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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: FAIR WORK **NO VID 333 OF 2015**

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER
Applicant

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
and others named in the Schedule
Respondents

APPLICANT'S OUTLINE OF CLOSING SUBMISSIONS ON LIABILITY

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A. SUMMARY

1. On 17 June 2014, Construction, Forestry, Mining and Energy Union (**CFMEU**) officials Mark Travers and Adam Hall entered a workplace occupied by McConnell Dowell Constructors Pty Ltd (**MacDow**). The site had two parts: a fenced-off, gated and signed compound incorporating site offices and amenities including a lunch room and a first aid room (the **Site Compound**) and, some distance away from the Site Compound, the part of the taxi lane on which building work was being undertaken. MacDow was the head contractor for the Papa Uniform Golf (PUGS) Taxi Lane Replacement Project which involved the demolition and replacement of the concrete pavement in the taxi lane for aeroplanes at Melbourne Airport (**the Project**).

2. Travers and Hall entered the Site Compound with the intention of having discussions with Rod Duggan, an employee of MacDow, a shop steward and the health and safety representative (**HSR**) for the Project. Travers and Hall were the officials responsible for dealing with issues at the Project on behalf of the CFMEU. By their account, the visit to the Site Compound on 17 June 2014 was an ad hoc social "drop-in" with Duggan. The Applicant contends that an entry for purposes which include a social discussion is nonetheless an exercise of, or seeking to exercise, an entry right under s 484 of the *Fair Work Act 2009* (**FW Act**).

3. MacDow had no prior notice of the visit, whether under s 487 of the FW Act or otherwise. MacDow, as the lawful occupier, had rights and obligations in respect of the premises, including to ensure the safety of those working there as well as members of the public. Equally, MacDow had rights and obligations (subject to Part 3-4 of the FW Act) to control who entered or remained on its site and who could not be prevented from entering or remaining on its site.

4. MacDow (through Luke Naughton, the project manager) twice asked the union officials to leave the site. They refused to do so. Naughton said he would have to call the police if they would not leave. Travers and Hall still refused to leave and the police were called and attended. This "stand-off" between the union officials and the occupier escalated and (on the Applicant's case) Travers threatened David White, MacDow's Operations Manager, that if the police were called "*you are starting a war and it will be no different to what we have done with Kane*".[1]

5. As events transpired, the Applicant submits that the entry and continued presence of the union officials on site, having regard to the requests of the occupier's representatives to leave (and in the case of Travers his threat said to White) constituted conduct in contravention of the improper manner limb of s 500 of the FW Act.

6. Further, the Applicant submits that Travers' threat was a contravention of s 348 of the FW Act.

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1 Exhibit 6 (White statement) at [13]. This evidence is discussed in paragraphs [14]-[17] and [38]-[39] below.

7. The Applicant accepts the Court hears industrial cases of more egregious conduct than occurred in this case. This case nonetheless raises legitimate enforcement issues for the Applicant as regulator of lawful conduct on building sites. For union officials to enter and remain on workplace premises when asked to leave, knowing their continued presence is unlawful, is a serious matter. Furthermore, any threat of "war" between a union and a construction company, even if not subsequently acted on, is necessarily a very serious matter.[2]

B. ADMISSIONS, EVIDENCE AND FACTUAL FINDINGS

8. These submissions focus on the substantive matters that remain in dispute between the parties. Those matters which were dealt with in the Applicant's pre-trial Outline of Submissions filed on 29 March 2016 (**Applicant's Outline**) and are not disputed by the Respondents' pre-trial Outline of Submissions filed 15 April 2016 (**Respondents' Outline**) are referred to below without full repetition.

Standing and status of parties

9. The Respondents do not take issue with the matters relating to the Applicant's standing and the status of the parties set out in the Applicant's Outline at [6]-[11].[3]

The Project, the Site Compound and MacDow's employees

10. The Respondents also do not take issue with the factual background about the Project, the Site Compound and the relevant employees of MacDow set out in the Applicant's Outline at [12]-[14].[4]

Key undisputed facts

11. The Respondents do not take issue with each of the following[5] and the Court can proceed on the basis that they are undisputed facts:

    11.1. Travers and Hall entered the Project premises on 17 June 2014.

    11.2. Travers and Hall had not provided any notice to MacDow of their entry.

    11.3. Travers and Hall both spoke to Duggan while on the Project premises.

    11.4. Travers' purpose in entering the Project premises was to speak to Duggan.

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2 *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184 per Allsop CJ at [20].

3 Respondents' Outline at [3].

4 Respondents' Outline at [4].

5 Respondents' Outline at [5] in relation to the Applicant's Outline at [15].

11.5. Naughton requested Travers and Hall to leave the Project premises on at least two occasions (more precisely, twice in a first conversation: see [30] below; and once in a second conversation: see [35] below). After the last request Naughton said he would have to call the police if they did not leave.

11.6. Travers told Naughton that if Naughton called the police he and Hall would have to stay, as it was CFMEU policy to do so.

11.7. Travers and Hall did not leave until, after a delay, the police attended.

Further admissions, evidence and facts as to what occurred when Travers and Hall entered the Project on 17 June 2014

The witnesses

I. The Applicant's witnesses: Luke Naughton, Gavin Carter and David White

12. Naughton was the MacDow Project Manager for the site and gave evidence of the critical conversations at the Site in support of the Applicant's case.

13. Carter was the MacDow Supervisor for the site. He gave evidence generally consistent with the Applicant's narrative of events. He was not cross-examined as to any aspect of that narrative.

14. White was MacDow's Operations Manager covering a number of projects including the Project. White gave evidence of phone discussions he had with Naughton, Travers and Ralph Edwards, CFMEU Branch President, in support of the Applicant's case.

15. On the pleadings, the Applicant's key witnesses were Naughton and White. The Court has before it both oral evidence from them **and** contemporaneous statements of Naughton and White made within 10 days of the events in issue.[6] The Court should make findings about what was said based on the statements as the words used are likely to have been fresher in the minds of the witnesses at the time those statements were made. In any event, the oral evidence of Naughton and White and their earlier signed statements are materially consistent on the critical conversations in this case. Neither was cross-examined as to any prior inconsistent statement.[7]

16. In reality, very little of the evidence of Naughton and White relied upon by the Applicant is disputed by the Respondents.

16.1. The only aspect of Naughton's evidence of his conversation with Travers and Hall which was not accepted by the Respondents was whether Travers said: "*We are chatting to Rod about a safety issue*".[8]

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6 Exhibits 3 and 6. A witness statement of Carter was marked for identification but ultimately not tendered. Accordingly, it does not form part of the evidence in this case.

7 Naughton was cross-examined as to the absence of reference to the comment "We are chatting to Rod about a safety issue" in an email he sent to White on the day of the incident: T 23:1-27.

8 Both Hall and Travers were cross-examined blow-by-blow as to this conversation and accepted all of Naughton's evidence except this single point: T 72-3 (Hall); T 86 (Travers).

16.2. The only aspect of White's evidence which was not accepted by the Respondents was whether Travers made a threat to the following effect: "*If you do that you are starting a war and it will be no different to what we have done with Kane*".[9]

17. The Applicant submits that the evidence of Naughton and White should be accepted on these matters for the following reasons:

17.1. The truthfulness of each was not challenged.

17.2. Each had no interest in the outcome of the litigation.

17.3. They had no antagonism to the union or the officials. Travers and Hall both agreed that each was professional in his dealings with the union and there was no bad blood before or after these events.[10]

17.4. Each had no motive to lie or even to prefer the Applicant's case.

17.5. They made appropriate concessions, but were unshaken in cross-examination on the points in controversy.

17.6. The witness statement of each was tendered. Their witness statements were made less than 10 days after the events in question. In contrast, Travers and Hall (and Duggan) did not have any contemporaneous notes. There was no material difference between the oral evidence and the witness statements of Naughton and White.

II. The Respondents' witnesses: Mark Travers, Adam Hall and Rod Duggan

18. Travers and Hall were the CFMEU organisers who visited the MacDow PUGS site on 17 June 2014. Their evidence was mostly consistent with the evidence of the Applicant's witnesses: see [16] above.

19. To the limited (albeit important) extent that the evidence of Naughton and White on key conversations is disputed by Travers and Hall, their evidence on those points should be treated with caution given their status as a party and the absence of any contemporaneous notes of their version of events. The evidence of the Applicant's witnesses should be preferred for the reasons set out in paragraphs 17 above and 22 below.

20. Duggan was a labourer employed by MacDow who served as a union shop steward and HSR.

21. Duggan acknowledged that he had not had reason to recall the events of 17 June 2014 until he was asked to be a witness at some time in 2016, and that his memory of

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9 Travers was cross-examined as to this conversation and accepted all of White's evidence except this single point: T 87:46-88:8.

10 T 65:42-66:24 (Hall re White); T 74:6-23 (Hall re Naughton); T 81:44-82:29 (Travers re White); T 82:31-41 (Travers re Naughton).

events was "a bit vague".[11] For example, he did not recall that Luke Naughton had come into the lunch room three times (once to go to the chocolate machine, once to ask Travers and Hall to leave, and another time after he had called White), which was agreed by other witnesses called by both sides.[12]

22. To the extent that Duggan's evidence was inconsistent with the evidence of the Applicant's witnesses, the Applicant's witnesses should be preferred, given the freshness of their recollection at the time of making their statements.

23. Duggan acknowledged in cross-examination that he was not present for the entire call between Travers and White, despite having said in evidence in chief that he was confident no such thing was said.[13] His evidence is therefore not inconsistent with the Applicant's case as to that conversation.

How Travers and Hall came to be at the Project

24. The Applicant does not take issue with the Respondents' evidence that Hall had been attending at a nearby site operated by Fulton Hogan, Travers was travelling with him, and Travers contacted Duggan and arrange to meet him on the Site, where they were subsequently joined by Hall and had a cup of tea together in the lunch room.[14]

The lead up to and Naughton's first conversation with Travers and Hall

25. On 17 June 2014, Carter walked past the lunch room on the Project premises and saw Duggan in there with another person. Carter told Naughton what he had seen.[15] This occurred at approximately 12.42pm.[16]

26. On receiving this information, Naughton immediately went to the lunch room and saw Duggan there speaking with Travers and Hall. This was prior to Duggan's lunch break at 1pm.[17]

27. Duggan was the HSR[18] on site and the shop steward, as Travers and Hall knew.[19] Duggan did not represent management of MacDow. The Project was a site for which both Travers and Hall had responsibility as CFMEU organisers.[20]

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[11] T 100:23-41.

[12] T 100:35-41; cf T 72-3 (Hall); T 86 (Travers); T9:41-12:17 and Exhibit 3 [15]-[19] (Naughton).

[13] T 101:11-12.

[14] T 63:1-14 (Hall); T 77:31-78-16.

[15] T 35:19-45 (Carter).

[16] T 8:23 (Naughton).

[17] Duggan's signed timesheet for Tuesday 17 June 2014 (Exhibit 5) evidences that Duggan took lunch from 1 to 1.30pm that day. Duggan was not in a position to say it was incorrect: T 99:5. Carter, who also signed the timesheet, gave evidence that generally employees would have to speak to him if they wanted to change their lunchbreak away from 1-1.30pm, and that he would normally know when employees were having lunch: T 42:23-43:26.

[18] That is, the health and safety representative elected pursuant to the *Occupational Health and Safety Act 2004* (Vic): T 10:3 (Naughton); T 69:1-3 (Travers).

[19] T 68:43 – T 69:5 (Hall); T 87:20-25 (Travers).

[20] T 69:7 - 10 (Hall).

28. Irrespective of whether there was social chit-chat, work was also discussed. In his examination in chief, Duggan volunteered:[21]

> "He [Travers] might have asked how the job was going, but that was just – you know, of course he is going to ask that, yes."

In cross-examination Duggan's evidence was: [22]

> "… We would have mentioned the job – "How's it going?" – just general, but there was nothing, no specific issues at the time."

29. Hall was not able to recall whether or not any safety issues were discussed.[23] But he did not deny that safety issues were discussed, in contrast to his clear statement that industrial issues were not discussed.[24]

30. Naughton approached Travers and Hall and there was a conversation to this effect:[25]

Naughton:	Guys, I'm gonna have to ask you to leave the site, you haven't given me 24 hours' notice in accordance with the right of entry process.
Travers and Hall:	No, we don't have to give 24 hours' notice.
Travers:	I'm just catching up with my mate Rod.
Naughton:	I understand but I still have to ask you to leave.
Travers:	We are chatting to Rod about a safety issue, but go ahead and call the police or whoever you need to.

31. In cross-examination, Hall accepted all aspects of this conversation other than Travers' saying "*We're chatting to Rod about a safety issue*".[26] However, he did not deny that Travers said that; Hall's evidence was simply he could not recall it being said.[27]

32. Travers, in cross-examination, also accepted the accuracy of this conversation other than him saying "*We're chatting to Rod about a safety issue*".[28]

33. Naughton was not cross-examined to the effect that any part of his version of this conversation was inaccurate other than the disputed statement about the safety issue.

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21 T 97:4-5 (Duggan).

22 T 101:7-9 (Duggan).

23 T 70:26-45.

24 T 70:37-40.

25 Exhibit 3 (Naughton's statement) at [17]. Naughton's oral evidence was materially to the same effect T 11:18-43.

26 T 72:28-45 (Hall).

27 T 73:1-5 (Hall).

28 T 86:1-24 (Travers).

The lead up to and Naughton's second conversation with Travers and Hall

34. Naughton then left the lunch room and made a telephone call to White and told him what had occurred. White instructed Naughton to ask Travers and Hall to leave the Project premises, and if they refused to do so, to contact the police.[29]

35. Naughton returned to the lunch room in the Site Compound and again requested Travers and Hall to leave the Project premises. The conversation was to the following effect:[30]

Naughton:	Guys, I'm gonna have to ask you to leave as you haven't given 24 hours' notice.
Hall:	No, we are not leaving. Who is giving you directions?
Naughton:	David White.
Travers:	I will call David White.
Naughton:	I am going to call the police.

36. Hall essentially accepted or did not take issue with the accuracy of this part of the conversation as put to him in cross-examination.[31] Naughton was not cross-examined to the effect that any part of this evidence was inaccurate.

37. Naughton called 000 and asked for the police.[32]

Travers' telephone conversation with White; followed by White's telephone conversation with Edwards; and the attendance of the police

38. Travers then called White. The conversation between White and Travers was to the following effect:[33]

Travers:	Luke has told me he wants me to leave or he will call the police.
White:	You know the rules, we have to do this, you can't be here, if you don't want to leave then we have no choice but to call the police.
Travers:	If he calls the police I won't leave, I'm just here to talk to Rod, another 5 minutes and we will be leaving.
White:	It is out of our hands, Luke has to do what he has to do.

[29] T 12:2-6.

[30] Exhibit 3 (Naughton's statement) at [19]. Naughton's oral evidence was materially to the same effect: T 12:9-15.

[31] T 73:7-35.

[32] T 12:15-20.

[33] Exhibit 6 (White's statement) at [13]. White's oral evidence was materially to the same effect: T 51:32-47.

Travers:	If you do that you are starting a war and it will be no different to what we have done with Kane.

39. The Applicant relies on these final words by Travers as a threat or statement of retaliatory action. In his oral evidence, White said that Travers said to him:

> If you call the police you will be starting a war, and – and we will deal with you like we have with Kane Constructions.[34]

Whilst the tone of Travers' voice was not aggressive[35], White's evidence was that there was "an underlying aggression" in Travers' statement to him.[36]

40. In cross-examination, Travers accepted all parts of conversation other than him saying the final words that the Applicant's relies upon as a threat or retaliatory statement.[37] Travers accepted that at the time he was aware of a dispute between the union and Kane Constructions and a "campaign".[38] Travers' threat was understood as a reference to an "industrial workover" that the CFMEU at that time was conducting.[39] White understood the reference as being to an ongoing dispute at the time at a Kane site where "there was almost daily disruption".[40]

41. Hall's evidence is that he did not hear what Travers said to White on the telephone.[41] His evidence is therefore not inconsistent with the Applicant's case on this factual matter.

42. White then phoned Edwards. The conversation between White and Edwards was to the following effect:[42]

White:	Can you please ask Travers and Hall to leave without us having to call the police?
Edwards:	I'm not going to do that. Organisers should be able to talk to delegates on site. Travers has been doing the rounds on other sites such as Leightons and had no problems. Why do McConnell Dowell want to push the barrow?
White:	We can't turn a blind eye to this.

43. White explained his understanding that MacDow had to insist that union officials only be on site if they had a lawful right of entry, or risk sanctions from the Victorian

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34 T 51:46-47 (White's evidence in chief).

35 T 52:11-14 (White's evidence in chief).

36 T 57:3-5 (White's cross examination).

37 T 87:46 – T 88:13 (Travers).

38 T 88:15-16 and 24-25 (Travers).

39 T 52:1-9 (White).

40 T 52:1-4 (White).

41 T 74:1-4 (Hall).

42 Exhibit 6 at [13]; T 52:18-44.

government.[43] Whether or not this was a correct understanding of the position is irrelevant; it was clearly his understanding as a result of the training he had received.

44. The police then attended the Project approximately 15 minutes later[44] and took the details of Travers, Hall, Duggan and Naughton. Travers said words to the effect "we know our rights, if the authorities are called, we wait, it's our policy".[45]

45. Shortly afterwards Travers and Hall left the Project premises.

The Key Factual Disputes

46. The factual matters of significance in dispute between the parties are limited.

46.1. The first dispute is whether each of the officials intended to, and did, discuss any safety or industrial matter with Duggan. It is in dispute whether Travers said words to the effect that "*we are here with Rod discussing a safety issue*" in the first conversation with Naughton.

46.2. The second factual dispute is whether Travers said to White, in response to the police being called, words to the effect "*If you do that you are starting a war and it will be no different to what we have done with Kane*".

Mention of safety in the first conversation between Naughton with Travers and Hall

47. The Court should find that Travers did say words to the effect that "*we are here with Rod discussing a safety issue*" in the first conversation with Travers and Hall.

48. Naughton's evidence about this matter should be accepted for the reasons in paragraph 17 above together with the following:

48.1. It is recorded in a near-contemporaneous statement made by Naughton on 26 June 2014 (exhibit 3 at [17]).

48.2. Naughton, who generally made concessions where appropriate, was unshaken about this matter in cross-examination.[46]

48.3. Naughton was not cross-examined to the effect that his evidence was deliberately untruthful.

48.4. Whilst the words "*we are here with Rod discussing a safety issue*" are not referred to in Naughton's email to White[47], there is no reason for such words to

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43 T 54-55 (White).

44 T 47:10-11 (Carter).

45 T 13:24-25 (Naughton).

46 T 22:5-12 (Naughton's cross examination).

47 LN-03 to Naughton's statement (Exhibit 3).

be included. His email was a high level summary and was not intended to note the words said by Travers on all matters.[48]

48.5. It was not put to Naughton that there was any reason for him to have volunteered such a statement if it was not made. Nor is any such reason apparent. Naughton is unlikely to have ascribed any significance to whether or not safety was being discussed; if anything, it would have seemed a justification for the officials' presence. In any event, MacDow has no stake in these proceedings.

48.6. Finally, it was clear from Naughton's evidence that he had no personal or emotional stake in the outcome of the proceedings. His evidence was measured and open to other perspectives.[49]

49. Hall could not recall, *but did not deny*, that safety on the site was discussed with Duggan.[50] He also did not deny that one of his reasons for wanting to have a cup of tea with Duggan was to see if there were any issues that needed to be discussed about the site.[51]

50. Other evidence supports the likelihood (on the civil standard) that work matters would be and were discussed.

50.1. Hall was engaged that day in meetings at airport sites in relation to his role as a CFMEU official.[52]

50.2. The three persons meeting were the three CFMEU officials/delegates with responsibility for the site in question: see [27] above.

50.3. The meeting was a meeting between three officials of the CFMEU, on a building site for which each had responsibility, one as the shop steward and HSR (Duggan), the others (Travers and Hall) as officials. It is in the nature of such a gathering that, even if casually, work matters will be discussed. The meeting cannot be divorced from this context.

50.4. Hall did not deny that such discussions in fact occurred (see [49] above), and Duggan agreed that there was an enquiry about work (see [28] above).

50.5. Edwards' statement that organisers should be able to talk to delegates on site: see [42] above.

50.6. Travers agreed, and Hall did not dispute, that at the end of the visit some union pamphlets were taken from the car and given to Duggan.[53]

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48 T23:6-10.

49 See, egs, T20:10-13, 19-20, and Hall's evidence about Naughton at T 82:29-41.

50 T 69:26-45 (Hall).

51 T 72:4-6.

52 T 62:40-41.

53 T 90:33-45; T 74:13 (Hall); T 13:30-33 (Naughton).

51. Even if it be accepted that Travers and Hall entered the Site Compound for the purposes of a social chat with Duggan, such a finding is not incompatible with the Applicant's case (namely, that Travers and Hall nonetheless an exercised or sought to exercise s 484 of the FW Act). Even if a purpose of the visit was social, a purpose could still be (and was) to hold discussions with Duggan within the meaning of s 484 of the FW Act. This is elaborated in Section C below from paragraph 89.

The threat in the telephone discussion between Travers and White

52. The Court should find that Travers did say to White words to the effect that "*If you do that you are starting a war and it will be no different to what we have done with Kane*".

53. White's evidence about it should be accepted for the following reasons:

  53.1. It is recorded in a near-contemporaneous statement made by White on 27 June 2014.

  53.2. It was not put to White that the statement was not made. (All that was put was that that the verbal tone of it was not aggressive and that no action followed the threat.[54])

  53.3. It is unlikely in the extreme that White would imagine or confabulate such a specific threat including the reference to another construction company.

  53.4. The evidence from witnesses for both parties was that White had a good relationship over many years with Edwards, the CFMEU and indeed Messrs Travers and Hall.[55] He had no personal or industrial reason to make such an accusation.

54. Travers' evidence on the point was a bare denial in circumstances where he otherwise agreed with White's evidence. Travers was unable to offer any reason why White might make such an allegation.[56] Travers agreed that he was aware of a campaign between the union and Kane.

55. Neither Duggan nor Hall was in a position to contradict White's evidence on the point, as neither was present for the entire phone conversation.

C. SECTION 500 CASE

56. Section 500 of the FW Act provides (emphasis added):

> <u>A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not</u> intentionally hinder or obstruct any person, or otherwise <u>act in an improper manner</u>.

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[54] T 57:1-43.

[55] T 65:42-66:24; T 81:44-82:29.

[56] T 89:1-23.

57. The Applicant relies only on the “improper manner” limb of s 500 in this case. Accordingly, in order to prove a breach of s 500 of the FW Act, the Applicant must show that:

57.1. there was a permit holder;

57.2. exercising, or seeking to exercise, rights in accordance with Part 3-4 of the FW Act; and

57.3. who acted in an improper manner.

Permit Holder

58. It is admitted that each of Travers and Hall was a permit holder on 17 June 2014.[57]

Exercising or seeking to exercise rights in accordance with Part 3-4

The issues

59. The Applicant’s case is that Travers and Hall exercised or sought to exercise their rights as permit holders under s 484 of the FW Act.

60. There are two key disputed aspects of the question whether Travers and Hall were exercising or seeking to exercise rights in accordance with Part 3-4 for the purpose of s 500. They are:

60.1. Travers and Hall, by virtue of their intention and conduct, were exercising or seeking to exercise entry rights (relevantly s 484) This is addressed in [66] – [87] below.

60.2. Can a purpose of entry including holding a social conversation fall within the meaning of “discussions” in s 484? This is addressed in [88] – [96] below.

Relevant legislative framework

61. Section 484 provides:

> A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:
>
> (a) who perform work on the premises; and
>
> (b) whose industrial interest the permit holder’s organisation is entitled to represent; and
>
> (c) who wish to participate in those discussions.

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[57] See 3(f) and 4(f) of the Second Amended Statement of Claim (**SOC**) and of the Second Amended Defence (**Defence**).

62. Section 484 of the FW Act is to be construed in the context of the other provisions contained in Division 2 of Part 3-4. Of particular importance is s 486 of the FW Act, within Subdivision C. It provides:

> **486 Permit holder must not contravene this Subdivision**
>
> Subdivisions A, AA and B do not authorise a permit holder to enter or remain on premises, or exercise any other right, if he or she contravenes this Subdivision, or regulations prescribed under section 521, in exercising that right.

63. Section 487 of the FW Act is also contained in Subdivision C. It provides

> **487 Giving entry notice or exemption certificate**
> *Entry under Subdivision A or B*
> (1) Unless the FWC has issued an exemption certificate for the entry, the permit holder must:
>
> (a) before entering premises under Subdivision A—give the occupier of the premises and any affected employer an entry notice for the entry; and
> (b) before entering premises under Subdivision B—give the occupier of the premises an entry notice for the entry.
>
> (2) An *entry notice* for an entry is a notice that complies with section 518.
> (3) An entry notice for an entry under Subdivision A or B must be given during working hours at least 24 hours, but not more than 14 days, before the entry.

64. The combined effect of ss 484, 486 and 487 of the FW Act is that a permit holder who has not complied with the requirements of s 487 is not authorised to enter or remain on premises under s 484 of the FW Act.[58]

65. It is also necessary to have regard to the statutory object of Part 3-4 provided for by s 484 of the FW Act. It is obvious (but nonetheless important) to note that entry permits under the FW Act confer rights which significantly erode the common law of occupiers to exclude those to whom they do not wish to grant entry.[59]

Travers and Hall, by virtue of their intention and conduct, were exercising or seeking to exercise entry rights (relevantly s 484).

66. It is not disputed that the entitlement to enter premises provided for by s 484 of the FW Act is a right in accordance with Part 3-4 of the FW Act for the purposes of s 500. A key legal dispute between the parties is whether Travers and Hall were exercising or seeking to exercise that right.

67. In common parlance, the word "*exercise*" when used with an abstract object means simply to use or apply a faculty, right or process.[60] To exercise control, or authority, or caution, does not necessarily involve a conscious advertence to what is being exercised. In the context of rights, one can exercise one's right to free speech, or freedom of religion, without turning one's mind to whether or not one is doing so.

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[58] *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147 at [18] (Charlesworth J).

[59] *Maritime Union of Australia v Fair Work Commission* (2015) 230 FCR 15 at [13]-[14] (North, Flick and Bromberg JJ).

[60] This is consistent with the definitions propounded in the Respondents' Outline at [18]-[19].

68. With respect, the Respondents' submission that "there is an active mental element implicit in the word 'exercising'"[61] is not consistent with everyday use of the word, whether or not in the context of rights.

69. In addition to s 500, the word "exercise" is used elsewhere in the FW Act[62] and the statutory phrase should be construed on the basis that the legislature intended that it should carry a consistent meaning wherever it is used in the FW Act.[63] The Applicant submits that the word "exercise" is used elsewhere in the FW Act in a way which cannot require any mental element. Further, it is so used in contexts dealing with the exercise of "rights".

70. For example, Part 3-1 Division 3 deals with workplace rights. Section 340(1) prohibits a person from taking adverse action against another person because the second person "has, or has not, exercised a workplace right" (s 340(1)(a)(ii)), "proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right" (s 340(1)(a)(iii)), or "to prevent the exercise of a workplace right by the other person" (s 340(1)(b)). Workplace rights, which are set out in s 341, include such rights as the right of an employee to make a complaint or inquiry in relation to his or her employment, the right of a person to initiate or participate in a process or proceedings under a workplace instrument, or the fact that the person is entitled to the benefit of, or has a role or responsibility under, a workplace law.

71. The protections provided by s 340(1) would be significantly undermined if the word "exercise" in that section was limited to situations where the person was first, aware that they had a legally protected right to take particular action, and, second, had consciously adverted to that right before taking the relevant action.

72. Section 343(1) prohibits a person from organising, taking, or threatening action against another person with intent to coerce the other person, or a third person, to:

    (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
    (b) exercise, or propose to exercise, a workplace right in a particular way.

73. It would artificially narrowly confine the prohibition in s 343 if it were limited so as to cover only the conscious exercise of rights. If (as the Respondents contend) the word "exercising" implicitly involves a mental element, that would have the result that an employee exercising a workplace right would be protected under the FW Act only if they engaged in the workplace right knowing at the time the relevant conduct was a protected workplace right.

74. Once it is accepted that to "exercise" a right does not necessarily imply conscious advertence to the existence of the right, let alone conscious reliance on the right, then there is no basis to import a mental element into the concept of "exercising" referred to in s 500.

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[61] Respondents' Outline at [20].

[62] See ss 194(g), 340, 343, 345, 481, 482, 483A, 483B, 483D, 486, 490, 495, 497, 498, 508 and 514 of the FW Act.

[63] *Project Blue Sky Inc v Australian Broadcasting Association* (1998) 194 CLR 355 at 381; [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Bunnings Group Limited v Laminex Group Limited* (2006) 153 FCR 479 at [72] (Young J).

75. As a matter of policy, there is no reason why a permit holder who is on premises carrying out an action described as a right in Part 3-4 (such as s 484) should not be restricted from obstructing or hindering persons or acting in an improper manner, regardless of whether the permit holder is consciously relying on their permit to do so. It is to be noted that permit holders are a small class of persons (the rights and obligations in Part 3-4 are accessible only to employed officials of federally registered organisations).

76. When exercising Part 3-4 rights, permit holders also have protection against being hindered or obstructed (s 502). A permit holder who is entitled to enter premises cannot be refused access (s 501). It will lessen the legislative rights and obligations on union officials (as well as occupiers) to confine their operation to circumstances where the permit holder says he or she is consciously relying on their statutory right of entry.

77. In this context, it should be noted that the protections in ss 500 and 502 apply to a number of rights, including:

    77.1. rights of entry:

        77.1.1. to investigate contraventions of the FW Act or a fair work instrument (ss 481 and 483A);

        77.1.2. conferred by a State or Territory occupational health and safety law (s 494)

    77.2. rights to inspect any work, process or object relevant to a suspected contravention (s 482(1)(a) and 494);

    77.3. rights to inspect or otherwise access employee records (s 494)

    77.4. rights to interview a person about a suspected contravention (s 482(b)); and

    77.5. rights to require the occupier or employer to allow the permit holder to inspect and make copies of relevant records or documents (s 482(c)).

78. The statutory object of Part 3-4 of the FW Act (see s 480) of balancing the rights of organisations with the rights of employers and occupiers is not served by arbitrary distinctions. Whether a person is “exercising” a right under Part 3-4 should be assessed by their conduct in the circumstances and not simply by whether the permit holder has subjectively turned their mind to the existence of the right and decided to rely on it.

79. Indeed, interpreting “exercising” in s 500 as involving a mental element leads to problematic results. The enforcement of the “balance” of rights set out in s 480 is undermined if the Applicant must prove not only that permit holders entered premises for the purpose set out in s 484, but that they knew they were relying on that provision. Permit holders could brazenly enter workplaces to hold discussions with workers without notice to employers and simply say that they were not consciously relying on their right of entry under s 484 or other provisions.

80. In this case, each aspect referred to in s 484 of the FW Act has been satisfied by the conduct of Travers and Hall that occurred on 17 June 2014 at the Project. Relevantly, it is not disputed that:

80.1. Travers and Hall (both permit holders) entered the premises;

80.2. they intended to speak to Duggan;[64]

80.3. Duggan was an employee who performed work on the premises and whose industrial interest the CFMEU was entitled to represent; and

80.4. Travers and Hall understood that Duggan would wish to participate in a discussion with them (the Respondents' position is that Duggan had indicated a preparedness to speak to Travers and Hall before they entered the premises).

81. In all of the circumstances, there was an exercise of the right in s 484 of the FW Act by Travers and Halls.

82. Significantly, this is a case where Travers and Hall *could* exercise the s 484 right. Each was a permit holder and the purpose referred to in s 484 was capable of being pursued by each of them. There was a work relationship between Duggan (the HSR) and the CFMEU organisers responsible for the Project: see [27] above. The discussion between them actually included at least a reference to work matters. Duggan accepted there was at least a high-level enquiry about how the Project was going: see [28] above. This "cup of tea" meeting between the union officials and Duggan was an *opportunity* to discuss to safety, industrial or other work matters. This is irrespective of whether or not the Court accepts Naughton's evidence that Travers said words to the effect that "*we are here with Rod discussing a safety issue*" in the first conversation with Naughton: see [46]-[48] above.

83. Thus, the present case is to be distinguished from one where it was impossible for a permit holder to exercise or seek to exercise rights in accordance with Part 3-4 of the FW Act.[65]

84. As a matter of fact Travers and Hall did not comply with the requirements in ss 487(1)(b) [giving entry notice] and 489(2) [producing authority documents]. However, that does not mean that they were not exercising or seeking to exercise the right in, relevantly, s 484 of the FW Act. The existence of the right in s 484 is provided for by the terms of that provision; namely, a "permit holder" having one or more of the purposes set out in s 484(a) to (c). The <u>existence</u> of the right in s 484 is not dependent upon full compliance with ss 487 and 489. Of course, non-compliance with those and other provisions can have consequences (eg, s 486 or perhaps trespass). However, it does not follow that s 484 has not been engaged such that the restrictions on rights (such as s 500) do not apply to a permit holder like Travers and Hall.

85. Alternatively, if a permit holder cannot be exercising or seeking to exercise a right under s 484 in circumstances where she or he did not provide notice pursuant to s 487,

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64 Respondents' Outline at [5].

65 Cf *Bragdon v Director of the Fair Work Building Industry Inspectorate* [2016] FCAFC 64 at [13], [26] and [41].

Travers and Hall were seeking to hold discussions within the meaning of s 484 and therefore were seeking to exercise that right. If there is no subjective mental element to “exercise”, all that “seeking to exercise” a right requires is that the person is seeking to do the thing which the right entitles them to do.

86. As to the burden of proving “exercising” or “seeking to exercise”, the following observations of the Full Court (Lander, Tracey and Yates JJ) in *Setka v Gregor (No 2)* (2011) 195 FCR 203 at [26] are apposite:

> Whilst the case against the appellant was for a contravention of s 767 of the Act [the predecessor to s 500], the issue for determination was whether the appellant had been exercising or seeking to exercise rights under the OHS Act at the time that he said what he was found to have said. That issue, like the respondent’s case which had to be proved on the balance of probability (s 140 [*Evidence Act*]) could hardly be said to be grave.

87. In other words, the question of whether Travers and Hall were exercising or seeking to exercise a right is not a matter which requires the Court to exercise particular caution before finding it proven on the civil standard of proof.

Can a purpose of entry including holding a social conversation fall within the meaning of “discussions” in s 484?

88. As a matter of fact, the Applicant submits that the purpose of entry of Travers and Hall included to hold discussions with Duggan other than conversations of a purely social nature: see [47] to [50] above.

89. However the Applicant submits that it is not determinative of the case that the purpose of Travers’ and Hall’s visit was primarily or even wholly social. No limitation on the word “*discussions*” appears in s 484 of the FW Act. Discussions may include (not necessarily in equal amounts) social and work matters. It is not inconsistent with a discussion of a social nature between the permit holders and Duggan that they would be exercising (or seeking to exercise) a right such as s 484 of the FW Act.

90. The following passage from the judgment of White J in *Director of the Fair Work Building Inspectorate v Construction Forestry Mining and Energy Union and ors* [2015] FCA 1293 at [72] should be followed (emphasis added):[66]

> There is no reason to construe the word “discussions” in s 484 narrowly. To hold otherwise would be to confine the kinds of discussions which union officials generally may have in the course of their legitimate activities. The term should be given its ordinary meaning. That includes “talking something over”. <u>Even a brief conversation comprising little more than an introduction and an enquiry as to whether a worker has any concerns may constitute a discussion in the relevant sense</u>. There is no reason to incorporate into s 484 a requirement that the discussions be of a formal kind, concern the pursuit of an agenda, or be of some minimum duration. The section itself contemplates that the discussions may be with one or more employees. A discussion with an individual employee may of necessity be brief. Section 480 contemplates that the discussions may be with potential members, as well as existing members. Discussions with such persons may be of diverse kinds, again indicating that the term should not be given a narrow meaning. Sections 132 and 194 indicate that Pt 3-4 is

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[66] A single judge of this Court should follow a conclusion of law reached by another single judge of this Court unless persuaded the conclusion is plainly wrong: *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at [83] - [86] (Greenwood J, Sundberg J agreeing at [1]).

intended to be the only prescription with respect to workplace entry by union officials, an intention which may well be frustrated if the term "discussions" was construed narrowly.

91. These comments were cited with approval by Charlesworth J in *Director of the Fair Work Building Inspectorate v McDermott* (**McDermott**)[67] who then said:

> [115] It may be confidently inferred that at least one of Mr Sloane's purposes for entering the Site was to meet the Employees there and to make it known to them that he was an official of CFMEU, the organisation entitled to represent their industrial interests. He was dressed in clothing identifying himself as a CFMEU official, permitted himself to be introduced as a person working locally for CFMEU and stood in close proximity whilst Mr McDermott provided brochures to the Employees titled What Your Union Can Do For You. He greeted the Employees and engaged in friendly banter with them.
>
> [116] In those circumstances, whether Mr Sloane personally said words to the Employees concerning any particular industrial issue is not the point. At the time that he entered the Site, Mr Sloane intended to have exchanges with the Employees at least to the extent I have described. That intention is sufficient proof that he entered the Site for the purpose of holding "discussions" with the Employees within the meaning of s 484 of the FW Act, albeit discussions of a brief and introductory nature.

92. A construction of "discussions" in s 484 read down to exclude conversations of or including social matters is not consistent with the purpose of Part 3-4 or the approach taken by White J or Charlesworth J. It should be rejected..

93. A contrary approach gives rise to problems. The first is that occupiers should have certainty about whether permit holders are entitled to be on premises. The rights of entry provided by Part 3-4 interfere with employers' and occupiers' enjoyment of their property rights and right to go about their business without undue inconvenience. Requiring occupiers to establish, in the face of union officials who are permit holders attending on their premises, whether or not the purpose of discussions is social or otherwise (or a combination of purposes) is unrealistic and contrary to the balancing of interests referred to in s 480 of the FW Act.

94. Further, a wrong assessment would expose occupiers to liability for breaching the FW Act such as under ss 501 or 502. As a matter of fairness to all, there should not be "wriggle room" as to whether or not the discussion is for a social, work or other purpose (or a combination of these purposes).

95. The second problem is that excluding social discussions from the operation of s 484 gives permit holders an opportunity to exploit uncertainty by claiming a social purpose so as to avoid the operation of the Part 3-4 regulatory regime.

96. The Respondents refer to examples where a permit holder might seek to enter a workplace for reasons unrelated to their role as union officials, such as to have lunch with a spouse or collect a friend or relative.[68] These examples do not assist the Respondents.

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[67] [2016] FCA 1147 at [114].

[68] Respondents' Outline at [28].

96.1. *First*, in almost all cases such a circumstance would not fit the description of exercising a right in accordance with Part 3-4. A person picking someone up would not be entering for the purpose of investigating a breach of the law, or having discussions. A person meeting another person for lunch arguably would be entering for purposes including a purpose of having discussions, but would still only be caught by s 484 if their lunch companion were a person whose industrial interests the relevant union was entitled to represent.

96.2. *Second*, as the Respondents' Outline points out, even if the purpose of entry did fall within the terms of the exercise of such a right, a person would not be exercising a right of entry if they enter pursuant to an invitation from the occupier.[69] If the hypothetical spouse had their employer's authority to invite the person to visit them for lunch, no exercise of a right of entry would take place. But that is not this case; Duggan gave no evidence of having been authorised, either in general or specifically, to invite persons, let alone union officials who were permit holders, onto the workplace for a cup of tea. It was put to Naughton that Travers or Hall could pay a social visit to Duggan, and his response was "I don't see why not, as long as it's not affecting his productivity and work that he should be performing and they abide by the site rules".[70] As Naughton said, it was a matter for MacDow whether such a visit would be appropriate.[71] Under cross-examination, White affirmed the proposition put to him that regardless of whether an official held an entry permit of not, the official was not authorised to enter the site compound to chat with a friend who happened to also be an employee.[72] White further maintained under cross-examination that if spouses, friends, children came to the site to visit employees, that they would need to sign the visitor book, they would need a reason to be on site and they would need to be escorted.[73] None of this occurred in relation to the visit by Travers and Hall to Duggan.

Act in an improper manner

Legal principles

97. In *Setka v Gregor (No 2)*[74]*,* the Full Court held that the words "*otherwise act in an improper manner*" in s 767(1) of the WR Act were to be understood as referring to actions <u>other than</u> those which hindered or obstructed any person, and thus broadened the scope of the provision.[75]

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69 Respondents' Outline at [27]; Explanatory Memorandum to the Fair Work Bill at [1919].

70 T18:8-14 (Naughton).

71 T 18:17.

72 T 56:4-7 (White).

73 T 56:8-13 (White).

74 (2011) 195 FCR 203 at [30] (Lander, Tracey and Yates JJ).

75 See also *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [28] (White J).

98. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) at [1994] provides that acting in an improper manner is intended to cover a "*wider range of conduct*".[76]

99. There is no intention element in this second limb of s 500 of the FW Act.[77] Thus, the improper conduct limb of s 500 does *not* depend upon the intention of the alleged contravenor.[78]

100. The characterisation of conduct as *"improper"* involves the application of an <u>objective</u> test.[79] *"Improper conduct"* is conduct that falls below that standard which can reasonably be expected of those who occupy positions of responsibility.[80] Impropriety "may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do".[81]

The "improper" conduct relied upon by the Applicant

101. The Applicant submits that by:

101.1. entering the site without providing 24 hours' notice to the occupier, MacDow;

101.2. refusing to leave when asked to do so by MacDow's representative (Naughton);

101.3. remaining on the premises until the police arrived;

101.4. conducting discussions with Duggan outside his lunchbreak; and

101.5. in Travers' case, threatening retaliatory action,

Travers and Hall acted in an improper manner within the meaning of s 500 of the FW Act.

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76 Cited recently by Tracey J in *The Footscray Station Case* [2016] FCA 872 at [46].

77 *Setka v Gregor (No 2)* (2011) 195 FCR 203 at [35]-[36] (Lander, Tracey and Yates JJ).

78 *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106] (Mansfield J); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [170]-[172] (White J); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [28] (White J); *The Footscray Station Case* [2016] FCA 872 at [49] (Tracey J).

79 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106] (Mansfield J); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [24] (White J); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [28] (White J); *Footscray Station Case* at [49] (Tracey J).

80 *R v Burns and Hopgood* (1995) 183 CLR 501 at 514-515; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106] to [108] (Mansfield J); *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2015] FCA 453 at [171] (Mansfield J); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [170] to [172] (White J); *Footscray Station Case* at [48] (Tracey J).

81 *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106] to [108] (Mansfield J), citing *R v Burns and Hopgood* (1995) 183 CLR 501 at 514-515.

102. Some of these matters are more important than others in the circumstances of this case, as explained below. It is not essential to the Applicant's case that he proves each of the above matters. The matters which the Applicant particularly relies upon are those in paragraphs 101.1, 101.2 and (in the case of Travers) 101.5.

1 - Entering the site without providing 24 hours' notice to the occupier

103. Travers and Hall did not give the occupier notice of entry under s 487 of the FW Act. Assuming they exercised their right of entry under s 484, the failure to comply with the requirement under s 487 to provide 24 hours' written notice but nonetheless enter was improper conduct.

104. In *McDermott*, Charlesworth J held that entering premises for the purposes of discussions without providing notice under s 487 was in breach of s 500.[82] White J came to the same conclusion in an earlier decision in this Court.[83]

2 - Refusing to leave when asked by the occupier to do so

105. Travers and Hall refused to leave when asked to do so by the representative of the occupier. Their refusal to leave was potentially a breach of the general law of trespass and a breach of s 9(6) of the *Summary Offences Act 1966* (Vic). However it is not to the point that the police did not charge anyone. The critical point is that by their conduct Travers and Hall were acting in an improper manner. Travers and Hall both accepted in cross-examination that they had no lawful right to remain on the Site Compound.[84]

106. In *McDermott*, a refusal by a permit holder to leave premises was held to be a breach of s 500 of the FW Act.[85] The same conclusion was held in the *SAHMRI case*.[86]

107. In the present case, Naughton asked Travers and Hall to leave more than once before he mentioned the police: see [30] and [33] above. They were requested to leave effectively three times in two conversations: see [11.5] above.

108. Any justification to the effect that once the police were called, they had a duty to remain in order to speak to the police, applies neither to the first time they were asked to leave, where the police had not been mentioned, or to the time between the police being mentioned, and when they were actually called. There were at least two opportunities for Travers and Hall to comply with the occupier's requests to leave the premises.

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82 *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147 at [118].

83 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 414 (the **SAHMRI case**) at [33], referring to *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [175] and [178]. White J made determinations to the same effect by consent in *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [19], [20], [30(d)], [42(d)], [59(c)], [61(c)], [62(e)] and [63(c)].

84 T 68:13-32; T 86:28-29 and T 87:7-8.

85 [2016] FCA 1147 at [118] (Charlesworth J).

86 [2016] FCA 414 at [33] and *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [175] (White J).

109. Travers and Hall were permit holders and had undergone training about their rights and responsibilities under the FW Act.[87]

3 - Remaining on the premises until the police arrived

110. Assuming that Travers and Hall had (inter alia) the purpose provided for by s 484 of the FW Act, things changed once the occupier requested that they leave and the unions officials refused to do so. Their attendance on the site waiting for the police was for a purpose different to s 484 of the FW Act. Travers' and Hall's purpose in remaining was no longer to hold discussions or any other purpose authorised by Part 3-4 of the FW Act. Rather, it was because of the CFMEU policy that officials were not to leave once the police had been called: see [44] above.

111. There is nothing improper per se about waiting for the police to arrive. What was improper was that the Travers and Hall remained on the occupier's premises in the face of a lawful request from the occupier that they leave. It was improper for them not to leave the Site Compound and await the police immediately outside.

4 - Conducting discussions with Duggan outside his lunchbreak

112. The Court should find that Travers and Hall met with Duggan at a time that was not his rostered lunch break: see [25]-[26] above. Section 490(2) of the FW Act provides that a permit holder may hold discussions under s 484 only during mealtimes or other breaks.

113. Although this is a matter that the Applicant relies upon, it is not essential to his case providing he establishes other more significant matters (particularly points 1 and 2 above and 5 below).

5 – Travers' threat of retaliatory action

114. The Court should find that Travers said to White words to the effect "If you do that you are starting a war and it will be no different to what we have done with Kane" (the **Threat**): see [15]-[17] and [19] above.

115. Such a statement is plainly a breach of the standards of conduct that would be expected of a union official exercising a right of entry to premises, noting that this occurred in the context of repeated requests to leave the site being ignored.

116. White said in evidence that Travers' tone of voice was not aggressive but there was "an underlying aggression in that statement": see [39] above. The words themselves are sufficient to convey a threatening intent. The calm tone of voice suggests that Travers' comment was not merely a momentary expression of frustration but rather intended to be taken seriously. Indeed, Travers' evidence was to the effect that he was not frustrated.[88]

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87 See s 513(1)(a), Hall's evidence at T 67:11-40 and Travers' evidence at T 83:43-84:12.

88 T 87:40-45.

117. The threat used strident and combative language, in particular the word "war". It threatened a consequence disproportionate to the situation. It gave a specific comparison to action taken by the CFMEU against another construction company. That comparison made the threat more realistic because it implied "We've done it before, we can do it again". The Court can take judicial notice of the fact that this union has on many occasions placed unlawful pressure on construction companies and caused them major disruption.[89] At the time it was said, the Threat could credibly and reasonably be perceived as a real one.

D. SECTION 348 CASE

118. Section 348 of the FW Act provides:

> A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

119. Sitting as a member of the Full Court, Jessup J made the following observation in relation to s 348:[90]

> Section 348 deals both with "action" and with threats to take action. There is nothing to suggest that the legislature intended that a threat of action should necessarily be regarded as less serious than engaging in the action as such.

120. The Court should find that Travers contravened s 348 of the FW Act by making the Threat. That is, Travers said to White "*if you do that you are starting a war and it will be no different to what we have done with Kane*". The "that" referred to the police being called.

121. The Applicant's submissions regarding the evidence constituting the Threat and why a finding should be made that the words constituting the Threat should be made are set out in paragraphs [15]-[17] above. The following submissions proceed on the basis that the Court accepts that the Threat was said by Travers.

122. By the Threat the Applicant submits that Travers threatened to organise or take action within the meaning of s 348 of the FW Act.[91]

123. The Applicant therefore must prove (on the civil standard provided by s 140 of the *Evidence Act 1995*) that Travers:

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[89] In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [118]-[119], Mortimer J recorded that the Applicant had filed tables setting out 106 different cases where the CFMEU was penalised for breaches of industrial law by the Court, including 23 examples of the Victoria/Tasmania branch being penalised for contraventions of coercion provisions. Reliance on this table was accepted by Jessup J in the Full Court, with whom the other members of the Court agreed on this point (fifth ground of appeal): [2016] FCAFC 184 at [93] per Jessup J (Allsop CJ agreed at [18] and North J agreed at [29]).

[90] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184 per Jessup J at [124].

[91] SOC at 21D.

123.1. threatened to organise or take action;

123.2. against another person;

123.3. with intent to coerce the other person;

123.4. to engage in "industrial activity" (as defined in s 347).

124. A statement "*if you do that you are starting a war and it will be no different to what we have done with Kane*" is a threat to take action. It is apparent that it is a threat of creating industrial strife for MacDow.

    124.1. The threat was said to White, a senior manager of MacDow (following Naughton having said to Travers that he would call the police). It was plainly a threat to take action against MacDow.

    124.2. The industrial nature of the Threat is clear from the reference to Kane (another construction company).

    124.3. The Threat was understood by White as one of giving MacDow an "industrial workover" and "on a daily basis".[92]

125. Accordingly, if the Threat was made, it was a threat to organise action against MacDow.

126. The statutory phrase "intent to coerce" has been held to comprise two elements:

    126.1. an intention that pressure be exerted which in a practical sense will negate choice; and

    126.2. conduct that is unlawful, illegitimate or unconscionable.[93]

    These elements are satisfied for the following reasons.

127. For the reasons at [116]-[117] above, the threat was serious and designed to be credible.

128. The use of the phrase to the effect "*you are starting a war*" implies that MacDow would be subject to action which would involve the resources of the CFMEU being applied against it. As understood by White, it was a threat of an "industrial workover" with daily disruption occurring.[94] The reference to "*what we have done with Kane*" evidences that the purpose of the threat was to exert the maximum pressure possible so as to ensure that the police were not called. There is no other reason for Travers referring to Kane.

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92 T 52:1-9 (White).

93 *State of Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172 at [71], citing *Seven Network (Operations) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia* [2001] FCA 456 at [41].

94 T 52: 1-9 (White). In his statement Mr White said "*I took that to mean that he would come back to site and disrupt work on a daily basis*" (Exhibit 6 at [13]).

129. The Threat was calculated to force MacDow's hand; essentially to negate its choice. It is not a defence to s 348 that MacDow resisted the Threat.

130. Comparable threats have been found to amount to breaches of s 348 or the other coercion provision, s 343 of the FW Act.

130.1. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 607, Besanko J held that a threat that "all hell would break loose" and that the Union would "take action on a national scale" was sufficient to contravene s 343.

130.2. In *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184, the Full Court dismissed the ground of appeal concerning a penalty imposed by Mortimer J on Mr Myles for breaches of s 348.[95] Relevantly, one of the breaches consisted him threatening "a war" if the building company refused to employ a CFMEU delegate. While in that case it was not disputed that the comment amounted to a breach of s 348, and it occurred in the context of disruptive action already having been taken, it is notable that the Full Court considered that it was "very serious conduct" (per Allsop CJ at [20], with whom at [30] North J agreed on this ground). Jessup J also held there was no error involved in imposing the penalty that was 98% of the maximum: at [121]-[128]. While the Threat in this proceeding was not made in the light of prior action against the same company, it nevertheless refers to earlier action by the union against another construction company (Kane).

130.3. In the *Red and Blue Case*, Jessup J held that a threat to put a company out of business, even though "not put in so many words" was coercive in contravention of s 355 of the FW Act, notwithstanding that there was no direct statement of what the relevant action entailed.[96]

131. To the extent that the Threat involved industrial action, such industrial action could not be protected industrial action[97] and would be in contravention of s 417 of the FW Act.

132. Disruption of work on building sites can scarcely be described as lawful or legitimate; it is the sort of conduct with which this Court is asked to deal on a regular basis. It is likely to involve trespass, economic torts, and unprotected, and therefore unlawful, industrial action.[98] The use of the word "war" implicitly involves a combative, aggressive and unrestrained approach to disrupting MacDow's activities. Particularly in light of the CFMEU's history (see footnote 89) this could reasonably be understood as referring to unlawful and illegitimate means for carrying out the Threat.

133. It is to be noted that, under s 360, in order for the Court to find that Travers had an intent to coerce, it is sufficient that that intention is a *"substantial and operative intent"*,

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95 Other aspects of the appeal were upheld, including an appeal against an order that the CFMEU not indemnify the official. See footnote 89 above.

96 *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Red & Blue Case)* [2015] FCA 1125 at [110].

97 No proposed enterprise agreement being in issue: FW Act s 408.

98 See the *Red and Blue Case* at [113].

notwithstanding that he may have had other intentions.[99] There is no evidence of other intentions for the Threat. It was not to express frustration; Travers' evidence was to the effect that he was not frustrated.[100] The Court does not have the benefit of any evidence from Travers offering an explanation of his intention (rather, he denied that the Threat was made).

134. At the point in time that Travers made the Threat, regardless of his initial purpose in coming on site, he was clearly speaking on behalf of the CFMEU. Both the nature of the Threat and the use of "*we*" in "*what we have done with Kane*" indicate that. His request that MacDow refrain from calling the police is therefore the request of the CFMEU. As such, it is a "lawful request made by…an industrial association" within the meaning of s 347(b)(iv) of the FW Act. To comply with that request would therefore be "industrial activity" for the purpose of s 348.

E. LIABILITY OF THE CFMEU

Summary of CFMEU's liability

135. Subject to one exception, if the Applicant succeeds in demonstrating the alleged contraventions of the FW Act by either Travers or Hall, the CFMEU accepts that he will also have established liability against it. The exception is that the CFMEU submits that it cannot be taken to have committed a contravention of s 500 of the FW Act, because it cannot be a "permit holder" within the meaning of s 500.[101]

136. The CFMEU therefore does not dispute that each of Travers and Hall was acting on behalf of the CFMEU when they engaged in the conduct in issue in this case.[102] Accordingly, their conduct is taken to be that of the CFMEU (s 793(1)), and their states of mind (s 793(3)) are attributable to the CFMEU (s 793(2)). For the reasons in paragraphs 140 to 150 below, the Court should find that it is not necessary to attribute to the CFMEU the status of a permit holder in order to establish its liability for a contravention of s 500 under s 793 of the FW Act.

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99 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at 542 [127] (Gummow and Hayne JJ) and 544 [140] (Heydon J).

100 T 87:40-45.

101 See Defence at [26]-[30] and T 3:1-15.

102 In any event that follows from:

a) their status as union officials;
b) their status as permit holders present on work premises;
c) the assertion that they were discussing safety matters, which can only have been union business rather than personal matters;
d) their refusal to leave, citing union policy;
e) Travers' reference to "we" and "starting a war…no different to what we have done with Kane" in his conversation with White; and
f) Edwards' endorsement of their conduct.

137. Further or alternatively, the CFMEU is liable under common law principles: see [151] to [156] below.

138. Further or alternatively, under s 550(2)(c) of the FW Act the CFMEU is a person involved in contraventions of s 500 by reason of being, directly or indirectly, knowingly concerned in or party to the officials' contraventions of s 500 of the FW Act: see [157] to [161] below. For liability through s 550, it is irrelevant that the CFMEU is not a permit holder and could not directly breach s 500 of the FW Act. If it is "knowingly concerned" in a contravention of s 500, it is expressly deemed to have contravened the provision (s 550(1)). That is so even if the union could not have contravened s 500 directly.

139. Finally, Travers' conduct in making the Threat to White was action taken by an officer of the CFMEU acting in that capacity, and therefore the action of the CFMEU pursuant to s 363(1)(b) of the FW Act. The CFMEU admits that if the Applicant demonstrates that Travers contravened s 348, it is liable under s 793.[103] In light of this admission the submissions below only address the contested issues concerning the CFMEU's liability in relation to s 500 of the FW Act.

The Applicant's primary submission: ss 500 and 793 do not require the union to be a "permit holder"

140. Section 793 is a deeming provision. On the proper construction of ss 500 and 793, it is not necessary to prove that the CFMEU itself was a "permit holder" for it to be "taken" to have engaged in the relevant conduct and thereby contravened s 500 of the FW Act.

141. Like all statutory provisions, s 793 is to be construed according to its text, context and purpose.[104] The section heading ("*Liability of bodies corporate*") indicates that s 793 is directed towards the **liability** of bodies corporate.[105]

142. It is clear from the text of s 793 that it is a provision of general application. The text does not incorporate, nor is it limited to, references to specific provisions of the FW Act.

143. The effect of the text and the evident legislative purpose of s 793 is to provide an alternative means by which liability is imposed upon or attributed to a body corporate.[106] It is an alternative to (and not a replication of) common law principles of liability. This alternative statutory mechanism involves the operation of a deeming provision and has a broad operation.

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103 Defence at [26A].

104 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ); *Independent Commissioner Against Corruption v Cunneen* (2015) 89 ALJR 475 at [57]-[62] (French CJ, Hayne, Kiefel and Nettle JJ).

105 The heading of s 793 forms part of the FW Act: *Acts Interpretation Act* 1901 (Cth), s 13(1).

106 *Hanley v AFMEPKIU* (2000) 100 FCR 530 (***Hanley***) at [59]; *AWU v Leighton Contractors Pty Ltd* (2013) 209 FCR 191 (***Leighton Contractors***) at [86] (Katzmann J).

144. The intention or object of s 793 was referred to by White J in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* as:[107]

> … to make the organisation responsible for the conduct of its officers. It is intended to encourage those organisations to take active steps to control the actions of its officers, servants and agents to ensure as far as is possible by taking all reasonable steps, that the conduct of them is not in contravention of … the Act.

145. The text of s 793 does not indicate that it *only* operates to make a union liable for the conduct of its officers in circumstances where the union itself could have committed a contravention, absent this deeming provision in the FW Act. Such a construction would be contrary to the statutory purpose identified above. It is sufficient for s 793 to operate so that the union is taken to be liable for an official's conduct if the official's conduct amounts to a contravention of the FW Act. The effect of s 793 is that if an official engages in conduct which constitutes a contravention of the FW Act (including s 500) then s 793 operates to attribute that contravention to the union.

146. The section does not expressly provide, for instance, that "a contravention of the Act by an officer shall be a contravention by a body corporate". This is explicable by the fact that s 793 has a wider purpose.[108]

147. Further, there is nothing on the face of s 500 to suggest that its reference to "permit holder" acts as a limitation on the accepted broad operation of s 793 of the FW Act.

148. An entry permit can only be issued to an "official"[109] of an organisation: s 512 of the FW Act. Under s 512, the application to FWC for the permit is by the organisation for who the person is an official.

    148.1. One consequence of a contravention of s 500 is that the organisation to which the permit holder belongs may be subject to an order by the FWC under s 508 if rights under Part 3-4 are misused.[110] Another consequence is that the organisation may be liable under s 793 of the FW Act.

    148.2. Section 793 relevantly refers to conduct engaged in on behalf of a body corporate by an "officer, employee or agent (an ***official***)". Accordingly, a "permit holder" under s 500 is one of the types of the persons (namely, an "officer" as defined in s 12 of the FW Act, which includes "(a) an "official of the association") who *could* engage in conduct on behalf of an organisation for the purposes of s 793.

    148.3. The purpose of creating the subset of persons in Part 3-4 of the FW Act, namely a "permit holder", is to identify those particular persons who are entitled to exercise rights under Part 3-4 of the FW Act.

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107 [2016] FCA 413 at [37], citing Cooper J's analysis in *Hamberger v CFMEU* [2002] FCA 585 of the intention of s 298(b)(2) of the *Workplace Relations Act 1996* (Cth) (the predecessor provision to s 793).

108 See *Leighton Contractors* (2013) 209 FCR 191 at [87] (Katzmann J). McKerracher J agreed in relation to s 793.

109 As defined in 12 of the FW Act, "official", of an industrial association, means a person who holds office in, or is an employee of, the association. "Office" is also defined in s 12 of the FW Act.

110 See note 2 to s 500 of the FW Act. See also note 1 to s 484 of the FW Act.

148.4. It would be counter-intuitive for an employee organisation (in respect of which the permit holder is required to be an official in order to exercise rights under Division 3 of Part 3-4) to obtain the benefit of being able to exercise Division 3 entry rights through its officials, while escaping compliance with the prohibitions imposed by Division 4. This is particularly in circumstances where the reference to “officer” in s 793 includes “an official of the association”; and a permit can only be granted to an official of an organisation (s 512).

148.5. An interpretation contrary to that proposed by the Applicant would run counter to the object of Part 3-4 set out in s 480, which comprehends a balance between the competing rights of organisations to (amongst other things) investigate suspected contraventions of State or Territory OHS laws, and of employers to go about their business without undue inconvenience. As a consequence, it would be inconsistent with s 15AA of the *Acts Interpretation Act 1901* (Cth).

149. Even on the narrowest construction of s 793, the relevant conduct in a s 500 case which is attributed to the union is exercising (or seeking to exercise) rights under Part 3-4 of the FW Act. Only a permit holder can exercise or seek to exercise those rights. It would be absurd to attribute to the CFMEU that it had engaged in the conduct of exercising statutory rights under a permit, but to deny the operation of s 793 on the basis that the CFMEU was not itself a permit holder.

150. Accordingly, the Applicant’s primary submission is that it is not necessary to attribute to the CFMEU the status of a permit holder in order to establish liability for a contravention of s 500 under s 793 of the FW Act. This reflects the approach that has consistently been applied by Judges of this Court in making declarations by consent or after a contested hearing on a s 500 contravention.[111] Those decisions are not clearly wrong, and accordingly this Court at first instance should not depart from them.[112] To the extent that the observations of Charlesworth J in *Director, Fair Work Building Industry Inspectorate v Robinson*[113] suggests otherwise, this case (which did not concern s 500) should not be followed.[114]

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[111] See, eg, *Director, Fair Work Building Industry Inspectorate v O’Connor* [2016] FCA 415; *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2015] FCA 199; *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1287; *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1293; *DFWBI v Bragdon* [2015] FCA 668 (overturned on appeal in [2016] FCAFC 64, but on a different point); *Director, Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672; *Stephenson*; *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 311; *Darlaston v Parker* [2010] FCA 771. It does not appear that the point which the Respondents now take was fully argued in any of these cases. It is nonetheless a matter of considerable weight that many Judges of this Court have construed and applied s 793 consistently with the construction advanced by the Director.

[112] *Cooper v Commissioner of Taxation* (2004) 139 FCR 205 at [46] (Lander J); approved in *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236 at [59] (Buchanan J) (Stone and Tracey JJ agreeing).

[113] *Director of the Fair Work Building Industry Inspectorate v Robinson* [2016] FCA 525 at [48]-[50].

[114] In *Director, Fair Work Building Industry Inspectorate v Bolton (No 1)* [2016] FCA 816 at [33], Collier J made some preliminary observations doubting whether Charlesworth J’s observations in *Robinson* led to the conclusion that a union is incapable of contravening s 500 through the operation of s 793 of the FW Act. *Bolton (No 1)* is currently the subject of an appeal.

CFMEU's liability for s 500 contraventions under common law principles

151. Alternatively to liability for a contravention under s 793 of the FW Act, the CFMEU is liable for its officials' contraventions of s 500 of the FW Act under common law principles of attribution of liability.[115]

152. It is well established that a union may be vicariously liable for a contravention of industrial legislation by an official acting within the scope of their authority. The presence of s 793 of the FW Act does not exclude the operation of vicarious liability at common law.[116] Accordingly the CFMEU may be vicariously liable at common law for the acts or liabilities of Travers and Hall constituting the contraventions of s 500 of the FW Act alleged in the SOC.[117] Whilst the traditional view of vicarious liability was confined to the former conduct-based approach[118], the weight of authority in Australia[119] and England[120] suggests that the latter liability-based approach now prevails.[121] That approach should be applied here.

153. In order to establish that the CFMEU is vicariously liable at common law for the officials' contraventions of s 500, it is sufficient to show that the CFMEU authorised the acts constituting the contraventions **or** failed to take proper steps to prevent those acts.[122] It is the former that is relevant in this case.

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115 See SOC at [29]-[30].

116 *Hanley* (2000) 100 FCR 530 at [59] (Ryan, Moore and Goldberg JJ).

117 As to the different approaches to vicarious liability, see *Pioneer Mortgage Service Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78 at [48]-[74] (Davies, Gleeson and Edelman JJ).

118 *Darling Island Stevedoring and Lighterage Co v Long* (1957) 97 CLR 36 at 61 (Kitto J) and 66 (Taylor J).

119 See *Kable v State of New South Wales* (2012) 293 ALR 719 (***Kable***) at [53] (Allsop P, as his Honour then was) and the cases his Honour there cites. His Honour's observations on this issue were not disturbed on appeal (see *State of NSW v Kable* (2013) 252 CLR 118). See also *Perpetual Trustee Company Ltd v Burniston [No 2]* (2012) 271 FLR 122; [2012] WASC 383 at [219] (Edelman J) and the cases there cited.

120 The policy objective underpinning the modern English view is explained by Lord Phillips JSC in *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 (***Christian Brothers Case***) at [34]-[35] (Baroness Hale, Lords Kerr, Wilson and Carnwath JJSC agreeing). The *Christian Brothers Case* was recently discussed in *Cox v Ministry of Justice* [2016] 2 WLR 806 at [15]-[24] (Lord Reed JSC, Lord Neuberger PSC, Baroness Hale, Lord Dyson, and Toulson LJJ agreeing).

121 See Allsop P's discussion in *Kable* at [53]. His Honour's discussion was recently cited with approval by a Full Court of this Court in *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78 (***Pioneer***) at [55]-[56] (Davies, Gleeson and Edelman JJ). The Full Court in *Pioneer* also cited the decisions of Gleeson CJ (at [55]-[74]) and Kirby J (at [320]) in *New South Wales v Lepore* (2003) 212 CLR 511 as supporting a "liability-based" construction. Ultimately, the Full Court in *Pioneer* found it unnecessary to express a concluded view on which of the "conduct-based" or '"liability-based" constructions of vicarious liability ought prevail as a matter of principle, as vicarious liability was established on either view in that case (see [58]). It was similarly unnecessary for the NSW Court of Appeal to form a concluded view on the issue in *Spratt v Perilya Broken Hill Ltd; Spratt v Rowe* [2016] NSWCA 192 at [37] (Leeming JA, McColl and Gleeson JJA agreeing).

122 *Evenco Pty Ltd v Australasian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 at [27] (Pincus J (diss)), approved in *Hanley* at [67]-[76] (Ryan, Moore and Goldberg JJ), and again more recently in *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union and Ors* (2013) 234 IR 59 at [60] (Cavanough J).

154. The relevant conduct need not be expressly authorised by the rules of the organisation. Rules will not accommodate conduct contrary to law, but that does not mean that unlawful conduct cannot be attributed to the organisation.[123]

155. It is enough if the officials had authority to engage in conduct of the sort in question. It is established law that once authority to engage in certain tasks is proved, vicarious liability extends to unauthorised modes of performing those tasks.[124]

156. It cannot be in issue that Travers and Hall had authority to engage in acts or conduct of the sort in question (namely, to conduct site entries on behalf of the CFMEU pursuant to their statutory rights as permit holders under Part 3-4 of the FW Act). Their role went beyond providing them with a mere *opportunity* to engage in unlawful conduct: the exercise of entry rights under the FW Act was a principal purpose of their employment.[125]

CFMEU's liability for s 500 contraventions under s 550 of the FW Act

157. Alternatively to liability for a contravention under s 793 of the FW Act or at common law, under s 550(2)(c) of the FW Act the CFMEU is a person involved in contraventions of s 500 by reason of being, "directly or indirectly, knowingly concerned in or party to" the officials' contraventions of s 500 of the FW Act.[126]

158. Section 550 is based on principles of accessorial liability similar to s 75B of the *Competition and Consumer Act 2010* (Cth) (**the CCA**). Here the Applicant relies upon s 550(2)(c), which is the same as s 75B(1)(c) of the CCA. For a person to be "knowingly concerned" under these provisions, they must be an intentional participant with knowledge of the essential elements that make up the contravention. However it is not necessary that the person knows that those elements amount to a contravention of the statute.[127] That is to say, it is not necessary that the accessory should appreciate that the conduct in question is unlawful.[128]

159. In this case, each of Travers and Hall was an intentional participant in the conduct relied on by the Applicant as contravening s 500, and had all the relevant knowledge. They were therefore "knowingly concerned" in the contraventions.

160. Section 793 is relevant to the way in which the Applicant puts his s 550(2)(c) case in relation to the CFMEU on both conduct and state of mind.

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123 See *Hanley* at [83]-[84] (Ryan, Moore and Goldberg JJ) and the cases there cited.

124 *Prince Alfred College Incorporated v ADC* [2016] HCA 37 (***Prince Alfred College***) at [42] (French CJ, Kiefel, Bell, Keane and Nettle JJ); Hanley at [76] (Ryan, Moore and Goldberg JJ).

125 See the discussion in *Prince Alfred College* at [39]-[47] and [80]-[84].

126 See SOC at [28].

127 *Yorke v Lucas* (1985) 158 CLR 661 at 667; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [48] (Gummow, Hayne and Heydon JJ).

128 *Rafferty v Madgwicks* (2012) 203 FCR 1 at [254] (Kenny, Stone and Logan JJ).

160.1. By the operation of s 793(1), the CFMEU is taken to have engaged in the conduct which the Applicant says was in breach of s 500.

160.2. Further, by the operation of s 793(2), the CFMEU had each official's "state of mind" (as defined in s 793(3)) in relation to that conduct. Section 793(2) – like s 84(1) of the *Competition and Consumer Act 2010* – alters the common law position[129] by providing that, in order to prove the state of mind of a corporation, it is only necessary to identify (here) an "official" of the body corporate engaging in the conduct complained of within the scope of that person's authority and prove that the said official had the requisite state of mind (here, knowledge).[130]

161. In relation to its liability pursuant to s 550 (see especially the terms of s 550(1)), it is irrelevant that the CFMEU is not itself a permit holder.

3 February 2017

Dan Star

Owen Dixon Chambers West

Robert O'Neill

Joan Rosanove Chambers

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129 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

130 See *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 at 737-738 (Toohey J).

Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
Division: Fair Work **No VID 333 of 2015**

Respondents

Second Respondent	Mark Travers
Third Respondent	Adam Hall