer for a contravention of an earlier dispute order – a penalty not exceeding in total $20,000 for the first day the contravention occurs and an additional $10,000 for each subsequent day on which the contravention continues."

It should be noted that this section does not confer power on the Court to impose pecuniary penalties on employees.

23 Part 1 of Chapter 4 of the IR Act deals with the establishment and functions of the Commission. Section 146 provides as follows:

"**146 General functions of Commission**

(1) The Commission has the following functions:

(a) setting remuneration and other conditions of employment,

(b) resolving industrial disputes,

(c) hearing and determining other industrial matters,

(d) inquiring into, and reporting on, any industrial or other matter referred to it by the Minister,

(e) functions conferred on it by this or any other Act or law.

(2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:

(a) the objects of this Act, and

(b) the state of the economy of New South Wales and the likely effect of its decisions on that economy."

24 Chapter 5 deals with industrial organisations. Part 3 of Chapter 5 deals with their registration. Sections 226 and 227 deal with the cancellation of the registration of an industrial organisation. Relevantly, they provide as follows:

"**226 Grounds on which registration may be cancelled**

The registration of an industrial organisation may be cancelled on any one or more of the following grounds:

(a) that the organisation, or a substantial number of its members, has or have contravened the industrial relations legislation, any industrial instrument, or any order of the Supreme Court,

(b) that the industrial organisation, or a substantial number of its members, has or have engaged in any industrial action that has had, is having or is likely to have, a substantial adverse effect on the safety, health or welfare of the community or a part of the community,

(c) that the organisation or a substantial number of its members, has or have engaged in any industrial action that has had or is having a major and substantial adverse effect on the provision of any public service by the State or an authority of the State contrary to the public interest and without reasonable excuse,

…

227 Cancellation of registration of industrial organisation

(1) The Supreme Court may cancel the registration of an industrial organisation if the Supreme Court considers that a ground for cancellation has been established.

(2) However, the Supreme Court is not to cancel the registration of an industrial organisation on a ground referred to in section 226 (a)–(c) unless the Supreme Court considers that it is appropriate to cancel the registration in the circumstances because of the gravity of the case."

The primary judgments

25 The primary judge delivered two judgments. His first judgment was delivered on 9 February 2017, several days before the day of the strike. In this judgment, he noted that s 138(1)(b) of the IR Act recognised that "industrial organisations will commonly (if not always) be parties to disputes". He stated that it was apparent from the definition of "industrial action" and the content of s 137(1)(a) and s 138(1)(b) that the concept of industrial action "does not just refer to individual members of an industrial organisation declining to attend for work as

part of a strike". He said that it was clear that it also applied to what the appellant might do in "bringing about a situation in which members do not attend for work, by way of strike action".

26 The primary judge considered that the breach particularised in the amended summons was a "clear contravention" of order A1 of the dispute orders. He stated that continuing to display the Flyer after the dispute orders had been made constituted conduct "to organise the strike" and was therefore in direct contravention of the direction in order A1 to "cease organising … any form of industrial action".

27 He stated that the display of the Bulletin also constituted a "continued organising of the strike". He stated that it was "a direct communication to members, by what is evidently a common means of conveying the organisation's wishes to its members, that the strike remains planned and that they may go to [the Flyer], which directs them as to the date and time of the strike and of its venue, by utilising the electronic link" contained in the Bulletin.

28 The primary judge also concluded that leaving the Flyer on its website and putting up the Bulletin constituted "encouraging members to take further industrial action" in contravention of the direction in order A2 to not "encourage" its members to "take further industrial action".

29 The primary judge determined that it was appropriate to impose a pecuniary penalty on the appellant under s 139(3)(e) for its contraventions of the dispute orders. He noted that this was the only power in s 139(3) which it was appropriate to exercise in the circumstances of the present case.

30 In assessing the amount of the penalty to be imposed, the primary judge stated that the matters referred to by Boland J in *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union (No 2)* [2005] NSWIRComm 210 at [37] were relevant, but were not an exhaustive list of matters relevant in assessing penalty. He stated that, tentatively, and subject to further submissions, it did appear that there was "a basis for finding that the circumstances in which the contravention has taken place are as serious as they could be", given that the contravention occurred "in explicit, deliberate defiance of the Commission's orders".

31 The primary judge also stated that some factors which would bear upon the amount of the penalty were not settled on the material before him. He noted that one item referred to by Boland J in *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union (No 2)* [2005] NSWIRComm 210 at [37] was the consequences of the strike, which could be ascertained by the level of disruption caused by the strike. Since no strike had occurred at the time of the first judgment, the primary judge was not in a position to make findings about any consequences which resulted from the strike.

32 By contrast, the primary judge stated that the need for general deterrence was something which was already apparent on the facts available to him. He said that it was critical to the operation of the industrial relations system established by the IR Act that lawfully made orders "be observed rather than explicitly and flagrantly disregarded". However, he stated that he was not in a position to assess the need for specific deterrence.

33 The primary judge stated that the appellant had not exhibited any contrition as at the date of the first judgment, but he concluded that he should allow the appellant a short period for it to reconsider its actions. He stated that it would significantly mitigate any penalty which might be imposed if the appellant showed a willingness to recognise the necessity for it to observe the orders of the Commission before the planned strike took place.

34 The second judgment was delivered by the primary judge on 12 April 2017 after the strike had taken place. He noted that the appellant had previously incurred a penalty for a contravention of a dispute order in 2012, and that, in those circumstances, the maximum penalty for the offence in question was that prescribed by s 139(4)(b).

35 The primary judge noted that the contravention commenced on 2 February 2017 when the appellant maintained the Flyer on its website after the dispute orders were made. He said that the direction to strike was given with respect to "most of 14 February 2017 and part of 15 February 2017". This was a reference to the fact that the Flyer indicated that the strike would last from the commencement of the first day shift at 7:00am on 14 February 2017 and last 24 hours until 7:00am on 15 February 2017.

36 The primary judge stated that the Flyer was maintained on the appellant's website "up to and including 15 February 2017", which was said to be a total of 14 days. He stated that the Bulletin was displayed on the website from 3 February 2017 to 15 February 2017. He said that he did not find that the display of the Bulletin was a separate or different contravention, but rather, that it was an "aspect" of the contravention which had occurred by continuing to display the Flyer on 2 February 2017.

37 The primary judge noted that, out of the 2,700 to 2,800 workers employed by the Department to provide care services, 1,350 to 1,400 were members of the appellant. He noted that 427 workers who were providers of care services and 117 "clinical and administrative" staff apparently participated in the strike.

38 The primary judge stated that the respondent would have had to further amend its amended summons had it wished to rely on the strike itself as a contravention of the dispute orders, but that no such amendment had been sought by the respondent.

39 The primary judge stated that, consistently with the decision of the Full Bench of the Commission in Court Session in *Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd* (2006) 151 IR 153; [2006] NSWIRComm 71, he would determine the amount of the penalty on the basis that there had been only one contravention of the "combined and common effect of orders A1 and A2".

40 The primary judge stated that "the contravention continued over 13 days and it exposes [the appellant] to a maximum penalty of $150,000, being $20,000 for the first day and $10,000 for each of the ensuing 13 days". It would appear that there is an inconsistency between the two periods of time noted in this statement. However, it is clear from other statements in the second judgment, which I have noted at [36] above, that the primary judge intended to and did assess the maximum penalty on the basis that the contravention continued over 14 days. This appeal proceeded on that basis.

41 The primary judge rejected a submission made by the appellant about the effect of the decision of the Full Bench of the Commission in Court Session in *Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd* (2006) 151

IR 153; [2006] NSWIRComm 71. The appellant had submitted that the Full Bench held that s 139(4) of the IR Act did not "permit a penalty to be imposed for multiple days of contravention of an ancillary order". The primary judge rejected this interpretation of the decision. He stated that, since the Full Bench had recognised that "there may be a contravention of ancillary orders even without an accompanying or ultimate breach of a primary order against the conduct of a strike, it must follow that there may be multi-day punishable contraventions of ancillary orders alone". He accepted that a consequence of this conclusion may be that there could be a high maximum penalty for encouraging a strike over a long period, even though the strike itself may be brief, of minimal impact and its severity limited by a long period of notice to the employer. By contrast, a strike over one or two days with no precursor period of encouragement or incitement would create a liability to a much lower maximum penalty. He accepted that this showed that there was "a deficiency in the maximum penalty provisions", but stated that it did not demonstrate that his construction of the provisions was incorrect.

42 The primary judge concluded that the contravention was "a knowing and deliberate defiance" of the dispute orders, which was exacerbated by the continuation of the contravention even after the first judgment had been delivered by the Court.

43 The primary judge noted that the prior contravention by the appellant arose out of the conduct of a stop-work meeting in October 2012, and that several thousand working hours were lost as a result. He noted that the stoppage disrupted the courts, prisons, the Department, schools and the registries of the Roads and Maritime Service. He noted that a fine of $2,500 was imposed for that contravention, and that the judge who imposed the penalty described the contravention as "not of the worst kind or anywhere near it". The primary judge stated that he did not doubt that the penalty was "in reasonable proportion to the maximum penalty of $10,000 which was available", but stated that it appeared to him that the level of fine which was fixed in that case, having regard to the degree of seriousness of the contravention, served to demonstrate that "the penalties prescribed in this area are inadequate to provide any significant level of general deterrence".

44 However, the primary judge stated that he did not consider that the prior contravention had any significance other than doubling the available maximum penalty. He stated that he was not satisfied that there was an "entrenched or longstanding culture of disobedience" to the Commission's orders within the appellant.

45 In dealing with the impact of the strike, the primary judge took into account the fact that, as a result of the strike, the Department had to cancel three days of respite care which it would normally offer, and that the administrative staff of the Department were diverted to finding replacements for employees who gave notice of their intention to strike. He stated that the total cost of the overtime wages paid for carers who worked to cover the absence of striking employees was $210,000, against which $135,000 had to be offset as a saving for not having to pay the striking employees. He found that no client suffered any tangible harm, which he stated was significantly contributed to by the appellant having given advance notice of the strike and instructing its members to give seven days' notice if they proposed to participate. He also accepted that an offer made by the appellant to assist in filling vacancies would have been honoured had the Department chosen to avail itself of the offer.

46 The primary judge stated that he regarded general deterrence of particular importance in cases where dispute orders made by the Commission are disregarded, stating that, if the Commission's authority was to be upheld, then participants in the industrial relations system "must face a sufficient deterrent against simply disregarding orders which are lawfully made". He repeated his earlier comment concerning the inadequacy of the maximum penalty to have any significant deterrent effect. He found little need for specific deterrence on the basis of the appellant's past conduct, but said that it was of some relevance having regard to the continuation of the contravention after the date of the first judgment.

47 The primary judge stated that, on receiving further evidence about the consequences of the strike, the degree of participation of the appellant's members, the absence of any critical loss of care, and the relevantly modest financial impact on the government, the contravention was not as serious as he

had tentatively concluded in his first judgment. He said, however, that there could be no discount for co-operation in the prosecution of the contravention, as the appellant had contested each stage of the proceedings in the Commission and the Supreme Court.

48 The primary judge stated that he did not find that the appellant had expressed any remorse or contrition, and that holding strong views on the issue the subject of the strike did not justify non-compliance with the dispute orders made by the Commission.

49 In these circumstances, the primary judge imposed a penalty of $10,000 for the first day of the contravention, $5,000 for each of the following seven days and $6,500 for each of the last six days. The increase in the amount of the penalty for the last six days took into account the appellant's continuing defiance of the dispute orders made by the Commission following the Court's first judgment.

Is leave to appeal necessary?

50 In my opinion, the appellant requires leave to appeal. Section 101(3A) of the *Supreme Court Act 1970* (NSW) contains the following provision in relation to appeals of this nature:

> "**101 Appeal in proceedings before the Court**
>
> …
>
> (3A) In relation to industrial proceedings within the meaning of Chapter 6A of the *Industrial Relations Act 1996* (except criminal proceedings), each of the following persons is entitled to appeal to the Court of Appeal as provided by this section against a judgment, order, opinion, direction, determination or other decision in the proceedings of the Court in a Division:
>
> (a) a party to the proceedings,
>
> (b) an industrial organisation within the meaning of the *Industrial Relations Act 1996*, or an association registered under Chapter 6 of that Act, affected by the decision,
>
> (c) the Minister administering the *Industrial Relations Act 1996* if the Minister considers that the public interest is, or is likely to be, affected by the decision,
>
> (d) the President of the Anti-Discrimination Board if that President considers that the decision is inconsistent with the principles contained in the *Anti-Discrimination Act 1977*."

51 Section 355A in Chapter 6A defines "industrial proceedings" to include "proceedings before the Supreme Court for the exercise of its functions under"

the IR Act. Section 355B(c) confers jurisdiction on the Court in respect of proceedings under s 139 of the IR Act for the contravention of dispute orders. Proceedings in the present case are therefore "industrial proceedings" which fall within Chapter 6A of the IR Act. It was not contended that the proceedings were "criminal proceedings" so as to fall within the exception stated in s 101(3A); rather, it appeared to be accepted that the proceedings were proceedings for a civil penalty. Section 101(3A) therefore governed the right to appeal in these proceedings.

52 Section 101(3A) provides that "each of the following persons is entitled to appeal to the Court of Appeal *as provided by this section*" against a judgment delivered by the Supreme Court in industrial proceedings. The italicised words are significant. Section 101(3A) does not provide a right of appeal in industrial proceedings distinct from those otherwise available under the other provisions of s 101. It merely defines the persons who are entitled to exercise a right of appeal which might otherwise exist. The circumstances in which a right to appeal may exist are thus governed by the other provisions of s 101 of the *Supreme Court Act 1970* (NSW).

53 Section 101(2)(r) provides that, if a proceeding in this Court is against a final judgment or order of the Supreme Court involving a matter at issue of less than the value of $100,000, then leave to appeal is required. As the penalty imposed in the present proceedings was only $84,000, it follows that leave is required.

54 Although leave was not formally applied for by the appellant, in my opinion, it should be granted. This is the first time that this Court has had the opportunity to consider s 137 and s 139 of the IR Act, which are of considerable importance in the industrial relations system in this State. Further, the respondent did not oppose the grant of leave.

The grounds of appeal

55 The appellant relied on the following grounds of appeal:

> "1 The Court at first instance erred in deciding that the Industrial Relations Commission was able to make an order under s 137(1)(a) of the *Industrial Relations Act* 1996 other than that the appellant and its members cease or refrain from taking industrial action as defined in that Act.

> 2 The Court at first instance erred in deciding that a pecuniary penalty could be imposed upon the appellant under s 139(3)(e) of the *Industrial Relations Act* 1996 for any day on which the appellant did not cease organising or encouraging industrial action contrary to the Commission's order but on which no industrial action was taken by the appellant or its members.
>
> 3 The Court at first instance erred in the determination of penalty by failing to consider whether the imposition of a penalty in the mid-range for each and every day between 2 February 2017 and 15 February 2017 resulted in an overall penalty that was just and appropriate having regard to the nature and circumstances of the contravention.
>
> …
>
> 5 The determination of penalty at first instance miscarried because the exercise of discretion was affected by the Court's own opinion that the penalties prescribed in the *Industrial Relations Act* 1996 in relation to contraventions of dispute orders made under that Act are inadequate.
>
> 6 The penalty imposed by the Court at first instance was manifestly excessive having regard to the nature and circumstances of the contravention, including that:
>
> a) the only industrial action proposed or organised by the appellant was a 24 hour stoppage on 14 February 2017;
>
> b) the appellant gave approximately one month's notice of its intention to hold a 24 hours stoppage;
>
> c) the appellant took steps to assist the Department in implementing contingencies to mitigate the impact of any stoppage on clients of the Department;
>
> d) discrete acts of organisation or encouragement of industrial action were not alleged to have occurred on each day for which a penalty was imposed;
>
> e) the industrial action was taken by members of the appellant as a result of serious and well-founded concerns about privatisation of disability services;
>
> f) the industrial action did not cause significant disruption or tangible harm to clients of the Department."

Ground 4 of the appeal was abandoned prior to the hearing in this Court.

56 As can be seen, grounds 1 and 2 deal with the Supreme Court's power to impose a penalty on the appellant for a contravention of the dispute orders made by the Commission under s 137(1)(a), while grounds 3, 5 and 6 deal with the amount of the penalty imposed by the Supreme Court. In these circumstances, the first two grounds can be dealt with together. However, prior to doing so, it is convenient to set out the history of the legislation.

The legislative history

57 In New South Wales, the first legislative regulation of strikes was contained in the *Industrial Arbitration Act 1901* (NSW) (the 1901 Act). Section 2 defined "strike" to mean "the cessation of work by a body of employees acting in combination done as a means of enforcing compliance with demands made by them or other employees on employers".

58 Section 34 of the 1901 Act provided that a person would be guilty of a misdemeanour if they did "any act or thing in the nature of a lock-out or strike; or suspends or discontinues employment or work in any industry" or "instigates to or aids in any of the above-mentioned acts". A penalty of a fine not exceeding £1,000 or imprisonment not exceeding 2 months was prescribed. While no prosecution could be commenced under the section except by leave of the Court of Arbitration established by the Act, the effect of the section was to make any strike unlawful.

59 The 1901 Act expired in 1908. The *Industrial Disputes Act 1908* (NSW) (the 1908 Act) was introduced as a replacement. The 1908 Act regulated strikes in a manner similar to the 1901 Act, but with a broader definition of "strike". Section 2 provided, "without limiting the nature of its meaning", that "to strike" or "to go on strike" meant:

> "the cessation of work by any number of employees acting in combination, or a concerted refusal or a refusal under a common understanding by any number of employees to continue to work for an employer in consequence of a dispute, with a view to compel their employer or to aid other employees in compelling their employer to accept terms of employment, or with a view to enforce compliance with demands made by them or other employees on employers."

60 Section 42 of the 1908 Act provided that a person was liable to a penalty if they did "any act or thing in the nature of a lock-out or strike, or takes part in a lock-out or strike, or suspends or discontinues employment or work in any industry" or "instigates to or aids in any of the above-mentioned acts". A penalty not exceeding £1,000 was prescribed, "or in default to imprisonment" not exceeding 2 months. Again, while it was provided in s 48 that no prosecution could be commenced under s 42 except by leave of the Industrial Court established by the Act, the effect of the section was to continue the system established under the 1901 Act which made any strike unlawful. Amendments

to the 1908 Act which were made in 1909 introduced prohibitions on certain types of conduct which was ancillary to a strike.

61 The 1908 Act was repealed by the *Industrial Arbitration Act 1912* (NSW) (the 1912 Act), which varied the simple prohibition on strikes established under the previous two Acts. However, substantially the same definition of "strike" was retained. Section 5 defined "strike", "without limiting its ordinary meaning", to include:

> "the cessation of work by any number of employees acting in combination, or a concerted refusal or a refusal under a common understanding by any number of employees to continue to work for an employer with a view to compel their employer or to aid other employees in compelling their employer to accept terms of employment, or with a view to enforce compliance with demands made by them or other employees on employers."

62 The provisions relating to strikes in the 1912 Act were contained in Part VI. Section 45(1) provided that a person was liable to a penalty if they did "any act or thing in the nature of a strike, or takes part in a strike, or instigates to or aids in any of the abovementioned acts". A penalty not exceeding £50 was prescribed. This was in similar terms to the provisions in the 1901 and 1908 Acts. Section 46(1) also provided that, if a person was a member of an industrial or trade union at the time of the offence, the union would be liable to pay part of the penalty imposed.

63 However, the 1912 Act also provided in s 48 that the Court of Industrial Arbitration established under the Act could grant a "writ of injunction" to restrain "any person from continuing to instigate to or aid in a lock-out or strike". A person would be guilty of a misdemeanour if they disobeyed the writ of injunction. A penalty of imprisonment not exceeding 6 months was imposed. This method of regulating conduct which was ancillary to a strike was new and was not included in the 1901 and 1908 Acts.

64 Unlike the 1901 and 1908 Acts, the 1912 Act provided for a separate prohibition on conduct engaged in by industrial and trade unions. Section 47 provided that an industrial or trade union was liable to a penalty if it "instigates or aids in any act for which any person is liable to be ordered to pay a penalty" under s 45(1). A penalty not exceeding £1,000 was prescribed, and the Court

of Industrial Arbitration was also permitted to suspend or cancel the registration of the union or any award relating to its members.

65 The relevant provisions in Part VI of the 1912 Act relating to strikes were repealed by the *Industrial Arbitration (Amendment) Act 1918* (NSW) (the 1918 Amendment Act). The replacement provisions introduced by the 1918 Amendment Act established the structure of the system which would govern strikes for the next several decades until the *Industrial Relations Act 1991* (NSW). These provisions continued the prohibition on strikes from the 1912 Act but provided for the first time that certain strikes would be lawful.

66 Section 45(c) provided that "any strike" was "illegal" if it had been "commenced prior to the expiry of fourteen clear days' notice in writing of intention to commence" the strike which had been given to the Minister administering the Act "by or on behalf of the persons taking part in such strike". A strike which commenced after the expiry of the stated notice period would not be "illegal" by reason of s 45(c).

67 However, this did not mean that a strike was lawful. A strike which was not illegal due to s 45(c) may still have been illegal due to the other provisions of s 45. Section 45(b) provided that "any strike" in an "industry, the conditions of which are for the time being wholly or partially regulated by an award or by an industrial agreement" was illegal unless the members of a union in the industry had voted to no longer be bound by the award or agreement no earlier than 12 months after the award or agreement had come into force. Section 45(a) also provided that any strike by several defined classes of public employees was "illegal". A strike would only be lawful if it did not fall into either of these categories as well as complying with the notice requirement in s 45(c).

68 In addition to providing that certain strikes not falling within the provisions of s 45 would be lawful, the 1918 Amendment Act also removed the penalties which were imposed on individuals who participated in illegal strikes. It also did not continue the provisions under the 1912 Act which permitted the Court of Industrial Arbitration to grant a writ of injunction restraining a person from "instigating" or "aiding" a strike. Instead, s 48B(i) provided that a person was guilty of "a default of public duty" if they "instigated or "aided" an illegal strike. A

penalty not exceeding £50 or imprisonment not exceeding 6 months was prescribed. Other provisions also imposed lesser penalties on conduct which was ancillary to an illegal strike.

69 The 1918 Amendment Act also changed the prohibitions on conduct which applied to unions. Section 46 provided that, if an illegal strike occurred, a trade union was liable to a penalty if its executive or members were "taking part in or aiding or abetting the strike". A penalty not exceeding £500 was prescribed. The penalties imposed in s 47 of the 1912 Act on a trade union itself "instigating" or "aiding" an illegal strike were removed, though a trade union may also have been a "person" for the purposes of s 48B.

70 These provisions introduced into the 1912 Act by the 1918 Amendment Act remained unchanged until the repeal of the 1912 Act by the *Industrial Arbitration Act 1940* (NSW) (the 1940 Act), which re-enacted them without any substantial changes. Section 99 defined categories of illegal strikes which corresponded to those which were formerly contained in s 45. Sections 100 and 103 replicated the penalties imposed on unions and individuals for engaging in strike activity which were provided for in s 46 and s 48B respectively. This system for regulating strikes remained the same until amended in 1959.

71 Despite its longevity, it has been suggested that the system established by the 1918 Amendment Act and maintained in the 1940 Act prior to 1959 did not operate as intended. The notice which was required to be given for a strike to be lawful under s 45(c) and later s 99(c) was said to have rarely been given, which meant that most strike activity would have been "illegal" under the terms of the legislation. However, prosecutions for engaging in illegal strike activity were also said to have been rare. The system thus apparently provided an ineffective means of controlling and resolving industrial disputes. See C P Mills, *Industrial Laws: New South Wales* (Butterworths, 4th ed, 1977) 399-400.

72 The *Industrial Arbitration (Amendment) Act 1959* (NSW) (the 1959 Amendment Act) made significant changes to this system. It removed the provision which imposed a penalty on a person for conduct which "aids or instigates an illegal strike", which was introduced as s 48B by the 1918 Amendment Act and was

maintained in s 103 of the 1940 Act. It also removed the penalties imposed on conduct which was ancillary to an illegal strike. However, it retained the provision which imposed a penalty on a trade union if its executive or members were "taking part in or aiding or abetting the strike", which was introduced as s 46 by the 1918 Amendment Act and was maintained in s 100 of the 1940 Act

73 The 1959 Amendment Act also repealed the definition of an "illegal" strike in s 99(c). At the same time, it amended the definition of an "illegal" strike in s 99(b). Formerly, the section defined an illegal strike as one which occurred in an "industry, the conditions of which are for the time being wholly or partially regulated by an award or by an industrial agreement" unless the members of a union in the industry had voted to no longer be bound by the award or agreement no earlier than 12 months after the award or agreement had come into force. The 1959 Amendment Act amended s 99(b) so that a strike to which it applied would not be illegal if it complied with the terms of the newly introduced s 99A as an alternative to fulfilling the former condition requiring a vote.

74 Section 99A provided that the executive of an industrial union could give notice to the Minister administering the Act in terms similar to those previously applying under s 99(c). Providing notice became an alternative requirement to holding a vote rather than a cumulative requirement as it had been under the 1940 Act prior to 1959. Subject to amendments altering the amount of the penalties applying to contraventions of the provisions of the 1940 Act, the system was not relevantly altered any further until 1991.

75 It can be seen from the legislative history of the regulation of strikes in New South Wales that the system which prevailed for most of the 20th century differs substantially from that in force under the current IR Act and its predecessor, the *Industrial Relations Act 1991* (NSW). The courts and commissions established under the previous system did not have any specific power to order that a strike or "industrial action" cease, except for a short period under the 1912 Act prior to 1918. In most cases, such strikes would have been presumptively unlawful under the legislation anyway. There was no need for the system to provide for separate orders prohibiting strikes if they

were already unlawful. Therefore, courts and commissions arbitrating disputes under this system did not have to deal with the questions which now arise in relation to the making of orders prohibiting industrial action under the current IR Act.

76 As I have noted, the *Industrial Relations Act 1991* (NSW) (the 1991 Act) established a substantially different industrial relations system from that prevailing under the 1940 Act. The 1991 Act introduced a distinction between disputes concerning rights which were "settled" and those which were not. Each form of dispute had a different dispute resolution mechanism prescribed by the Act. The sections which identified the different disputes to which the Act applied were s 193 and s 201. The former section related to disputes about rights which were "settled" and the latter related to disputes about rights which were not. Broadly speaking, "settled" rights related to rights conferred by awards which were in force at the time of the dispute, whilst other rights were those which were not so covered.

77 The 1991 Act also created a new category of conduct called "industrial action", which was defined in s 4(1). This replaced the concept of a "strike" under the previous legislation. The definition was in the following terms:

> "industrial action" means:
>
> > (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which in either case is a restriction or limitation on, or a delay in, the performance of the work, where the terms and conditions of the work are wholly or partly governed by an award or agreement, or by a determination, order or direction of the Commission or the Industrial Court; or
> >
> > (b) a ban, limitation or restriction on the performance of work, or on an acceptance of or offering for work, in accordance with the terms and conditions of an award or any such agreement, or of a determination, order or direction of the Commission or the Industrial Court; or
> >
> > (c) a ban, limitation or restriction on the performance of work, or on an acceptance of or offering for work, that is adopted in connection with a question, dispute or difficulty concerning an industrial matter; or
> >
> > (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work; or
> >
> > (e) a lock-out or (without limiting the scope of that term) a closing of a place of employment, or a suspension of work, or a refusal by an employer to employ any number of employees with a view to

> compelling those employees, or to aid another employer in compelling employees, to accept conditions of employment; or
>
> (f) a strike or (without limiting the scope of that term) the cessation of work by any number of employees acting in combination, or a concerted refusal under a common understanding by any number of employees to continue to work for an employer with a view to compelling their employer, or to aid other employees in compelling their employer, to accept conditions of employment, or with a view to enforcing compliance with demands made by them or other employees on employers,
>
> unless it is an action by employees that has been authorised or agreed to by their employer or is an action by an employer that has been authorised or agreed to by or on behalf of employees of the employer."

78 It can be seen that the previous definition of "strike" was included in paragraph (f) of the definition. However, the other paragraphs substantially widened the scope of the definition of "industrial action". At the same time, the ambit of "unlawful industrial action" was narrowed considerably. Section 215 only provided for three very limited circumstances in which industrial action would be "unlawful", namely, when the action was based on a "demarcation dispute", where it is engaged in by an industrial organisation to support another industrial organisation involved in a separate industrial dispute, and where it was in support of wages or benefits for the time spent on engaging in industrial action. This was a significant change from the previous system for regulating strikes, under which most strikes were presumptively unlawful unless certain conditions were fulfilled.

79 In relation to those disputes about rights which were "settled", s 194(1) provided that "if industrial action to which this Division applies is taking place, or is threatened, the Industrial Court may grant an injunction in order to prevent the industrial action or to bring the industrial action to an end". This provision appears to suggest that a distinction is being drawn between industrial action which is "taking place" and industrial action which is only "threatened". However, s 193(3) states that "this Division also applies to threatened industrial action that, if engaged in, would be industrial action to which this Division applies". The effect of this section would appear to be that "threatened industrial action" was deemed to be "industrial action" for the purposes of s 194, though this interpretation is not beyond doubt.

80 It would therefore seem that the powers of the Industrial Court under s 194 extended to making orders relating to threatened industrial action rather than just the intended industrial action itself. This seems to be the approach in the two cases which considered the issue: the decision of the Industrial Court in *Davids Distribution Pty Ltd v National Union of Workers, New South Wales Branch* (1995) 60 IR 285, and the decision of the Court of Appeal in *National Union of Workers, New South Wales Branch v Industrial Court of New South Wales* (1996) 70 IR 80. In that sense, the 1991 Act reintroduced the restrictions on conduct which fell short of an actual strike which prevailed prior to the 1959 Amendment Act by conferring on the Industrial Court at least the power to grant an injunction restraining threatened strike action.

81 This position may be contrasted in relation to those disputes about rights which were not "settled". In relation to such disputes, the Industrial Relations Commission was empowered to undertake a conciliation and arbitration process. Section 204(2) predicated such a process either on there being "threatened, probable, or contemplated industrial action" or on industrial action having actually commenced. Under s 208(1), if and only if conciliation had failed and the Commission had issued a certificate of attempted conciliation could the Commission then proceed to arbitration.

82 Section 208(3)(c) provided that the Commission could make "dispute orders" during arbitration proceedings. Section 210(1), which deals with dispute orders, provided that "if industrial action concerning a question, dispute or difficulty to which this Part applies is taking place, or is threatened, the Commission may …. order a person to cease, or to refrain from, industrial action".
Section 210(6)(c) provides that the Commission must specify the time within which the order is to be complied. There is no provision similar to s 193(3) which deems "threatened industrial action" to be "industrial action" for the purposes of s 210.

83 In the second reading speech for the bill for the 1991 Act in the Legislative Assembly on 28 August 1991, the Minister for Industrial Relations made the following remarks regarding the different approaches in relation to "settled" rights and those rights which are not "settled":

“The bill makes a clear distinction between the phase of negotiating an award or agreement and the phase during which the award or agreement is in force. The grievance and dispute settling procedures required by the bill are specifically linked to resolving disputes during the latter phase. Another principal reason why grievance procedures have generally been unsuccessful in Australia is that either party can cut short the process set out in the procedure at any time and unilaterally take a dispute to the tribunal. The bill seeks to avoid this problem by providing that the commission is not to deal with disputes concerning personal grievances or matters in respect of an award or agreement unless the parties have complied with the settlement procedures so far as is reasonably practicable. However, if the settlement procedures are not successful in solving the dispute, an application may be made to the commission for settlement. If the commission cannot bring the parties to an agreement it may make a determination. However, the commission cannot change conditions of employment by arbitration during the rights phase. The Government recognises that while the correct legislative framework is essential to encourage the successful use of grievance procedures at the workplace level, other actions are necessary.

…

… However, for the system to have any chance of working effectively it is critical that those parties operating within the system take the bad with the good and accept the tribunals' decisions. While voluntary compliance with commission decisions is to be preferred, there must exist, as a last resort, effective sanctions of both a monetary and non-monetary nature where parties fail to comply.

Of equal importance is the principle that once the terms of an award or agreement are determined one party cannot use industrial action to overturn that award or agreement. This principle is closely linked to the concept of the sanctity of awards and agreements and is crucial if we are to introduce greater stability and predictability into our industrial relations system, and a greater sense of ownership and responsibility by the parties. To give effect to these two principles the bill introduces new dispute order and injunction processes. In particular, the court is empowered to issue injunctions against any person who engages in industrial action during the nominal term of an award or agreement; that is, during the rights phase. Breach of an injunction may lead to the imposition of substantial penalties, of either a monetary or non-monetary nature. This is based on the principle that such industrial action is unnecessary - in the first instance because of the fixed term nature of awards and agreements; in the latter instance because unions and employers will have an obligation to use grievance and dispute procedures and then may have access to the commission to settle such matters without the need for industrial action.

Where there is industrial action in the course of negotiations for an award or agreement - that is, during the interest phase - the commission will be required to attempt to resolve the dispute by conciliation. However, if conciliation fails, the commission may order a person to cease, or to refrain from, industrial action by issuing a dispute order. The person who is the subject of such an order must satisfy the commission that he has complied with the order within a specified time frame. Failure to comply with such an order may lead to the imposition of substantial penalties by the court. In addition to the injunction and dispute order processes, certain types of industrial action will be unlawful. It will be an offence to take industrial action if it is based on a demarcation dispute, if its purpose is to support another industrial organisation engaged in

> industrial action, or if it is based on an unauthorised claim for wages or benefits in respect of time spent engaging in industrial action."

It can thus be seen that the power to impose pecuniary penalties, both in the case of disputes arising during the term of an award or agreement and in other cases as a result of the contravention of dispute orders, was regarded as an important part of the industrial relations system introduced by the 1991 Act.

84 The current IR Act removed the distinction between disputes in relation to rights which are "settled" and those rights which are not "settled". It also removed the provision in the 1991 Act which provided that certain strikes were unlawful. Any dispute which is notified to the Commission was subject to the same process of conciliation and arbitration regardless of whether the rights were "settled" or not. However, the conciliation and arbitration process provided for disputes under the current IR Act is similar to that provided in relation to disputes under the 1991 Act in relation to rights which were not "settled". Section 133 requires the Commission to attempt to resolve a dispute first by conciliation. Section 135 provides that the Commission can proceed to arbitration only if conciliation fails and the Commission issues a certificate of attempted conciliation. In arbitration proceedings, s 136(1)(c) permits the Commission to make the dispute orders specified in s 137(1). However, the types of dispute orders which may be made under the current IR Act are much wider than under s 210 of the 1991 Act.

85 In the second reading speech in respect of a bill introduced in the Legislative Council on 23 November 1995 which was not passed but on which the current IR Act was substantially based, the Attorney-General and Minister for Industrial Relations made the following remarks concerning the effect of the bill:

> "Under this bill, the commission may make the following kinds of dispute orders when dealing with an industrial dispute in arbitration proceedings: it may order a person to cease or refrain from taking industrial action; it may order a person to cease a secondary boycott imposed in connection with the industrial dispute; it may order an employer not to dismiss employees in the course of the industrial dispute if the employer has threatened to do so; and it may order an employer to reinstate or re-employ any one or more employees who were dismissed in the course of an industrial dispute or whose dismissal resulted in an industrial dispute, thus re-investing the commission with its useful pre-1991 Act jurisdiction in this regard.
>
> The legislation provides the commission in court session with a suitable range of powers to deal with contraventions of dispute orders, including powers to

> impose financial penalties against industrial organisations or employers. It should be noted that the legislation has been drafted to ensure that while individual officials of industrial organisations and workers may be the subject of dispute orders, they cannot be the subject of fines for breach of a dispute order. In the case of officials of industrial organisations, the commission may apply the penalty against the organisation for whom the official is acting. In the case of individual workers other penalties, such as the suspension or modification of entitlements under an award or agreement, are more appropriate and equally sufficient deterrents."

86 I do not think that this legislative history is of great assistance on the question raised in these proceedings. It does demonstrate that, until the 1991 Act, the Industrial Relations Commission and its predecessors had no power to restrain actual or threatened industrial action, presumably because industrial action was prima facie illegal unless particular conditions were fulfilled. While it may be relevant that the power to grant injunctions against threatened or actual industrial action introduced under the 1991 Act was removed by the current IR Act, this was done in circumstances where the ambit of the dispute orders which could be made was much wider than was previously the case. Further, the second reading speech does not indicate any legislative intention that the Commission has no power to make what might be described as "binding, preventative orders" such as those made in the present case.

87 What the legislative history also demonstrates is a movement away from the position where some strikes were illegal and a change from the approach under which disputes were classified by whether they arose out of matters covered by an award or otherwise. Instead, there is an increasing emphasis on the resolution of industrial disputes by the Commission, including a significant expansion of the types of dispute order which it was entitled to make. It is in that context that s 137(1)(a) falls to be considered.

Grounds 1 and 2

a The appellant's submissions

88 The appellant accepted that orders under s 137 could be made against an industrial organisation, stating that this was made clear by s 138(1)(a) and s 138(1)(b) of the IR Act. It is also clear that s 139(3)(e) and s 139(4) envisage a penalty being imposed on an industrial organisation.

89 Counsel for the appellant accepted that an industrial organisation giving a direction to its members not to go to work comes within the definition of

industrial action, but that an order under s 137(1)(a) that an industrial organisation and its members refrain from taking industrial action would only be contravened when the members complied with the direction. He submitted, however, that the orders made by the Commission in the present case went beyond ordering the appellant and its members to refrain from taking industrial action and encompassed acts of "aiding and abetting" or "encouragement" of such action so as to ground a contravention on days when no industrial action in fact occurred.

90 The appellant submitted that the power to make orders under s 137(1)(a) could not "extend to any order that the Commission might consider would be useful or would enhance the objectives of its orders". The appellant relied in that regard on what was said by the Full Court of the Federal Court of Australia in *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* (2008) 166 FCR 108; [2008] FCAFC 26 at [38].

91 Counsel for the appellant stated that, merely by communicating over the relevant period that the appellant continued to propose to impose a ban on 14 February 2017, or continued to direct its members not to attend work on 14 February 2017, it had not contravened and could not contravene any order properly made by the Commission. He submitted that, to the extent the Full Bench of the Commission in Court Session reached a contrary conclusion in *Bluescope Steel Ltd v Australian Workers' Union, New South Wales* (2004) 137 IR 176; [2004] NSWIRComm 222, the decision was incorrect and should not be followed.

92 The appellant submitted that order A1, to the extent that it purported to order the applicant "immediately to cease organising industrial action", went beyond ordering the appellant to "refrain from taking industrial action" and was not supported by s 137(1)(a). Counsel for the appellant submitted that it was the "taking" of the industrial action to which an order could be directed, not the "communication to members of a direction to cease work at a time in the future". He submitted that, if the industrial action did not occur, there could be no breach of an order directing an organisation to "refrain from taking industrial action".

93 Counsel for the appellant submitted that it did not follow from this construction of the legislation that a dispute order could never be made against an industrial organisation. He submitted that this followed from paragraph (b) of the definition of "industrial action", which extended its meaning to a "ban, limitation or restriction affecting the performance of work". Referring to a decision of the Federal Court of Australia in *Williams v Construction, Forestry, Mining and Energy Union* (2009) 179 IR 441; [2009] FCA 223, he submitted that the ban is "imposed on the day in which the employees are directed to not attend work". He submitted that the power to order industrial action to "cease" was sufficient to enable the Commission to exercise its functions.

94 Counsel for the appellant also submitted that non-compliance with directions or recommendations made by the Commission under s 134(2), whilst not having penal consequences, could be taken into account by the Commission in exercising its functions. He submitted that this wider power to make directions or recommendations was sufficient to fill any gap in the Commission's powers to conciliate and arbitrate disputes which might be thought to exist by reason of the appellant's interpretation of s 137(1)(a).

95 The appellant submitted that the interpretation for which it contended was not inconsistent with the objects of the IR Act. It emphasised that it was not submitting that an order could not be made against an industrial organisation, but that the order must be capable of characterisation as an order directing the organisation "cease or refrain from taking industrial action".

96 Counsel for the appellant submitted that, contrary to the submissions of the respondent, paragraph (b) of the definition of "industrial action" in the IR Act provided no assistance to the respondent's contentions. He pointed out that an industrial dispute is not "industrial action". He also submitted that the reference in the definition to bans, limitations or restrictions having been "adopted" supports the view that what s 137(1)(a) is referring to is a ban, limitation or restriction that has "actually been adopted". He accepted that various cases had referred to the need for a "common-sense resolution" of industrial disputes, but submitted that none of them suggested that the sensible control of such

disputes required penalties to be imposed other than for the period in which the industrial action in fact occurred.

97 So far as ground 2 of this appeal was concerned, the appellant submitted that, if the orders made by the Commission were construed as no more than "an order that the appellant not impose a ban, restriction or limitation on the performance of work", then the orders, if validly made, could only be contravened on the day that the ban, restriction or limitation was in fact imposed.

98 The appellant submitted that the reference to "the first day the contravention occurs" and "each subsequent day" in s 139(4)(b) was to days on which a person fails to "cease or refrain from taking industrial action", that is, days on which the ban, restriction or limitation is imposed. In the present case, it was submitted that the appellant organised a single instance of industrial action to occur on only one day.

99 The appellant submitted that the approach adopted by the primary judge in assessing the penalty to be imposed could give rise to "perverse consequences", stating that there would be a greater liability to penalties if industrial action was organised in a responsible manner with notice to employers when compared to a "wildcat strike" or a strike without notice extending over more than one day.

b The respondent's submissions

100 Senior counsel for the respondent submitted that what the appellant did by the publication of the Flyer and the Bulletin was, in effect, to impose a ban. In its written submissions, the respondent submitted that the dispute orders made by the Commission were orders that the industrial organisation "cease or refrain from taking industrial action", and that the words "advising, authorising, encouraging, directing, aiding or abetting its members to organise or take part in industrial action" were within the concept of "taking industrial action". The respondent submitted that these matters were ancillary to the matters specified in the definition of "industrial action", but stated that this would not preclude them from falling within the broad concept of "taking industrial action", which

included acts done in preparation for and organisation of the industrial action itself.

101 In dealing with the opening words of the definition of "industrial action" in the IR Act, senior counsel for the respondent referred to what was said by Dixon J in *McKernan v Fraser* (1931) 46 CLR 343 at 361: that "the ordinary meaning of strike is confined to ceasing work – 'downing tools'". Senior counsel for the respondent submitted, however, that industrial organisations themselves do not "strike" and that it was clearly contemplated that industrial organisations could be the subject of dispute orders under s 137. He submitted that the types of orders contemplated by s 137 were not orders solely concerned with the actual strike by members, but those which were also concerned with the arrangement of the industrial action by industrial organisations. He submitted that, although the Full Bench of the Commission in Court Session in *Bluescope Steel Ltd v Australian Workers' Union, New South Wales* (2004) 137 IR 176; [2004] NSWIRComm 222 referred to such orders as "ancillary orders", it was made clear that the Commission was not exercising a power which was separate from that contained in s 137(1)(a) of the IR Act.

102 Senior counsel for the respondent submitted that this construction was supported by the statutory context. He pointed to s 130(1)(a), which empowered an industrial organisation to notify an industrial dispute to the Commission, s 146(1)(b), which imposed on the Commission the function of resolving industrial disputes, and s 226(b), which referred to an industrial organisation having "engaged in any industrial action", which he submitted would include the calling of a ban in a "vital industry", which of itself might have a serious impact on the industry even prior to the time at which the ban took effect.

103 In its written submissions, the respondent pointed out that the Commission's power to make dispute orders under s 137 of the IR Act is only exercisable in arbitration proceedings conducted in accordance with s 135, that being part of the process for resolving industrial disputes notified under s 130 by persons which included industrial organisations but not employees.

104 Senior counsel for the respondent pointed to the fact that s 137(1) referred to "kinds of dispute orders", which he described as a "general description". He referred to the fact that "industrial dispute" was defined by reference to an "industrial matter" and included a "threatened or likely industrial dispute".

105 In dealing with the definition of "industrial action", the respondent pointed out in its written submissions that the appellant itself could not "strike or adopt a practice relating to the performance of work that restricts, limits or delays" its performance. It also submitted that it could not "adopt a ban, limitation or restriction" within the meaning of paragraph (b) of the definition of "industrial action". In those circumstances, it submitted that an industrial organisation could only be the subject of an order under s 137(1)(a) if the concept of "taking industrial action" is properly understood to refer to what an industrial organisation may do to bring about a strike or one of the other matters referred to in the paragraphs of the definition of "industrial action". Senior counsel for the respondent submitted that if there was no power to make such an order, then the operation of s 138 of the IR Act would be frustrated.

106 Senior counsel for the respondent referred to the expression "adopted in connection with an industrial dispute" which appears in paragraph (b) of the definition of "industrial action". He submitted that it did not impose a limitation that an order directing an industrial organisation to "cease or refrain from taking industrial action" could only be made if a ban imposed by an industrial organisation was "adopted" in the sense of being given effect to by the employees going on strike. He said that such a construction would give no content to the words "refrain from taking industrial action" in s 137(1)(a) of the IR Act. He submitted that, if this was the case, then the structure of the legislation would be undermined. He further submitted that merely to make an order against employees is "virtually useless", if only because of the difficulty of ascertaining their identities.

107 Senior counsel for the respondent submitted that, if "adoption" meant, in effect, the decision to adopt a ban, which is effected by encouragement of compliance with the ban, then that could be restrained by an order under s 137(1)(a). He submitted that, in those circumstances, "the process of adoption is not a single

act"; it could be a "continuous act" by an industrial organisation maintaining and advocating that its members give effect to the ban. He submitted that words such as "encouragement and the like" are really no more than different ways of expressing the process of adoption.

108 Senior counsel for the respondent also submitted that, as an alternative, the appellant must at least have been in breach of the dispute orders made by the Commission on 14 and 15 February 2017 due to the fact that the appellant's conduct was found by the primary judge to have continued on 14 and 15 February 2017 while the strike was actually occurring.

109 So far as the maximum penalty was concerned, senior counsel for the respondent submitted that s 139(4)(b) was "clear and unambiguous". In its written submissions, the respondent submitted that this did not result in "perverse consequences", and that the appellant's approach conflated the maximum penalty with the penalty to be imposed and failed to appreciate that the Court would have regard to the nature and circumstances of the contravention in determining the appropriate penalty.

c Consideration

110 In considering the issues raised by grounds 1 and 2, it is necessary first, in my opinion, to consider the actual scope of the dispute orders made by the Commission. If the dispute orders were not contravened by the appellant simply maintaining the Flyer and the Bulletin on its website, then the question of the power to make the dispute orders does not arise.

111 It seems to me relatively clear that each of orders A1 and A2 are not dependent on a strike in fact occurring. Order A1 includes a direction "immediately to cease organising … any form of industrial action in the area of disability services operated by" the Department, whilst order A2 directs the appellant to not "direct … members of [the appellant] to organise or take further industrial action" in that area. It seems to me that the placement of the Bulletin on its website and the maintenance of the Flyer on its website involved steps in the organisation of industrial action in contravention of order A1 and encouragement or direction to members of the appellant to take further

industrial action in contravention of order A2. The contrary is not contended in the grounds of appeal.

112 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; [2009] HCA 41 at [47], Hayne, Heydon, Crennan and Kiefel JJ stated that "the task of statutory construction must begin with a consideration of the text itself" and that the "language which has actually been employed in the text of legislation is the surest guide to legislative intention". Their Honours stated that the "meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy".

113 In *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936; [2017] HCA 34 at [14], Kiefel CJ, Nettle and Gordon JJ emphasised the importance of considering the text in context. They made the following remarks:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

See also the comments of Gageler J at [35]-[37].

114 The provisions here in question undoubtedly pose difficulties of construction. The appellant effectively submitted that the powers to make dispute orders could only be directed to preventing industrial action, such that any dispute orders which were made could only be contravened by the actual occurrence of a strike or any of the related activities referred to in the definition of "industrial action" in the IR Act. As was put in argument, on this construction of the legislation, any offence committed by the appellant in publishing the Flyer and Bulletin on its website was contingent on the actual occurrence of a strike.

115 That construction certainly has textual support. First, the dispute orders which the Commission may make under s 137(1)(a) are orders to "cease or refrain

from taking industrial action". In common parlance, "cease" means "stop", whilst "refrain" means "not take". Read with the definition of "industrial action", the section would then mean that the Commission could make an order to "stop or not take strike action", including the activities referred to in paragraphs (a), (b) and (c) of the definition of "industrial action".

116 Further support for this construction can be derived from the definition of "industrial action" itself. It is defined to mean "a strike by employees", which includes the activities in paragraphs (a), (b) and (c). Although the expression "strike" is not defined, unlike in the earlier legislation to which I have referred, there is no suggestion that the legislature intended it to have a different meaning to that contained in the earlier legislation, or at least, to the common law meaning discussed by Dixon J in *McKernan v Fraser* (1931) 46 CLR 343 at 361 to which I have referred at [101] above. On that construction, "industrial action" would not extend to a direction to strike, or for that matter, the organisation of a strike.

117 However, there are difficulties with this construction. It is clear and has been conceded by the appellant that dispute orders can be made against an industrial organisation. Section 138(1)(a) of the IR Act provides that a dispute order can be made against "a party" to a dispute. A party to a dispute can include an industrial organisation which has the power to notify the Commission of the existence of a dispute under s 130(1)(a). So much also appears to be assumed by s 138(1)(b) in referring to an "industrial organisation that is such a party" to a dispute. Further, s 139(3)(e) and s 139(4) expressly provide for penalties to be imposed on an industrial organisation for contravention of a dispute order, while penalties cannot be imposed on individual employees. In the present case, the appellant, in organising and advocating a strike by its members, was a party to an industrial dispute under s 138(1)(a).

118 If it is accepted that the definition of "industrial action" is read literally, as submitted by the appellant, it is difficult to see what types of dispute orders could be made against an industrial organisation, even though this is contemplated by the IR Act as set out in the previous paragraph. Industrial

organisations do not themselves engage in strikes, adopt practices relating to the performance of work under paragraph (a) of the definition of "industrial action", or refuse to attend for work or to perform work so as to attract paragraph (c) of the definition. Further, if the expression "adopted in connection with an industrial dispute" in paragraph (b) means "adopted by employees", then there is no industrial action by an industrial organisation in respect of which dispute orders can be made. The relevant industrial action would be the "adoption" of the ban, restriction or limitation by the employees rather than any conduct by the industrial organisation. It was not contended that an industrial organisation could be fined simply as a result of its members contravening dispute orders.

119 Given this difficulty with the definition of "industrial action", I think that there is more force in the construction of the phrase "adopted in connection with an industrial dispute" as merely meaning "put into effect in connection with an industrial dispute" rather than "adopted by employees". However, even on that construction, it is again difficult to see how an industrial organisation could be ordered to "cease or refrain from taking industrial action", when the action is necessarily "taken" or "put into effect" by employees.

120 The appellant sought to overcome this difficulty by submitting that the words "adopted in connection with an industrial dispute" could refer to "adoption" by an industrial organisation. However, if the word "adopt" is read as extending to an industrial organisation directing its members to put into effect such a ban, or advocating that they do so, the "adoption" could take place prior to the strike actually occurring or the ban being put into effect. Such a result would not assist the appellant in the present case, since it would seem that, on this construction, the appellant would have contravened the dispute orders merely by directing its members to strike through the Flyer and the Bulletin.

121 As I indicated at [114] above, the appellant attempted to escape this further difficulty by submitting that the Commission had power to order an industrial organisation to cease or refrain from "imposing a ban, restriction or limitation affecting the performance of work", but that such an order would only be contravened if the ban, restriction or limitation was in fact put into effect or

carried out. However, this construction itself extends the scope of s 137(1)(a) beyond simply directing that industrial action not take place, and encompasses an order directing an industrial organisation not to take steps to organise industrial action. Although the appellant did attempt to qualify the scope of this order by submitting that a contravention would not occur until the industrial action took place, there does not seem to be any reason why a contravention should be limited to the circumstances where industrial action in fact takes place if it is accepted that such an order could be made. As senior counsel for the respondent pointed out, considerable industrial disruption can be caused by the threat of industrial action as well as from industrial action itself. In the present case, for example, steps had to be taken by the Department to alleviate the consequences of the strike prior to the date on which the strike commenced.

122 Further, it must be remembered that the Commission's duty to conciliate and arbitrate industrial disputes under s 133 and s 136 extends to dealing with a "threatened or likely industrial dispute" due to the definition of "industrial dispute" in the IR Act. It would be an unusual limitation on the power of the Commission and contrary to the objects of the IR Act to resolve disputes by conciliation and arbitration if, after arbitration, the Commission could not make an order to prevent such a "threatened or likely" dispute crystallising into industrial action, such as an order requiring an industrial organisation to refrain from directing its members to go on strike. Such orders assist the Commission in performing its functions of resolving industrial disputes through a process of conciliation and arbitration in a "prompt and fair manner" in accordance with the object expressed in s 3(g), and by providing "a framework for the conduct of industrial relations that is fair and just" in accordance with the object expressed in s 3(a).

123 It must also be remembered that s 137(1) refers to "the following kinds of dispute orders". That expression lends support to the conclusion that, in dealing with an industrial dispute, the Commission can make orders consistent with the object of resolving industrial disputes expressed in s 3(g), including orders that may prevent threatened industrial disputes from occurring.

124 Therefore, in considering the meaning of the text of s 137(1)(a) alongside its statutory context and the purpose of the IR Act as a whole, it is first relevant to bear in mind that dispute orders can be made in dealing with a "threatened or likely industrial dispute", as I noted at [122] above, and that, once it is accepted that orders can be made against an industrial organisation which cannot itself take "industrial action" as defined under the IR Act, then the power in s 137(1)(a) must be read to extend to the Commission ordering the industrial organisation to "cease or refrain" from causing its members to take industrial action. This would encompass the dispute orders made by the Commission in the present case. Ultimately, so much seems to have been accepted by the appellant, as I noted at [120] above. Once that is accepted, consistently with the text and context, there is nothing in the section itself which indicates that such an order will only be contravened if the threatened industrial action takes place.

125 In these circumstances, the power of the Commission under s 137(1)(a) extends to making orders directing an industrial organisation to refrain from directing its members to engage in industrial action or to refrain from organising industrial action as defined in the IR Act. Further, contravention of such orders is not conditional on the strike or industrial action actually occurring.

126 It follows that the dispute orders made by the Commission were within power and that the primary judge was correct in determining that they were contravened.

127 As I noted at [90] above, the appellant placed reliance on the decision of the Full Court of the Federal Court of Australia in *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* (2008) 166 FCR 108; [2008] FCAFC 26 at [38], where Gray and North JJ held that s 496(1) of the *Workplace Relations Act 1996* (Cth) which provided that the Commission may make an order that industrial action "stop, not occur and not be organised" did not empower the Commission to "choose whatever means it thinks likely to enhance the attainment of the object of its orders". However, the question in the present case is whether an order to cease organising any form of industrial action (order A1) or prohibiting the appellant from directing its members to take

industrial action (order A2) was within the power of the Commission as a matter of construction of the IR Act. In my opinion, in the present case, the IR Act did extend to empower the Commission to make such orders.

128 In *Sydney Water Corporation v Australian Services Union (NSW and ACT Branch)* (2005) 146 IR 388; [2005] NSWIRComm 305 at [37], the Full Bench of the Commission stated that, in furthering the objects of the IR Act, "it is vital that the Commission recognise the broad discretion granted by [the IR Act] to fashion appropriate relief by reference to the merits of the industrial dispute itself and the steps necessary to resolve it", which it stated involved a variety of considerations, including the "public interest in managing the industrial dispute in a fair and just manner with minimum disruption and disputation".

129 This passage from the judgment was approved by the Industrial Court in *BlueScope Steel (AIS) Pty Ltd v Australian Workers' Union, New South Wales* (2006) 153 IR 176; [2006] NSWIRComm 149 at [24]-[26], where the Court stated that s 137(1)(a) should not be given a confined operation. Although the powers of the Commission to make dispute orders under s 137(1)(a) are not unlimited, I agree for the reasons given by the Industrial Court that the section should be given a broad interpretation. This is consistent with the view of s 137(1) which I have expressed at [124]-[125] above.

130 Because of the view I have taken of the construction of s 137(1)(a), it is unnecessary to consider whether there was an implied power to make the dispute orders made by the Commission as "necessary for or facilitative of" other types of dispute orders provided for in s 137(1)(a): *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Engineering Union* [2018] HCA 3 at [115]. However, in the context of the IR Act, there is much to be said for the proposition that there was an implied power to make such orders.

131 It follows that ground 1 has not been made out.

132 Ground 2 may be dealt with shortly. Once it is accepted the Commission had the power to make the dispute orders under s 137(1)(a), it follows that the dispute orders made by the Commission were contravened on a daily basis by the continued maintenance of the Flyer and the Bulletin on the appellant's

website, as found by the primary judge. The "perverse consequences" of this outcome referred to by the appellant in its submissions can be avoided in determining the appropriate penalty by having regard to the nature and effect of the contravention, which will be discussed in relation to grounds 3, 5 and 6. This ground has not been made out.

Grounds 3, 5 and 6

a The appellant's submissions

133 The appellant submitted that, even if it was open to the Court to order penalties for daily contraventions, the primary judge failed to give consideration to whether the total penalty determined by adding up the daily penalties was "just and appropriate". Counsel for the appellant submitted that the approach adopted by the primary judge was to determine that the contravention was in the "middle range of objective seriousness" and then fix a penalty of half the maximum for the first day and the next six days and then a slightly higher amount for the remaining period. He submitted that the primary judge then totalled the amounts arrived at without considering whether the overall penalty was "just and appropriate" in all the circumstances.

134 Counsel for the appellant pointed out that from the period from 3 February 2017 until 15 February 2017 there was no conduct by the appellant which contravened the dispute orders aside from the continued display of the Flyer and the Bulletin on the website.

135 The appellant submitted that it was "artificial" to describe the task of the primary judge as "the imposition of a single penalty for a single contravention". It submitted that, even though it was envisaged that there could be a "continuing contravention", s 139(4)(b) permits the imposition of a discrete penalty with respect to each day on which the contravention occurs or continues.

136 So far as ground 5 was concerned, the appellant pointed to the comments by the primary judge to the effect that the maximum penalties were "inadequate" and that they did not have "a really significant deterrent effect". I have earlier referred to these comments at [43] and [46] above. It was submitted that the primary judge's reasons "can only be read as being influenced by the view of

the Court that the maximum penalty was inadequate", and that in permitting himself to be so influenced, the primary judge erred in fixing the penalty.

137 In relation to ground 6, the appellant submitted that the sentence was manifestly excessive having regard to a number of considerations. First, the strike was only planned for a period of 24 hours. Second, the imposition of a discrete penalty for each day resulted in a penalty which was far higher than an objectively more serious case of a longer and more disruptive strike. Third, discrete acts of organisation and encouragement aside from the continued display of the Flyer and Bulletin were not alleged to have occurred on each day between 2 February 2017 and 15 February 2017. Fourth, there was a single course of conduct and no separate contraventions of the dispute orders. Fifth, the strike was organised in a "responsible manner" and was "designed to reduce disruption and inconvenience", and resulted in minimal financial costs to the New South Wales government, with no person who was being provided with care services by the Department suffering any tangible harm.

138 The appellant accepted that it consciously disregarded the order to cease organising the strike, but submitted that this did not justify the level of penalty imposed. It pointed to the fact that any contravention of a dispute order was likely to be deliberate and that Parliament can be assumed to have taken that into account in assessing the maximum penalty.

139 The appellant also pointed to the fact that it was a large union, with only one previous contravention, and that the strike was taken as a result of "serious and well-founded concerns about the privatisation of disability services".

140 The appellant also pointed to the fact that the highest penalty previously imposed was $17,500, so that the penalty in the present case was well outside the historical pattern and was manifestly excessive. The appellant noted that, in the previous highest case, no penalty was imposed in respect of the period preceding the stoppage.

141 In those circumstances, the appellant noted that the penalty imposed by the primary judge was almost five times higher than any previous penalty, despite the fact that there had previously been more substantial and disruptive instances of industrial action. It pointed to the objective of achieving

consistency in sentencing, referring to *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 (*Hili v The Queen*). It also submitted that to say that the contravention continued for 14 days "overlooks that the industrial action actually took place and was only ever planned to take place for a period of 24 hours". It contrasted the present case with the decision of the Industrial Court in *Australian Workers' Union (NSW) v Bluescope Steel (AIS) Pty Ltd* (2006) 151 IR 153; [2006] NSWIRComm 71, in which a penalty of $8,000 was imposed for a three-day "wildcat" strike carried out in contravention of dispute orders.

b The respondent's submissions

142 The respondent submitted that, whilst the principle of totality applies for the fixing of fines where there are multiple contraventions, the task of the primary judge in the present case was the assessment of an appropriate penalty to be fixed in respect of a single contravention in accordance with s 139(4)(b) of the IR Act.

143 Senior counsel for the respondent emphasised that the respondent did not contend for an approach that involved "a simple aggregation of daily penalties" to produce an aggregate figure, and submitted that what was involved was the "process of instinctive synthesis by which the Court determines what is the appropriate penalty in all the circumstances". He submitted that the level of culpability would depend on the particular facts of the case.

144 The respondent submitted that there was nothing to suggest that the primary judge's comments concerning the adequacy of the maximum penalty had any influence on his ultimate sentencing decision.

145 So far as manifest excess was concerned, the respondent submitted that, in light of the objective seriousness of the contravention and "absent any compelling and relevant subjective circumstances", the penalty, whilst significant, was within range. It pointed out that the organisation of the strike "was in knowing and deliberate defiance" of the dispute orders and that those circumstances required the imposition of a penalty that would act as a sufficient general deterrent if the authority of the Commission was to be upheld. The

respondent pointed to the fact that there had been no evidence of genuine remorse.

146 The respondent submitted that, referring to *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, the fact that the penalty was significantly greater than those imposed in respect of past matters did not of itself lead to the conclusion that the penalty was manifestly excessive. It pointed out that none of the previous decisions referred to by the appellant involved a contravention that continued for a total of 14 days. The longest previous single contravention was said to have been for three days. It submitted that, when account is taken of the greater maximum penalty that applied in the present case, the penalty imposed was not proportionally as high as previous penalties imposed by the Commission, being 56% of the applicable statutory maximum in circumstances where the range of penalties previously imposed ranged between nil and 87.5% of the statutory maximum.

147 Senior counsel for the respondent submitted that the threat of the strike required the Department to take measures prior to the strike which mitigated its effects, such as cancelling three days of respite care. He submitted that, in fixing the penalty, the primary judge was entitled to rely on the organisation's acts on 14 February 2017 and 15 February 2017, although he accepted that the strike itself could not be relied upon as a contravention.

148 Senior counsel for the respondent also submitted that it was wrong to suggest that an organisation which acts in knowing contravention of a dispute order could be said to be acting responsibly simply because notice was given of its intention to participate in the unlawful action.

c Consideration

149 The primary judge, in my opinion, was correct in treating what occurred as a single contravention of the dispute orders made by the Commission. Section 139(4)(b) of the IR Act envisages a contravention occurring on more than one day. Here, there was a single course of conduct which occurred over a period of 14 days. By contrast, the principle of totality is concerned with the approach to be adopted by the Court in sentencing for separate offences or

contraventions: *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57 at [45].

150 Thus, in my opinion, it would not be appropriate in the present case to impose a penalty for each day that the contravention occurred and apply the principle of totality to determine the appropriate overall penalty. Rather, a single penalty is required to be determined by instinctive synthesis having regard to the maximum penalty as a "yardstick" along with other factors relevant to the sentencing exercise: *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [37], [69]-[74].

151 I do not think that the primary judge adopted a different approach in the present case. He expressly stated at [12] of his second judgment that he was determining the penalty on the basis that there was one contravention which occurred over 14 days. Although his ultimate calculation of the penalty would tend to suggest that his approach was to deal with each day as a separate contravention, this must be read in light of his earlier remarks. However, as I have sought to explain below, the approach adopted, with respect to the learned primary judge, did lead to the imposition of a sentence which was manifestly excessive.

152 Nor do I think that the primary judge erred by noting his views on the inadequacy of the maximum penalty in imposing the sentence. The remarks seemed to be in passing and do not appear to have been considered in determining the penalty. I do not think that the penalty which the primary judge imposed was to give effect to, or influenced by, his opinion that the maximum penalty was inadequate.

153 However, I have come to the view that the penalty is manifestly excessive in the sense that it is "unreasonable or plainly unjust": *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at [6], [22].

154 Although, as I indicated at [149] above, the principle of totality does not directly apply, the question is whether the overall penalty imposed was manifestly excessive. The approach of the primary judge in fixing a separate penalty for each day on which the contravention occurred tends to obscure the question of

whether the overall sentence was appropriate in the circumstances considered as a whole.

155 The primary judge concluded at [36] of his second judgment that the contravention was in the middle range of seriousness. The appellant did not directly challenge this conclusion, although to the extent that it is necessary to do so, I would have assessed the seriousness of the contravention at a little below the middle range. Although the contravention continued for 14 days, it was related to a single-day strike which ultimately had limited impact, as I have noted at [45] above. Further, it must be remembered that the contravention, apart from the placing of the Bulletin on the appellant's website, involved what might be called "passive" conduct or "contravention by omission"; namely, failing to take down the Flyer and the Bulletin from the website.

156 The primary judge placed some weight on the fact that the failure to take down the Bulletin and the Flyer was in "deliberate defiance" of the dispute orders made by the Commission. It is true that, as the appellant pointed out, most contraventions will be deliberate, but it must be remembered that, in the present case, the Bulletin publicly indicated the appellant's intention to ignore the dispute orders by being prepared to "cop a fine", and urged its members to strike in the face of the dispute orders. Further, consideration must also be given to the continual failure to take down the Flyer and the Bulletin after the primary judge delivered the first judgment.

157 I agree with the primary judge that general deterrence is an important consideration. If the industrial relations system embodied in the IR Act is to achieve its objects, any penalty needs to incorporate a significant level of general deterrence. I agree with the remarks of the primary judge that there was little need for specific deterrence in the circumstances of the present case. I also agree with his comments on the issues of remorse and contrition.

158 Finally, it is significant that the penalty imposed was considerably higher than any previous penalty. The Court was supplied with a schedule of cases where penalties were imposed for contraventions of dispute orders. However, beyond demonstrating that the penalty was well in excess of any penalty previously imposed, the contraventions in each of the cases in the schedule differed in

their circumstances. Although a number of cases involved strikes occurring over more than one day, none involved a contravention of the nature of that which occurred in the present case, which continued over an extended period of 14 days.

159 Of course, it must be remembered that, although a history of sentencing can establish a range of sentences, it does not establish that the range is the correct range: *Hili v The Queen* at [54], citing Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 at [303]-[305]; *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2 at [7], [26]-[28]; *R v Pham* (2015) 256 CLR 550; [2015] HCA 39 at [26]-[27]. However, it remains relevant to consider the range as a "yardstick" against which to measure the sentence imposed by the primary judge: *Hili v The Queen* at [54]. In particular, a sentence which is totally disproportionate to sentences previously imposed may tend to suggest that the sentence is manifestly excessive.

160 In the present case, the fact that the penalty is well outside the range of penalties previously imposed, coupled with the matters to which I have referred at [155]-[157] above, leads me to the conclusion that the penalty is manifestly excessive and should be set aside.

161 It is therefore necessary to reassess the penalty to be imposed on the appellant for its contravention of the dispute orders. Again, taking the matters to which I have referred above into account, the appropriate penalty, in my opinion, is a fine of $25,000.

162 So far as costs are concerned, as each party has had partial success on the appeal, I would not make a costs order as a matter of discretion. In these circumstances, it is not necessary to consider whether s 355E(3) of the IR Act precluded the making of a costs order in this appeal.

Conclusion

163 In the result, I would make the following orders:

(1) Grant leave to appeal.

(2) Order the appeal be allowed.

(3) Set aside the orders of the primary judge and in lieu thereof impose a penalty of $25,000.

164 **GLEESON JA:** I agree with Bathurst CJ.

165 **SIMPSON JA:** I agree with Bathurst CJ.

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Amendments

14 March 2018 - [74] change "holding a strike" to "holding a vote"

[112] last line insert "to" after "seeking"

Coversheet Add file number 2017/233994