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Details of Filing

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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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No. VID 3 of 31

Federal Court of Australia

District Registry: Victoria

Division: Fair Work Division

DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE

Applicant

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

Respondents

OUTLINE OF CLOSING SUBMISSIONS OF THE FIRST, SECOND AND THIRD RESPONDENTS

Summary of Respondents' Submissions

1. The First, Second and Third Respondents (together, **the Respondents**) submit that the contraventions alleged by the Applicant cannot be made out. The behaviour of the Second and Third Respondents does not constitute breaches of ss 348 or 500 of the *Fair Work Act 2009* (Cth) (**FW Act**).

2. Even if the conduct of the Second and Third Respondents constituted technical breaches of ss 348 or 500 of the FW Act, the conduct is *de minimus* and the Court should dismiss the application.

3. If the Court finds, to the contrary, that the Second and/or Third Respondents breached s 500 by improper conduct, the Court should find that the First Respondent has not breached that section pursuant to s 793, s 550, common law principles or a combination of these, because the First Respondent is not capable of holding a permit and therefore cannot breach the provision.

Filed on behalf of (name & role of party) The First, Second and Third Respondents
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4. If the Court finds for the Respondents in respect of paragraph 1 or 2 above, then the costs of the Respondents of and incidental to the proceeding should be awarded against the Applicant.

Evidential standard

5. As acknowledged by the Applicant at paragraph [5] of its Outline of Submissions (**Applicant's Outline of Submissions**), the Applicant must prove its case to "*the standard set forth in Briginshaw v Briginshaw (1938) 60 CLR 336 at 361 to 363 per Dixon J and as now embraced by s140(2)*"[1] of the *Evidence Act 1995* (Cth) (**the Evidence Act**).

Witness credibility and reliability

6. The Respondents consider that all of the witnesses who appeared and gave evidence did so honestly and in a genuine endeavour to assist the Court. Much of the evidence gave rise to no dispute; much of it was more or less consistent. There were a few matters – words or phrases said to have been uttered – that are in dispute.

7. The Applicant in its Outline of Closing Submissions on Liability (**Applicant's Closing Submissions**) suggests that the evidence of its witnesses should be preferred to that of the Respondents' witnesses because the former gave statements in some proximity to the events.[2] The Respondents submit that the Court should not draw such a bland conclusion, but rather consider the conflicting evidence as given by all witnesses. The detail of these few matters will be explored below but it is submitted that the Court should find the Respondent witnesses credible and reliable and that, to the extent there is conflicting accounts of what was said, find that the words alleged may or may not have been said, but that their utterance (and intendment) has not been made out to the required standard.

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[1] See for example *Director of Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 at [13] (Flick J) (*Bragdon*)

[2] See Applicant's Closing Submissions, [17], [19], [22].

Section 500 of the FW Act

8. Section 500 of the FW Act relevantly provides that:

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

9. As observed by the Applicant at [29] of its Outline of Submissions of 29 March 2016, in order for the Applicant to establish contraventions of s500 with respect to the Second and Third Respondents, it must prove that they each:

   a. were permit holders for the purposes of the FW Act;

   b. were *"exercising or seeking to exercise"* rights in accordance with Part 3-4 of the FW Act at the relevant time; and

   c. intentionally hindered or obstructed a person or otherwise acted in an improper manner.

10. For the purposes of this proceeding, the Respondents accept that:

   a. a permit holder in s500 is a person to whom a permit has been granted by the Fair Work Commission (**FWC**) pursuant to s512 of the FW Act; and

   b. at all relevant times the Second and Third Respondents were persons to whom such permits had been granted by the FWC.

11. The question is whether the Second and/or Third Respondents were *"exercising or seeking to exercise"* rights under Part 3-4 at the relevant times alleged by the Applicant. That is a question of statutory construction.

When is a permit holder "exercising, or seeking to exercise" rights under Part 3-4 of the FW Act?

General principles of construction

12. Any question of statutory construction relevantly begins with an examination of the words of the provision being construed.[3]

[3] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47].

13. The words of s500 should be given a *"strict construction"*.[4] The fact that s500 is a civil penalty provision forms part of the context in which that provision is to be interpreted – it is relevant to the question of construction.[5]

14. A majority of the High Court have also observed:

> An appreciation of the heavy hand that may be brought down by the criminal law suggests the need for caution in accepting any loose, albeit "practical" construction of the [relevant provision].[6]

15. The principles of construction applicable to the interpretation of penal provisions are equally applicable to the consideration of civil penalty provisions.[7]

The words "exercising, or seeking to exercise, rights…"

16. The Applicant contends that the Second and Third Respondents were 'exercising or seeking to exercise' their rights under Part 3-4 of the FW Act, by the simple *doing* of something that is described as a right in Part 3-4.[8] The Respondents submit that this is an incorrect interpretation of s500. The Respondents submit that there is an important distinction to be drawn between simply *doing* something that is set out in Part 3-4, and *'exercising or seeking to exercise'* a right to do something that is set out in Part 3-4.

17. The verb 'do' is relevantly defined in the Australian Oxford English Dictionary 2nd Edition as follows:

> 1. perform, carry out, achieve, complete (work etc.)
>
> …

18. The Applicant's construction asks the Court to essentially read s500 as 'a permit holder *that performs or carries out an action* described as a right in Part 3-4…' However, that is not what the section says.

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[4] *R v Adams* (1935) 53 CLR 563 at 567-8.
[5] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 49.
[6] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 210-11.
[7] See for example *Trade Practices Commn v TNT Management Pty Ltd* (1985) 6 FCR 1 at 47-8, *Rich v Australian Securities and Investment Commn* (2004) 220 CLR 129 and *Trade Practices Commn v CSR Ltd* (1991) ATPR 41-076 at 52, 152-3 (French J); as referred to in Pearce, D and Geddes, R, *Statutory Interpretation in Australia (7th Edition)*, p. 302.
[8] See paragraphs [16], [41] – [43] of the Applicant's submissions.

19. Section 500 uses the words 'exercising' or 'seeking to exercise'. The verb 'exercise' is relevantly defined in the Australian Oxford English Dictionary 2nd Edition as follows:

> 1. use or apply (a faculty, right, influence, restraint, etc.)
>
> ...

20. The verb 'use' is relevantly defined as:

> *"cause to act or serve for a purpose, bring into use or service; avail oneself of".*

21. Therefore, a person is 'exercising' a right under Part 3-4 of the FW Act when they *"bring [a right] into use or service"* or *"avail themselves of"* a statutory right that exists in Part 3-4. Simply because a right *exists* at any relevant time, does not mean that a permit holder is *using or exercising* that right, or seeking to use or exercise that right. There is an active mental element implicit in the word 'exercising'; that is, a permit holder must actively decide to 'avail him or herself of', or 'bring into use' a Part 3-4 right. In essence, the permit holder must *rely* on the permit to do something provided for in Part 3-4 to be offered the protections contained within that Part, as well as be made subject to its sanctions.

22. If a permit holder does not wish to 'avail him or herself' of a right in Part 3-4, then that person cannot enter a workplace under the protection of their permit and Part 3-4 of the FW Act - they must enter a workplace by some means other than their statutory entitlement to do so. For example, they might enter the worksite by invitation or for a social visit unrelated to any industrial activity.

23. The Applicant's submissions concerning whether a purpose of entry including holding a social conversation fall within the meaning of "discussions" in s 484 are misconceived.[9] Its reference to *McDermott* at [91] is inapposite. In that case and in the passages cited by the Applicant, Sloane was found to have entered for a permit purpose in circumstances where he stood in close proximity to McDermott who was engaged in clear industrial discussions while handing out handed out brochures reading "What Your Union Can Do For You". Indeed, in that case Mr Sloane admitted he entered other worksites for the same purposes and in respect of another worksite in the Adelaide area that he entered it for the purpose of exercising his permit rights. If a visit is social and unconnected to the

[9] See Applicant's Closing Submissions, [88] – [96].

roles the interlocutors might otherwise play, the Act is not relevantly engaged and they have not contravened the Act by virtue of visiting for social purposes. If they enter as permit holders seeking to exercise rights accordingly and contravene (for example) s 500, the Act is engaged and they will be dealt with accordingly. The Applicant should focus on whether it can prove that *the Respondents have entered the work site as permit holders exercising such rights, and whether having done so they have contravened the Act.* That is clearly what the Act calls for; the Applicant cannot in this case make good its allegations.

24. The Applicant in its Closing Submissions seeks to answer the Respondent's submissions about the construction of s 500 (which was set out in the Respondents' initial submissions) to construct the meaning of "exercising" (a workplace right) such that it requires no active mental element.[10] However, the Applicant's own construction betrays its difficulty in sustaining such a submission. The very provisions it cites (ss 340, 343 FWA Act) contemplate not only "exercising", but also "proposing" or "preventing" the exercise of a workplace right. It is implicit in the terms "proposing" or "preventing" that the subject actively avers to the conduct and was conscious of doing so. Furthermore, the scenario described by the Applicant under those provisions refers to a person against whom action is taken because of the exercise (or not, etc) of their rights; whereas, in s 500 it is the possessor of the rights who is actively taking adverse action for which they are being prosecuted. How that person could passively be exercising permit rights in such a situation is inexplicable.

25. There is no inevitable or even persuasive content in these other provisions in the FW Act that suggest the conclusion portended by the Applicant.

26. Putting it bluntly, it would be absurd to construct *'exercising or seeking to exercise'* a right to do something set out in Part 3-4 in the manner contended. The Applicant is asking the Court to accept quite literally that to "exercise" a right of entry under Part 3-4 of the FW Act, a permit holder does not have to consciously avert "to the existence of the right, let alone conscious reliance on the right".[11] On that construction, a permit holder is "exercising, or seeking to exercise, rights in accordance with [Part 3-4]", and potentially in breach of s 500 of the FW Act, even if that person:

[10] See Applicant's Closing Submissions, [66] – [74].
[11] Applicant's Closing Submissions, [74]

a. has no intention of exercising permit rights;

b. takes no conscious steps to do so;

c. it does not occur to them for a moment that they are so doing; and, indeed

d. has no idea anything done in the context of their presence on a site has any connection with the exercise (or purported exercise) of permit rights.

27. The Applicant's exhortation leads it to pose at [79] a scenario in which, on the Respondents' construction, "[p]ermit holders could brazenly enter work places to hold discussions with workers without notice to employees and simply say that they were not relying on their right of entry under s 484 or other provisions". That is a conclusory argument. Such permit holders, if they were on site with the intention of exercising their permit rights and the evidence showed that was the case, would be:

a. appropriately found to be exercising their permit rights; and

b. accordingly, be responsible for their conduct as permit holders.

In this case, the evidence points to the contrary. The Applicant appears to wish to avoid its obligation to establish offences it alleges without proving that which it must. The Applicant's argument in its Closing Submissions shows that it is seeking, ostensibly and contrary to the clear intendment of the Act, to turn such s 500 offences into offences of strict liability, or at least offences for which the legal burden of proof is reversed. The facts set out and relied upon by the Applicant at [80] in its Closing Submission cannot give rise to a finding of contravention as alleged.

28. The Respondents submit that its construction of s500 is entirely consistent with the context and purpose of Part 3-4 of the FW Act, in which the section appears. The Applicant's is not.

Context in which s500 of the FW Act appears

29. Part 3-4 of the FW Act is concerned with the "*rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State and territory OHS laws*".[12]

30. There is no evidence that the Second or Third Respondents entered the premises "*for purposes related to their representative role*".

31. Division 2 of Part 3-4 is concerned with "entry rights" of permit holders. That is, Division 2 sets out what a permit holder may do *by reason* of his or her permit. It is the existence of the permit that gives a person the power to do the things set out in Division 2, without fear of reprisals at common law.[13]

32. Importantly with respect to Division 2 of Part 3-4, the Explanatory Memorandum to the Fair Work Bill 2009 (**the Explanatory Memorandum**) at [1919] provides as follows:

> It is not intended [for Division 2 of Part 3-4] to codify all of the ways in which entry can occur or provide an exhaustive list of the powers exercisable on the premises. The Division does not affect the ability of an occupier of premises to invite any person onto that premises, e.g., to meet with the employer about a particular matter.

33. Paragraph [1919] of the Explanatory Memorandum implicitly recognises that a permit holder may enter a premises by means, other than in accordance with his or her entry rights set out in Division 2. So much is recognised by the example provided; that is, where a person is invited onto a premises. That is clearly what happened as a matter of course on the MacDow site on every occasion other than the one in question.

34. There may be a number of other reasons why a person who holds a permit enters a particular workplace. Another example might be where a permit holder arrives at or enters a workplace to collect their son, daughter or friend who is finishing a shift; or arrives at or enters a workplace to meet their spouse for lunch, or a friend for a cup of tea. A person entering onto premises in that capacity could not be said to be exercising or

[12] Section 478 of the FW Act.
[13] See *Maritime Union of Australia v Fair Work Commission* (2015) 230 FCR 15 at [13] – [15] (North, Flick and Bromberg JJ).

purporting to exercise their entry rights under Division 2, Part 3-4 of the FW Act, whether they in fact held a permit or not.

35. If it is accepted that Division 2 of Part 3-4 of the FW Act was not intended to cover every circumstance in which a permit holder can enter a workplace, then how does a permit holder 'exercise or seek to exercise' the entry rights set out in Division 2?

36. The Respondents submit that, as described above, for a permit holder to exercise or seek to exercise their entry rights in Division 2, the permit holder must avail themselves of their entry rights *by reason of their permit.* That is, they must rely upon their permit and have an intention to rely upon it.

37. If a permit holder is not relying on their permit, then they are not exercising or seeking to exercise a Division 2 entry right.

Evidence of the Second and Third Respondents 'exercising or seeking to exercise' a Part 3-4 right

38. The right that the Applicant alleges the Second and Third Respondents exercised was their right pursuant to s 484 of the FW Act to enter premises.

39. There was no evidence in the trial to the effect that the Second and Third Respondents relied on their permits to gain access to the premises, or that they did or sought to exercise permit rights when on site. Indeed, the evidence was entirely to the contrary.

40. Mr Travers' evidence was that his car was being serviced that day and so he was getting a lift with Mr Hall, who had to visit the Fulton Hogan site just next door to McConnell Dowell (**MacDow**).[14] He rang Rod Duggan, who invited him over and Mr Travers walked next door and had a cup of tea with Mr Duggan.[15] None of these facts are disputed by the Applicant.[16] Mr Travers described the purpose of his presence as a "social visit"; he was talking about Mr Duggan's holidays; "it had nothing to do with work", and that he was finishing his cup of tea and would be gone in five minutes.[17]

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[14] TS 77.
[15] TS 78.
[16] Applicant's Outline of Closing Submissions on Liability, 3 February 2017 (Applicant's Closing Submissions), [24].
[17] TS 79. See also, TS 84, 87,

41. The Applicant mischaracterises the evidence in relation to this issue at [28] of its Closing Submissions. The recounted evidence of Mr Duggan (that Mr Travers "might have asked how the job was going, but that was just – you know, of course he is going to ask that" and "We would have mentioned the job – 'How's it going?' – just general, but there was nothing, no specific issues at the time") is relied upon as some admission by Mr Duggan that "work was also discussed". This (a) mischaracterises that evidence as an admission that anything beyond a polite inquiry about how work was going had been discussed, and (b) cannot amount to evidence that a matter pertinent to the exercise of right of entry powers was raised. That interpretation is simply not open on the evidence.

42. Mr Travers' evidence was that he had never entered the MacDow project on a right of entry basis;[18] he had never before given formal 24 hours' notice, and had never before been asked to do so. He would always resolve any safety issues informally.[19] He had never had to go through this process before.[20] There were no safety issues at the time of this incident or otherwise on the project; nor were there any industrial issues.[21] That was consistent with the evidence of all the witnesses and is beyond dispute.

43. Mr Travers said he could not recall if anyone asked him to produce an entry permit; he said even if they did he would not have had it on him as he did not have his car and he had never had to produce his permit before at the job anyway.[22] Of note, Mr Naughton's recollection was clear: his evidence was that on this occasion he was not shown a right of entry permit and did not ask to see a right of entry permit.[23]

44. Mr Hall's evidence was that Mr Travers or he would visit the MacDow site no more than every 3 - 6 months, and that as to whether there were any safety issues on the site, he said "No. None at all".[24] Despite extensive cross-examination as to there being discussed industrial or safety issues, Mr Hall was adamant no industrial issues were raised and had no recollection of any safety issues being raised.[25] He was a credible witness who tried to recall what was said and done as best he could. Like the other witnesses, he was

[18] TS 78.
[19] See, e.g., TS 78.
[20] TS 81.
[21] TS 79.
[22] TS 80.
[23] TS 22.
[24] TS 62.
[25] See, e.g., TS 70-72. When put to Mr Hall a number of times in cross-examination that there was mention of "safety issues" by Mr Travers, he says each time he cannot recall that being said (see TS 72-73).

perplexed by the MacDow employees' reaction to his presence on site, and he expressed in his evidence the sense that this was all a storm in a teacup.[26]

45. On 17 June 2014, he visited the Fulton Hogan site next door to MacDow. Mr Travers was with him because the latter was having his car serviced and Mr Hall had picked him up in Sunbury.[27] While he was at Fulton Hogan, Mr Travers said he was going across to MacDow "to catch up with Rod [Duggan] for a cup of tea".[28] Mr Hall said he was at Fulton Hogan for 10-15 minutes and then walked over to MacDow and joined Mr Travers and Mr Hall, where he had a cup of tea and they were "just talking about just anything, you know. Nothing about the job."[29] Mr Hall gave the following evidence:

> In the conversation that you had with Mr Duggan while you were there, either when the management was there or otherwise, did you discuss any issues relating to the worksite at McConnell Dowell? --- No.[30]

46. Mr Hall said at no time did Mr Naughton or Mr Carter ask he or Mr Travers to produce their permits.[31]

47. Mr Duggan's evidence was that whenever Mr Travers had to attend the site he did not enter on a right of entry basis; entry "was pretty casual. He just turned up".[32] On the occasion in question, Mr Duggan received a call from Mr Travers: "He said that…his car was in for a service and he was next door and he would just call over and have a cuppa and say hello".[33] They had a cup of tea in the lunch room.[34] Mr Duggan gave the following evidence about his conversation with Mr Travers:

> All right. What were you discussing? --- I'm not exactly sure, but it would have just been general – you know, "I've been on holidays," and he has got somewhere down the coast and I go for trips interstate, so just general sort of – just general talk like people do.
>
> Okay. During the course of that conversation were there any safety or industrial relations issue raised? --- No, not – nothing to me; nothing specific.
>
> Do you recall? --- He might have asked how the job was going, but that was just – you know, of course he is going to ask that, yes.

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[26] See, e.g., at 71-72: "One of your reasons for going there, Mr Hall, was to have a chat with Rod about any issues that might have come up on the site, wasn't it?---I went to the Fulton Hogan job to have a meeting with Fulton Hogan while Mark was over there and then I just moseyed on over there to have a cup of tea. That's a fact."
[27] TS 62.
[28] TS 63.
[29] TS 63.
[30] TS 65
[31] TS 64.
[32] TS 96.
[33] TS 96.
[34] TS 96.

> And do you recall anything specific being raised in relation to the worksite or the project? --- No.[35]

48. Whilst the other witnesses were unable to recall, Mr Duggan recalled that at the time of the visit there was no work being undertaken on the actual worksite beyond gate 22.[36]

49. The Applicant sought to make something of the time at which Mr Duggan took lunch, presumably for the point that if the Respondents were in breach of right of entry laws that they were seeing an employee outside of official break times. The Applicant in its Closing Submissions sought to make a case that Mr Duggan was not on a lunch break and made selective reference to Mr Carter's evidence.[37] Mr Duggan explained the notation on his time sheet for the day (as taking lunch between 1pm and 1.30pm), explaining that a) there is flexibility in the times at which employees can take lunch,[38] and b) the time sheets were normally filled out once a week and unless he had worked back and taken a late lunch, "usually I just sort of put 1 to 1.30".[39] Given the evidence, although it bears on little relevantly, the Court should not find it established that Mr Duggan had a cup of tea with Mr Travers and Mr Hall outside his lunch time, but that he instead took his lunch early that day because he was receiving a spontaneous social visit from Mr Travers.

50. It was put to Mr Duggan that when Mr Naughton confronted the group in the lunch room that Mr Travers said to him, "We have just been having a chat about safety with Rod". Mr Duggan's evidence in answer to this proposition was clear: "No, he said it was a social call. He said, 'I'm not even here as an official. I'm just here having a chat'".[40]

51. All witnesses agreed it was a project that gave rise to no safety or industrial problems; that there had been no difficulties on the site;[41] no one had raised any real safety issues, and only one ARREO had been issued relating to drug and alcohol policy, which was at the behest of MacDow, was undertaken informally and occurred about a year **after** this

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[35] TS 96-97.
[36] TS 97.
[37] See, Applicant's Closing Submissions, [25] – [26]; footnote 17.
[38] TS 99.
[39] TS 99.
[40] TS 101.
[41] See, e.g., Mr White at 56.

incident.[42] Mr Naughton recalled Mr Travers making a joke about the 17 June 2014 incident when they met to discuss this matter.[43]

52. Nothing in the evidence of the Applicants' witnesses advanced the Applicant's position on this point. Neither Mr Travers nor Mr Hall had been required to produce permits or enter on any formal right of entry basis before or after this particular day.[44] All witnesses accepted that things had changed prior to this visit due to matters that had nothing to do with Mr Travers or Mr Hall. Mr Naughton referred to a sanction that had been imposed by the Fair Work Building Industry Inspectorate upon MacDow "for not complying with right of entry… so we had been, I suppose, briefed to ensure we were in strict adherence with the right of entry process".[45] Mr White said, in response to Ralph Edwards asking where the pressure was coming from for him to call the Police in this situation:

> Well, on another project we had – we had not properly reacted correctly as far as the legislation went, and we were looking down the barrel of sanctions by the Victorian Government for tendering future work. We were very sensitive to the fact that we had to company to the – to the legislation as it was written, without – without any – any room to move.[46]

In a conversation between Mr White and Mr Duggan some weeks after 17 June 2004, Mr Duggan recalls:

> I spoke to David White next time he came out and asked him what was going on because everything had changed… He said that "things were different". He said, you know, they had lost government work. They had lost their ability to ..... on government work and if they didn't have government work, then they were pretty much out of business, so they had to take a harder line and things had changed.[47]

53. There was no evidence that Mr White was informed that Mr Travers and Mr Hall said they were there on a purely social visit, nor was it conveyed to Mr White that the two men had no industrial purpose in being there and they were not seeking in any way to exercise their permit rights. His response to being told they were on site, in the circumstances of government pressure referred to by him, was to take a strict approach to remove them. Mr White did concede as follows:

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[42] See, e.g., Mr Naughton at 21.
[43] See TS 21 (Mr Naughton); TS
[44] See, e.g., TS 16 (Mr Naughton).
[45] TS 26.
[46] TS 54.
[47] TS 99. Mr White could not recall a conversation with Mr Duggan after the incident (TS 57-58).

> People could walk in and come to that area without going through gate 22 and, for example, meet with an employee, as a friend or a partner bringing lunch that has been forgotten or something like that. That could happen? --- Yes, they could.
>
> And you wouldn't be calling the police if they came and had a catch-up with – say, Rod Duggan had a catch-up with a friend who wasn't a union official and had a cup of tea, then you wouldn't be seeking to kick them off-site? --- Probably not, no.

54. Mr White's understanding of the law was that, no matter what the circumstances, a union official being present on site without having given 24 hours' notice of intention to enter the site would be in breach of industrial law.[48] Without being critical of him, Mr White's understanding of the law in this respect was simply erroneous.

55. Counsel for the Applicant sought to suggest to each of the Respondents' witnesses that Mr Travers or Mr Hall might have provided leaflets or pamphlets to Mr Duggan while outside and before they departed. Mr Naughton said Mr Duggan returned with some colourful leaflets but had no idea what was on them.[49] Mr Travers[50] and Mr Hall[51] both said they could not remember providing Mr Duggan with any leaflets. Mr Duggan, who was after all the person said to have been provided leaflets, when asked the same question in further cross-examination about pamphlets by the Applicant's counsel, had a clear recollection:

> All right. And then, right at the end, after the police had come and the guys were leaving, you went down to the car with him, didn't you? --- Yes.
>
> And they gave you some pamphlets? --- No, they gave me a business card as the police wanted – wanted their ID. Mark gave the police a business card and Adam didn't have any on him, so he went to the car and I grabbed it and bought it back for him.[52]

56. The Court should find no leaflets were provided to Mr Duggan. Even if the Court finds there were leaflets, there is no evidence at all about the content of them – they could have been anything. And, at any rate, if they were provided at all, they were provided outside in the car park, at the end of the incident, when the police were speaking to the parties and Mr Travers and Mr Hall were about to leave.

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[48] TS 55; and at 56: "So your understanding is that if they're officials of a union, regardless of whether they hold a permit, they can't come on-site and have a chat with a friend? --- That's correct".
[49] TS 13.
[50] TS 90.
[51] TS 76.
[52] TS 101.

57. The fact of the matter is that the Applicant has not produced any evidence that the Second and Third Respondents relied on their status as permit holders at any stage, either on entry or while present on site.

58. The clear and uncontradicted evidence was that it was never the Second or Third Respondent's intention to enter the premises relying on their right to do so pursuant to their permits.

Consideration of other cases

59. In *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287 **(Powell)**, Bromberg J held that "s 494 is to be understood as only addressing an industrial right, specifically a right of entry conferred upon a representative of a trade union for a representational purpose".[53] His Honour traced the historical development of right of entry from common law through the legislation leading to and including the FW Act, concluding with great force that "right" in the context of s 494 means "industrial right":

> 81 The rights of entry conferred by each of those regimes may fairly be characterized as industrial rights. They were, in each case, rights provided to a representative of a trade union for the purpose of the trade union providing representation to its members or those eligible for membership. That the purpose of the representation was related to health and safety does not deny the industrial character of the rights conferred. To the contrary, the health and safety of employees is a common purpose of the industrial representation of employees by trade unions.
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> ...
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> 98 To adopt the language and approach of Gageler and Keane JJ at [66] of *Taylor*, the context does here reveal statutory text capable of a range of potential meanings. One meaning which is not "wholly ungrammatical or unnatural" is that the word 'right', when used in s 494, means an industrial right – a right conferred for representational purposes to be exercised by an official of an industrial organisation. I have evaluated the relative coherence of that meaning (for which Mr Powell contends) as against the literal meaning (for which the Director contends) that "right" means any right conferred by a State or Territory OHS law upon any person for any purpose. I have done that by reference to identified statutory objects or policies. For the reasons given, the conclusion I have arrived at is that the meaning for which Mr Powell contends is relatively more coherent with the identified objects and discernible policy of the FW Act.[54]

60. In *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147, the agreed facts indicate that McDermott initially told the Project Manager on site

[53] Powell, [36]. Bromberg J also examines the history of right of entry as developed through the legislation in reaching his conclusions.
[54] *Powell*, [81], [98].

that he was not there exercising his right of entry.[55] In fact, McDermott admitted that he was on site exercising his permit rights in accordance with s 484 of the *FW Act*. It was expressly on the basis of that admission that Charlesworth J found that McDermott entered the site for the purpose of holding discussions with the employees.[56] In other words, the case determined on the basis of McDermott's express admission to entering for a permit purpose. That is entirely different to the instant case. Further, in relation to contraventions on 14 July 2014 in that case, admissions as to the conversations between McDermott, another Union official Cartledge and the Project Supervisor, clearly show that the Union officials were, and accept they were, on site exercising permit rights.[57] Again, there is no relevance to this proceeding where the Second and/or Third Respondent were clearly not on site exercising permit rights.

61. In *McDermott*, the Respondents not only entered the worksite and remained after being asked to leave, they moved around the site, spoke to workers, handed out leaflets on what the CFMEU could to for them, behaving in a manner more consistent with the exercising of permit rights.[58] Furthermore, one of the Respondents, Mr Sloane, admitted he entered other worksites for the same purposes and in respect of another worksite in the Adelaide area that he entered it for the purpose of exercising his permit rights. That is entirely different to this case, where all the surrounding evidence suggests that there was no basis for the Second and Third Respondents to attend the sight for a permit purpose and they clearly were not so doing.

62. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 (**Lend Lease SA Case**) referred to by the Applicant, the Respondents in that case, inter alia, entered, walked around the site, spoke to form workers and pointed out (clearly in connection with industrial activity) issues regarding a second access staircase to the formwork decks, access under the formwork platforms and the locking of the switch box containing RCD breakers;[59] there were discussions about the Lend Lease Safety Committee carrying out site walks, padlocking

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[55] *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147 (McDermott), at [35].
[56] McDermott, at [37].
[57] McDermott, at [45], [47]-[48], [56].
[58] The Applicant's suggestion that pamphlets were provided to Mr Duggan at the end of the incident may be intended to enliven reference to the McDermott case. For the reasons set out above the Court should find neither that pamphlets were handed over nor that they were in any way proved to be relevant to the contraventions alleged.
[59] See Lend Lease SA Case, [40].

electrical boards and issues about stair access points,[60] and about placing CFMEU flags on the cranes.[61] Similar indicia was present with respect to the conduct of officials on the Flinders university site.[62] Again, this is entirely different to the facts of the instant case.

63. The Applicant must prove by evidence a demonstrable intention on the part of each Respondent to "exercise, or seek to exercise" permit rights.[63] What is required is proof of the subjectively held purpose of the permit holder.[64]

64. Nothing in the statement by White J in *Lend Lease South Australia*, at [71], should be read as expressing the view that the test is anything other than a subjective one. Her Honour, Charlesworth J, addressed that matter directly in *McDermott*, stating that she did not read White Js words (taken in the context of his ruling) as expressing a view that the test was an objective one.[65] Indeed, all that White J is saying is that one can look at what a person says and does to assist in reaching a conclusion as to the subjective state of mind of that person.

65. In *Setka v Gregor (No 2)* [2011] FCAFC 90 (**Setka No 2**), there was likewise clear conduct that the Court could rely upon to conclude that, contrary to Mr Setka's submission, he had entered the site for a permit purpose. Mr Setka had appealed a Federal Circuit Court decision that found he acted improperly on site. He argued on appeal that he was not seeking to exercise his rights under the *Occupational Health and Safety Act 2004* (Vic) and therefore s767 of Workplace Relations Act 1996 (Cth) was not engaged as there was no evidence about the reason for his visit to the site. The Full Bench found that there was ample evidence that he engaged with the section, including complaining about safety, calling the site a "f...ing pigsty"[66] and threatening the builders.[67]Others in Setka's company were found to be taking photographs of works on the site which were

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[60] See Lend Lease SA Case, [43].
[61] See Lend Lease SA Case, [45]. In relation to entry onto the Flinders university site, Mr Gava admitted he entered the site for a permit purpose, and remaining on site in the circumstances constituted a breach of s 500 (at [67]).
[62] See Lend Lease SA Case, [73].
[63] See, McDermott, [102].
[64] McDermott, [105] – [111], citing Dowsett Js judgment in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2010) 186 FCR 8, at [41], and the judgment of Greenwood J on the same case on remittal confirming that proposition: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* (2011) 195 FCR 280 at [130].
[65] See, McDermott, [111].
[66] *Setka No 2*, [5]. [7].
[67] *Setka No 2*, e.g., [15], [16].

said to present a risk to the health and safety of workers.[68] In these circumstances, the Full Court held that Mr Setka's conduct, as the Federal Magistrate held, was clearly "improper" in the necessary sense.[69]

66. Each of these cases differs materially from the present proceeding. The Applicant has not referred, and will not be able to refer, to a single case in which there has been a finding of breaches by permit holders for such clearly innocuous conduct. While factual comparators are generally of little benefit, in this case the total lack of an analogous case dealing with permit holder breaches is instructive.

67. A person could enter a work site like this one for any number of reasons. The evidence here is overwhelmingly that the intention of the Second and Third Respondents was to enter for a social purpose entirely unrelated to a permit purpose. The context and surrounding facts also support that clear evidence given by the Second and Third Respondents, but also Mr Duggan. The Applicant has not discharged its burden to the contrary.

68. The Applicant will doubtless be seeking to have an inference drawn that the conduct of the Respondents support a proposition that they entered the work site for the purpose of and were exercising permit rights. As was plain from the evidence, such an inference is unavailable.

69. The Applicant's construction of s 484,[70] suggests that the provision operates as an absolute liability provision, in the sense that once a person is a permit holder enters a worksite and speaks with an employee, they are exercising permit holder rights. For the reasons set out above, that construction is cannot be sustained.

70. The proper construction of s 484 is that expounded by Bromberg J in *Powell*, as set out above. The Applicant must prove by evidence a demonstrable intention on the part of the permit holder to "hold discussions" with an employee for a purpose relevant to the holding of a permit; an industrial purpose. A person (who happens to be a permit holder) who visits a friend on site (who happens to be an employee), is not sufficient to establish that the person is exercising, or seeking to exercise, permit rights.

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[68] *Setka No 2*, [14].
[69] *Setka No 2*, [31].
[70] See [40] – [43] Applicant's Initial Submissions; [66] – [74] Applicant's Closing Submissions.

"Improper manner" – s 500

71. Further to the arguments set out above, the term "improper manner" must have a connection with an industrial issue. This is because it is acting in an improper manner while "exercising, or seeking to exercise" permit rights.

72. Refusing to leave a work site could only constitute a breach of s 500 if that refusal is connected relevantly with the person exercising permit rights. The evidence in this case bears out the following:

    a. It is not entirely clear whether the Second or Third Respondent refused to leave before an indication was given by Mr Naughton that he would call the police. Things moved rather quickly, there was toing and froing about why they were being asked to leave, phone calls passed at least between Mr Naughton and Mr White, Mr White and Mr Travers, Mr White and Mr Edwards, in an endeavour on the part of the Respondents to understand why protocols had changed, to try to indicate that Mr Travers and Mr Hall were only there on a social visit and would be leaving promptly, and then in reaction to this. Calling the police was raised fairly early on and Mr Travers and Mr Hall made it clear that, if that were to occur, they were required to remain until the police arrived, as they did. It appears to be submitted by the Applicant in its Closing Submissions that refusal to leave for this purpose converted their presence into attendance at the site for a s 484 purpose.[71] It cannot be seriously contended that the Second and Third Respondents by remaining on the premises for the police to arrive relates to right of entry or their presence as permit holders. Because CFMEU employees have a practice of remaining to speak to police if they are called does nothing to convert their presence into a purpose relating to a ROE.

    b. Even if they did refuse to leave, where such refusal has no connection with the exercise of the person's permit rights it cannot offend the FW Act. So much is clear from Bromberg Js analysis in *Powell* set out above.

[71] Applicant's Closing Submissions, [110] – [111].

c. Rather, it may constitute a trespass. Certainly, the police were called and attended. The evidence was clear that they were unimpressed, having taken some bare details they departed; no further investigation was undertaken, neither Mr Travers nor Mr Hall were interviewed, charged or even further contacted in relation to the incident. Evidence was given that the police were unimpressed and made it clear to the MacDow employees that they should not have been called out for such a matter.[72] Not that it is relevant to this case, but it was accepted by all witnesses and not disputed by the Applicant that the Police took no further action in relation to this matter as against Mr Travers or Mr Hall.

73. To follow the Applicant's approach in this case would be to invite the application of the FW Act to circumstances that have no relationship with industrial matters.

74. The "improper manner" cases relate to conduct clearly in the context of industrial activity of some sort; they do not relate to, and there should be no extension to, activity clearly outside of that rubric.

75. The meaning of "improper manner" in s 500 was considered by Flick J in *Director of the Fair Work Building Industry Inspectorate v Bragdon* [2015] FCA 668:

> 97 "Improper conduct" is conduct which falls below that standard which can reasonably be expected of those who occupy positions of responsibility: cf. *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (No 2) [2015] FCA 199. Mansfield J there observed in respect to s 500:
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> [106] Consequently, as they were seeking to exercise powers under Pt 3-4 of the FW Act, s 500 may be contravened when their conduct exceeds that authorised by the exercise of those rights. Section 500 requires an objective assessment or determination whether there was conduct or action of an improper manner. It does not depend upon intention.
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> [107] In *R v Byrnes and Hopgood* [1995] HCA 1; (1995) 183 CLR 501, the High Court said in the majority judgment at 514–515:
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> > Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged defendant by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are

[72] See TS 98 (Mr Duggan); TS 65 (Mr Hall); TS 47 (Mr Carter); TS 28 (Mr Naughton).

> important factors in determining the question whether the power has been abused. But impropriety is not restricted to an abuse of power. It 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.

See also: *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2015] FCA 453 at [171] per Mansfield J.

76. The Second and Third Respondents have not done an act they know or ought to have known they had no authority to do. Even if they are held to have entered as permit holders:

a. The "refusal to leave" in the circumstances does not constitute a breach of standards of conduct that would be expected of officials in the circumstances. Where there were no safety issues present or in train, no project work being performed and what was occurring was an informal exchange between friends, Mr Travers telling Mr Naughton that he would leave when he finished his cup of tea was not improper. Once it was indicated the police were to be called, it was entirely the proper thing to do to wait until police arrived before leaving the site. To find otherwise would be to impose a hair trigger upon the statutory purpose behind
s 500, which is neither warranted nor needed.

b. If it is found that Mr Travers told Mr White anything along the lines of "you are starting a war and it will be no different to what we have done with Kane", again in the context of this project, these relationships and this event, as discussed below, the conduct:

   i. was directed not to an industrial purpose, but to seeking to have Mr White not call the police; and

   ii. was *de minimus* and insufficient to constitute acting in an "improper conduct".

Section 348 of the FW Act: was there a threat to organise or take action?

Did Mr Travers refer to a "war" or Kane" and does it matter?

77. The Applicant alleges that Mr Travers told Mr White "If you do that [Naughton calling the Police] you are starting a war and it will be no different to what we have done with Kane".

78. The only witnesses who gave evidence about this were Mr Travers and Mr White himself. The Applicant in its Closing Submissions sought to suggest that Mr Duggan's evidence was not inconsistent with the Applicant's case on this issue because he was not present for the entire call.[73] This is a selective and partial account of the evidence. Mr Duggan, who only overheard part of the phone conversation between the two was asked if he heard Mr Travers say anything about "war" or Kane"; he said he did not hear anything along those lines said, and went on to say: "I know Mark and that's not the sort of words he uses".[74]

79. Mr White said the words were spoken by Mr Travers and that he took that to mean that there would be almost daily disruption of the work site. He accepted in cross-examination that no such action was taken and he never heard from Mr Travers or the CFMEU about the matter again.[75] Mr White also clarified what he took Mr Travers' comment to mean: "It was, 'If you continue to call the police then you're starting a war'…"; and further: "…[was the comment] quite specific to you calling the police on him to get him off-site? --- Yes, it was".[76]

80. Mr Travers said he did not say that to Mr White.[77]

81. There is conflicting evidence about what was said. It makes little sense that Mr Travers would say these things in a context where there was a longstanding good relationship between the two men, there were no issues on the project and nothing ensued either in relation to the alleged comments or in relation to the project at all. This was a completely isolated and benign incident, without context to any safety or industrial dispute of any kind between MacDow and the CFMEU. In these circumstances, that these words were

[73] Applicant's Closing Submissions, [23].
[74] TS 98.
[75] TS 57.
[76] TS 57.
[77] TS 88.

uttered must be considered at least unlikely. On the other hand, both witnesses were credible and both witnesses had a firm recollection of what was said or not said about this. In the circumstances, the Respondents invite the Court to conclude that the utterance of the words as alleged has not been proven to the required standard.

82. Alternatively, should the Court find that the words were uttered, the Court should find that those words do not make out the contraventions alleged:

a. As to s 500, the Respondents are not present exercising permit rights. Even if the words were uttered there is no relationship between those words and any industrial activity. Telling Mr White that by calling the police he is starting a war and it will be no different to what was done with Kane, in the context has no industrial connection. It cannot be a breach of s 500 because Mr Travers was not "exercising, or seeking to exercise" permit rights.

b. Even if the Court finds that the words were uttered, they do not make out a contravention of s 348. That provision requires that the words:

i. constitute a threat;

ii. to organise or take action

iii. against another person (Mr White/MacDow);

iv. with intent to coerce;

v. to engage in industrial activity.

Whilst it is accepted that the words may fulfil elements i. to iv. above, they cannot satisfy element v. This is because the coercion, if it exists, is to stop Mr White from having the police called in response to the Second and Third Respondents' presence, as clearly stated by Mr White as being how he took the intent of the words.[78] That is not an industrial activity, because the threat (if it is that) is directed at Mr White calling the police, not in relation to anything of an industrial nature on the site.

[78] TS 57.

c. The words, if uttered, were hollow and inconsequential – no action or conduct flowing therefrom – and should in the circumstances be considered *de minimus* and not worthy of sanction.

83. Further support for these proposition flows from a review of the cases in which s 348 of the *FW Act* is considered and applied. As with the s 500 "improper manner" cases, none of these cases deal with the type of factual matrix presented in this proceeding. An example of coercion under s 348 is the Lend Lease SA case referred to above, in which White J found that there had been coercion in respect of demands by Union officials for Lend Lease to place CFMEU flags on the crane hook.[79] A proper example of such coercion was the Respondent Gava in that case saying to a Lend Lease manager "if you don't do it [put the union flag on the hook], we will stop the job".[80] In that case, it was plain that the threat relates to an industrial purpose.

84. Again, the Applicant has not referred, and will not be able to refer, to a case in which there has been a finding of breaches of s 348 FW Act for such conduct. While factual comparators are generally of little benefit, in this case the total lack of an analogous case is instructive.

85. Nothing in the alleged conduct amounts to coercion to engage in industrial activity, as defined by s 347 of the *FW Act*. There has been no breach of s 348 of the FW Act.

Conclusion: were the Second and Third Respondents 'exercising or seeking to exercise' their s 484 rights?

86. For the reasons set out herein, the Respondents submit that for a permit holder to 'exercise or seek to exercise' their entry rights in Division 2, the permit holder must avail themselves of their entry rights *by reason of their permit.* That is, they must rely upon their permit to do or carry out an action specified in Division 2 of Part 3-4 of the FW Act. The Respondents submit that this also requires the Applicant to demonstrate evidence of an intention by the Second and Third Respondents to do so.

[79] See Lend Lease SA Case, [92].
[80] See Lend Lease SA Case, [95].

87. The Respondents submit that there is no evidence of the Second or Third Respondent's intention to avail themselves of their Part 3-4 rights. Therefore, the Second and Third Respondents were not, at any relevant time, 'exercising or seeking to exercise' rights under Part 3-4 of the FW Act. The only reason they entered the site was for a social visit after receiving an invite from another employee.

88. The Respondent submits that the alleged contraventions of s500 should be dismissed.

Allegations of Improper Behaviour

89. If the Respondents' construction of s500 is accepted, it does not matter how the Respondents behaved for the purposes of this proceeding, as they were not 'exercising or seeking to exercise' a Part 3-4 right.

De minimus: even if technical breach/es made out, case should be dismissed

90. The Respondents submit that, even if the Court accepts that technical breaches of s 500 an/or s 348 are made out, the matter should be dismissed by application of the maxim *de minimis non curat lex.*

91. In *The Reward* (1818) 165 ER 1482, a ship was stopped for transporting 3 tons of Jamaican logwood from Jamaica to the United States. At that time the export of such wood was prohibited. When discussing the application of the maxim, the Court observed as follows:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.[81]

92. For the maxim to apply, the following elements must be established:

a. an offence or contravention was committed;

b. the offence was a "mere trifle";

[81] *The Reward* at p1484.

c. if the offence were continued it would weigh little or nothing on the public interest; and

d. the accused is exposed to the infliction of inflexibly severe penalties.

93. The case amounted to Mr Travers and Mr Hall entering onto the property of MacDow, sitting down in the lunch room with Mr Duggan and having a cup of tea. Whether it is found that they were there as permit holders under s 484 of the FW Act or not, all the Applicant's witnesses accepted that it was a benign incident, that they would rather not have had to act as they did, and that they did so because of pressures the company was under due to a sanction some time earlier in relation to failing to adhere formally to right of entry requirements and the pressure to maintain a strict position if they were to continue to receive government work.

94. The Applicant's account of the "key factual disputes" in its Closing Submissions reveal how petty the entire matter was from the outset.[82] That a prosecution could be brought over the presence of Mr Travers and Mr Hall in the lunch room, enjoying a cup of tea and a catch up – and in circumstances where everybody acknowledged that there were no safety or industrial disputes on the site, had never been and there were none thereafter, and where Mr Travers and Mr Hall had never been required to produce permits or attend the site on a ROE basis before or after, and driven to the bitter conclusion of a contested trial – is simply a misuse of community and court resources, not to mention the resources of the Respondents in having to defend this matter. That the Applicant continued the trial and prosecution following pointed remarks from the Bench on the morning of the trial only serves to reinforce the point.

95. The First Respondent submits that the alleged conduct, even if found proven, falls squarely into each of the four limbs of the maxim. This was an incident so trifling that it should not cause the Court any concern, and should otherwise be dismissed.[83]

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[82] Applicant's Closing Submissions, [46] ff.

[83] For further discussion of the modern application of the principle of *de minimis,* see Ross on Crime (5th Edition) at [4.1300] – [4.1310].

Liability of the CFMEU

96. The Respondents submit that by reason of the matters set out herein, no contraventions of s500 or s348 of the FW Act can be made out Therefore, the First Respondent cannot be found liable for contraventions pursuant to:

    a. s793 of the FW Act; and/or

    b. s363(1)(b) of the FW Act.

97. Alternatively, the First Respondent also submits that if the Court finds that the Second and/or Third Respondent contravened s 500 of the FW Act by acting in an improper manner, the First Respondent is not liable for the contravention/s.

98. The Applicant contends that the First Respondent is so liable by one of three means: by operation of s500 in conjunction with s793, by means of s550 or under common law principles of vicarious liability.

Sections 500 and 793 of the FW Act: legislative background

99. As this Court observed in *McDermott*:

> ...s 793 of the FW Act. is concerned with the attribution of conduct. and states of mind of certain natural persons to a body corporate but does not directly operate, of itself, to ascribe liability to the body corporate. Whether the ascription of conduct and a state of mind to a body corporate results in one or more contraventions by the body corporate will depend upon the elements of the contravention that is alleged in any particular case...[84]

100. Section 793 mirrors provisions in the former *Trade Practices Act* introduced by the *Trade Practices Revision Bill 1986.* The explanatory memorandum to the *Trade Practices Revision Bill 1986* expressly identified the mischief to be remedied. The mischief was the difficulty proving that decisions were taken by a body corporate:

> Because of the limited scope of sub-s.84(I) large corporations with extensive management structures able to avoid liability in situations where smaller companies and individuals would be held liable under Act.[85]

101. Section 793 provides a statutory mechanism by which the state of mind of the body corporate may be established[86] and a statutory mechanism by which conduct of an officer, employee or agent of the body corporate may be taken to have been engaged in

[84] *McDermott* at [23].
[85] *Trade Practices Revision Bill 1986 Explanatory Memorandum* cl 182.
[86] Compare, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

by the body corporate. Section 793 is not a deeming provision. Rather, "(i)t sets out the circumstances in which liability may be imposed upon a body corporate where conduct is engaged in on behalf of a body corporate."[87]

102. As Her Honour Justice Charlesworth relevantly observed:

> Section 793 does not, of itself, fix upon a body corporate liability for contraventions found to have been committed by its officers, employees or agents. Rather, it attributes to the body corporate the conduct and state of mind of its officers, employees and agents in prescribed circumstances. The question of whether the body corporate has contravened the FW Act (and, if so, on how many occasions) must be answered by assessing the facts, namely the conduct and state of mind attributed to the body corporate, against the elements of the contravention said to have been committed by it.[88]

CFMEU is not a "permit holder"

103. For the First Respondent to be liable for a contravention of s500, the Applicant must establish that it is responsible for the conduct of the Second and/or Third Respondent as a *permit holder*, seeking to exercise rights in accordance with Part 3-4 of the FW Act, and acting in an improper manner.

104. "Permit holder" means a person who holds an entry permit.[89] Section 512 authorises the FWC to issue entry permits to officials of organisations, but clearly distinguishes persons who may be issued permits from the relevant body corporate (the organisation). The phrase "permit holder" in s500 of the FW Act has the same meaning as in s512 of the FW Act because of the definition of permit holder in s 12 of the FW Act.

105. The Applicant pleads at paragraph [2] of its Second Amended Statement of Claim filed 2 December 2016 (**SASOC**) that the First Respondent is an "organisation" for the purposes of s12 of the FW Act. It does not plead that the First Respondent is an "official". The FW Act does not authorise the FWC to issue entry permits to *organisations,* as distinct from their officials.

106. The status of being a permit holder only arises by reason of a statutory enabling power, and the exercise of a statutory discretion by a quasi-judicial body following an application in prescribed circumstances. That status is wholly and qualitatively different

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[87] See Explanatory Memorandum.
[88] *Director of the Fair Work Building Industry Inspectorate v Robinson* [2016] FCA 525
[89] Section 12 of the FW Act.

from a status that arises from an individual's decision (e.g. the status of being a person who has acted in an improper manner) or a status that arises from an agreement between two private individuals (e.g. the status of employer and employee). It is not a status that can be attributed to anyone to whom it is not directly and expressly granted in accordance with the relevant statutory requirements.

107. A body corporate cannot hold the status of a permit holder and cannot exercise any consequential right. A body corporate does not have and cannot breach the corresponding duties imposed upon a permit holder.

108. No duty is imposed on the CFMEU by s500; it could only apply to the CFMEU if the CFMEU could engage in each element of the contravention (direct liability); or if the CFMEU was liable for a contravention of s500 engaged in by another person (indirect liability). The CFMEU cannot as a matter of law either directly or indirectly contravene s500 by reason of s793.[90]

109. The First Respondent contends that:

a. section 500 prohibits conduct by "permit holders." The CFMEU cannot be directly liable for a breach of s500, as s500 only imposes a duty on a "permit holder";[91]

b. the First Respondent is not and cannot be a "permit holder" (s512 of the FW Act); and

c. s793 of the FW Act does not attribute the status of being a "permit holder" to the CFMEU.

110. *Darling Island*[92] considered whether a regulation[93] that penalised breach of duty by the "person-in-charge" imposed a duty on the defendant company. Williams J held:

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[90] *R v Cook; ex parte Twig* (1980) 147 CLR 15.

[91] See further, *Darling Island Stevedoring v Long* (1957) 97 CLR 36, 52 in which Williams J, in considering the scope of a duty held, *"It* is necessary to *go to reg. 3 I* in *order* to ascertain the nature *and* extent of the *duty and* the *persons who* are *bound* to *perform* it *the duty* created *by that regulation* is *imposed not on the* stevedore *but on his supervisor or* foreman. *The* stevedore is *not included within its* scope *and* to *hold that the* stevedore *could* be *responsible* for *a breach* of *the regulation by* the *supervisor* or foreman *simply* because *the latter* is *in the employment* of the former *would give the regulation an* operation *not justified by* its *provisions."* See also *Australian Federal* of *Air Pilots v* Ansett *Transport Industries (Operations) Pty Ltd and Ors* (1990) 34 IR 12, 16

[92] *Darling Island Stevedoring v Long* (1957) 97 CLR 36.

[93] Regulation 31 of the *Navigation (Loading and Unloading) Regulations.*

> [t]he definition of "person-in-charge" includes any person indirectly in control of the persons actually engaged in the process of loading or unloading a ship. . . . An employer, in this case, the defendant stevedoring company, who employs a supervisor or foreman to take charge of the loading or unloading of a ship could not be said to be even indirectly in control of the persons actually engaged in the process of loading or unloading the ship...[94]

111. The duty was not imposed on the defendant company.[95] Williams J held it was necessary to construe the regulation *"to ascertain the nature and extent of the duty and the persons who are bound to perform it."*[96] The issue of the CFMEU's liability is a question of statutory construction.[97]

112. Part 3-4 of the FW Act concerns Rights of Entry. Division 4 concerns prohibitions. Section 500 imposes a duty upon a permit holder. It may be contrasted to sections 50 I through to 504 of the Act which impose duties upon "a person". In other words, the prohibitions contained in Division 4 operate upon "permit holders" or "persons", and specifically distinguishes between these two concepts.

113. The attribution of the conduct and state of mind of a person to a corporation by s793 can make out certain contraventions of the FW Act, when the elements comprising the contravention are conduct engaged in by a person on behalf of a body corporate, by an official of the body within the scope of their actual or apparent authority[98] and/or a state of mind held by that person when engaging in the relevant conduct.[99]

114. Like the person in charge in *Darling Island*, the obligation not to act in an improper manner properly falls on the permit holder, the person actually on the spot and in control of their own conduct. By imposing an obligation not to act in an improper manner on a permit holder in s500, the plain intention of the statutory provision is that the obligation be reposed only in the permit holder and no one else.

115. This is akin to offences which can be committed by a licensee, but which cannot be committed by others who are not licensees.[100]

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[94] *Darling Island Stevedoring v Long* (1957) 97 CLR 36, 50 (Williams J).
[95] See *Darling Island Stevedoring v Long* (1957) 97 CLR 36, 52 (Williams J); 53 (Fullaghar J); 54 (Webb J).
[96] *Darling Island Stevedoring v Long* (1957) 97 CLR 36, 52 and at 53 (Fullaghar J) and 54 (Webb J).
[97] *Darling Island* (1957) 97 CLR 36 at 52 - 53 (Williams J); 57 (Fullaghar J).
[98] See s793(1)(a) of the FW Act.
[99] For example, s44 of the FW Act, and its prohibition on employers contravening the National Employment Standards. See further section 793(2).
[100] *Morris v Tolman* (1923) 1 KB 166; referenced by Latham CJ in *Malian v Lee* [1949] 80 CLR 198 at [210].

116. The regulation of organisations in relation to their officials who are permit holders is addressed elsewhere in the Act.[101]

117. Irrespective of any conduct or state of mind attributed by s793, the CFMEU cannot contravene s500 because an element of s500, being a permit holder, is not pleaded by DFWBII and in any event cannot be made out in relation to the CFMEU.

Common law principles of vicarious liability

118. The test for common law vicarious liability requires the Director to show that the Second and Third Respondents as a matter of law, acting not merely as a servant, representative, agent or delegate of the Union, but rather as the 'directing mind and will' of the Union when they each engaged in the conduct that is alleged to have contravened s500: *Tesco Ltd v Nattrass* [1971] UKHL 1; (1972) AC 153 at 170 per Lord Reid, approved by the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121 126-127 at 127 and *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74; (1993) 178 CLR 477 at 514-5.

119. In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2000] FCA 629 (a case concerning contempt) Merkel J held that he was not satisfied that the evidence 'establishes beyond reasonable doubt the individual respondents, or any other particular officer or agent of the respondent unions, acted under the rules of the unions, or were authorised to act under those rules, so as to authorise or organise the stopwork meetings on behalf of the unions': at [48]. Here, of course, the standard of proof is the balance of probabilities, but the principle is equally applicable.

120. The proper rule is that the employer must be shown to have authorised the act complained of or shown not to have taken proper steps to prevent it: *Evenco Pty Ltd v Amalgamated Society of Carpenters, Joiners, Bricklayers and Plasterers of Australasia Union of Employees, Queensland* [2000] QCA 108, and see also Keely J in *GTS Freight Management Pty Ltd v Transport Workers Union of Australia* [1990] FCA 78; (1990) 25 FCR 296 at 307. Inaction on the part of the CFMEU is not enough: *GTS Freight*

[101] See ss508(1) and (2) of the FW Act.

Management Pty Ltd v Transport Workers Union of Australia [1990] FCA 78; (1990) 25 FCR 296 at 307 [16].

121. The authority must be established by evidence. A corporation is not held liable for the actions of others unless authority to do the actions on its behalf is established by evidence: *Australia v Burgess Brothers Limited* [1916] HCA 2; (1916) 21 CLR 129 at 134 per Griffith CJ. The need for evidence was emphasised by the High Court in *The Commonwealth Steamship Owners' Association v The Federated Seamen's Union of Australasia* [1923] HCA 40; (1923) 33 CLR 297 where Isaacs and Rich J said that: "... no Court can act on mere suspicion, particularly when the consequences are of a penal nature."

122. There is no material available here that permits the Court to infer that the First Respondent had given any such authority authority at the time the Second and Third Respondents are alleged to have engaged in the relevant conduct the subject of these proceedings.

Section 550 Liability

123. Section 550 does not apply to a body corporate with respect to s500. As Dixon J (as he then was) explained in *Malian v Lee:*

> There is a number of cases which show that the application of sections dealing with aiding and abetting may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created ... .[102]

124. The examples cited by Justice Dixon show that accessorial liability is inapplicable when the intention of the prohibition[103] or the policy underpinning the prohibition, suggest that the prohibition is only intended to apply to the contravening individual.[104]

125. Only "permit holders" can contravene s500. No duty is imposed by s500 on natural persons who are not permit holders, or on corporations at all.[105]

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[102] *Malian v Lee* [1949] 80 CLR 198 [216]; *R v Tyrell* (1894) 1 Q.B. 710; *Morris v Tollman* (1923) 1 K.B. 166; *Ellis v Guerin* (1925) S.A.S.R 282

[103] Here, the prohibition on permit holders acting in an improper manner whilst exercising or seeking to exercise particular rights.

[104] *R v Tyrell* (1894) 1 Q.B. 710

[105] See for example s499 of the FW Act.

126. If s500 was intended to impose a duty not to act in an improper manner whilst exercising particular rights on a corporation, the duty in s500 would be fixed on 'a person' and not on 'a permit holder'. Part 3-4 includes duties imposed on 'a person' which are plainly intended to have a broader operation.[106] The reference in s500 to a "permit holder" excludes s500 from the operation of s550. The responsibility of body corporates for the conduct of their permit holders is regulated by ss508 and 509, and not by s500.

127. Section 550 may impose liability on natural persons who are involved in contraventions of the Act when their principal (whether the principal is a corporation or a natural person) is a direct contravenor. The Explanatory Memorandum[107] evinces that intention in the illustrative examples it provides, namely:

a. pecuniary penalties can be imposed on a director of a company or a manager, employee or agent of a principal where a principal contravenes a civil remedy provision[108]; and

b. civil responsibility for remedying the breach lies with the primary contravener (being the principal) - a director of a company for example is not personally liable to pay amounts to an employee to remedy an underpayment.[109]

128. The EM says that s793 "sets out the circumstances in which liability may be imposed on a body corporate where conduct is engaged in on behalf of a body corporate".[110] The EM does not suggest that s550 comprehends accessorial liability of body corporates and the Act, particularly when the Act read as a whole evinces a contrary intention.[111]

129. Further, pursuant to section 550(2)(c) a person is considered to be "knowingly concerned in a contravention" if they are aware of the essential elements which constituted the contravention and with such knowledge intentionally participate in it.[112]

130. A body corporate, such as the CFMEU cannot possess the requisite 'intent to participate' required to establish the accessorial liability of being "knowingly concerned", as the

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[106] See for example s 509 of the FW Act, and the persons that can be subjected to order under s 508 which including 'an organisation' and 'officials of an organisation'.
[107] Fair Work Bill 2008 Explanatory Memorandum
[108] Fair Work Bill 2008 Explanatory Memorandum, cl. 2176
[109] Fair Work Bill 2008 cl. 2177.
[110] Ibid, clause 2827.
[111] *Australian Federal of Air Pilots v Ansett Transport Industries (Operations) Pty Ltd and Ors* (1990) 34 IR 12, 16; *Acts Interpretation Act 1901* (Cth), 2C.
[112] *Hamilton v Whitehead* (1988) 166 CLR 121, 128.

CFMEU cannot intentionally participate in an element of the offence, that of being a "permit holder".[113]

131. A contravention of s500 by the combined effect of s793 and s550, cannot be established as the effect of s793 does not establish the separate element of being "knowingly concerned" required to establish accessorial liability.[114]

132. Section 500 is a penal provision. It must be construed strictly. Insofar as other provisions are relied on in asserting a contravention of a penal provision, they must be construed strictly also. Even without construing the provision strictly, the Applicant's allegation that the CFMEU is liable for the officials' contraventions of s500 cannot be made out.

[113] *Hamilton v Whitehead* (1988) 166 CLR 121, 128.

[114] See, for example, *Australian Securities & Investments Commission v Somerville* (2009) 259 ALR 574, 588 [4]; *Quinlivan v Australian Competition and Consumer Commission* (2004) 160 FCR I at [IOJ; *Yorke v Lucas* [1985] HCA 65.

Conclusion

133. The Applicant's case does not make sense. The Respondents had no reason to be present for permit purposes. There was no safety or any other industrial issues of note on site, before, at the time of after 17 June 2014. Any discussions between the union and MacDow were dealt with amicably and informally; no organiser ever having entered or been asked to enter the site on a strict ROE basis, with notice to be given. Everyone benefited from that and it never caused any difficulty before or after.

134. There was also no reason for Mr Travers to say the things attributed to him about "war" and "Kane". He had a good working relationship with all involved over a lengthy period. Even if they were said, they were not directed to an industrial purpose and there was no force in them.

135. The Respondents repeat paragraphs 1 – 4 above.

Date: 17 February 2017

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Signed by
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