

establish that its conduct was not unlawful (at [127]). The Court concluded that the CFMEU took action against the managing contractor with intent to coerce it to exercise a workplace right and to engage in industrial activity in contravention of ss 343 and 348 of the FW Act.

Although not strictly necessary, the Court also considered the question whether the CFMEU's conduct was illegitimate (at [128]). The Court considered a number of single judge and one Full Court decision (from [129]). Accepting that the Court was bound by authority that illegitimate conduct is one of three kinds of conduct that meets the second element of coercion under ss 343 and 348 of the FW Act, Reeves J said "the critical question then is to identify the legal standard that is to be applied in the field of industrial relations to determine when the threat, or application, of lawful pressure is illegitimate" (at [145]). At [152], Reeves J held that "disproportionality between a lawful threat of action, or the lawful action itself, and the legitimate interest in the demand the threat, or action, supports is the appropriate legal standard to be applied to determine whether the threat of action, or actual action, is illegitimate". Applying this principle, the Court held that CFMEU's conduct was illegitimate (at [153]-[154]).

#### PRACTICE AND PROCEDURE – COSTS

Costs where compromise offer is greater than consent order for damages – The discretion to make an order inconsistent with the rules under r 1.35 of the *Federal Court Rules 2011* (Cth)

In *Sydney Equine Coaches Pty Ltd v Gorst* [2017] FCAFC 34 (2 March 2017) the Full Court dismissed an appeal on costs.

At first instance the proceeding was settled on the second day of the trial by the Court entering judgment, by consent, for the applicant in the sum of \$36 000. This was less than the respondent's offer of compromise under pt 25 of the *Federal Court Rules 2011* (Cth) (the Rules). The respondent sought payment of its costs (from the relevant date) on an indemnity basis pursuant to r 25.14(1)(b) of the Rules. This rule provides that where a respondent makes a compromise offer that is of a greater quantum than the order for damages the applicant shall pay the costs the respondent incurred after the offer was served on an indemnity basis. The primary Judge declined to make an order for indemnity costs in accordance with r 24.14(1)(b) and made a different costs order. The respondent appealed from the order as to costs.

The Full Court (Rares, Flick and Bromwich JJ) considered r 1.35 of the Rules in relation to the costs consequence under r 25.14. Rule 1.35 provides: "The Court may make an order that is inconsistent with these Rules and in that

event the order will prevail." The Full Court stated at [19]: "The provisions of r 1.35 are remedial in character. They, like r 1.34, enable the Court to make an order that is inconsistent with the Rules. The purpose of the broad power in a provision such as r 1.35 is to relieve against injustice: *FAI [General Insurance Co Ltd v Southern Cross Exploration NL]* (1988) 165 CLR 268] at 283. Parties can expect that r 25.14(1) provides for the costs consequences that in the ordinary course of litigation will flow from the non acceptance of an offer of compromise made under pt 25 of the Rules where the offeree obtains a less favourable result than the one made in the offer. Nonetheless, the purpose of r 1.35 is to allow the Court to make an order that is inconsistent with what r 25.14 prescribes would otherwise occur, so as both to meet the justice of the case or to prevent injustice and to give effect to the Court's broad discretion to make orders for costs conferred in s 43(2) of the *Federal Court Act*."

The Full Court referred to authorities which appeared to qualify the Court's discretion under r 1.35 through the use of phrases such as 'proper reasons' and 'exceptional circumstances' (at [21]-[22]). The Full Court said that such phrases should be understood as "simply conveying the notion that a reason or reasons must be shown for departing from the prima facie position set forth in r 25.14."

There was no *House v King* (1936) 55 CLR 499 error with the primary Judge's exercise of discretion and the appeal was dismissed.

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#### Crossword Answers

ACROSS: 1. Quo 2. Slander 8. Alfred Denning 10. Mahatma Gandhi 13. Master 14. Duress 15. Bail 20. Rea 23. Arbitration 24. Con 26. Dope 27. Cross examination 29. Lien 30. Lieu 32. PII 37. Warrant 38. Nolle Prosequi 40. DVO 41. Constitution 43. Visa 44. Crook 46. Sanction 47. Bench 48. Cell DOWN: 1. Quash 3. Die 4. Legislation 5. Lex 7. Extortion 8. Autrefois acquit 11. Andrea Bocelli 12. Act 16. Affirmation 17. Entrapment 18. Jerry Springer 21. Voire dire 22. Magna Carta 25. Civil 28. Atticus Finch 31. Extradite 32. PC 33. Sedition 34. Oath 35. Counsel 36. Debt 39. Crown 42. Nisi 45. Ice