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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 CLOSING SUBMISSIONS IN REPLY**[1]

1. These reply submissions are structured to address the following topics:



| | | |
|---|---|---|
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[1] The Applicant makes these submissions in reply to the Respondents' closing submissions dated 17 February 2017 (**Respondents' Submissions [RS]**), which were in response to the Applicant's closing submissions dated 3 February 2017 (**Applicant's Submissions [AS]**). These reply submissions use the terms defined in the Applicant's Submissions.


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## A. THE MEANING OF "EXERCISING, OR SEEKING TO EXERCISE" IN SECTION 500

2. A key legal issue in dispute between the parties is the meaning of the words in s 500 of the FW Act "*exercising, or seeking to exercise*" rights in accordance with Part 3-4.

3. The Applicant submits that the proper construction of "exercising" rights referred to in s 500 is using, putting into action or performing a Part 3-4 right (in this case, s 484).

4. In contrast, the Respondents submit as follows:

   4.1. "There is an active mental element implicit in the word 'exercising'; that is, a permit holder must <u>actively decide</u> to 'avail him or herself of', or 'bring into use' a Part 3-4 right": [RS 21, underlining added].

   4.2. "… 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.": [RS 36; see also 86].

5. Contrary to the Respondents' Submissions, the Applicant's position is that there is not a mental (or state of mind) element <u>in the meaning of "*exercising*" in s 500</u>. That is not to say that other parts of s 500 may not incorporate a mental (or state of mind) element.

   5.1. The "*intentionally hinder or obstruct*" limb of s 500 obviously has an intention element.

   5.2. The "*otherwise act in an improper manner*" limb has been held not to have an intention element.[2]

   5.3. In s 500, the expression "*exercising, or seeking to exercise*" is used in relation to the words "*rights in accordance with this Part*", that is Part 3-4 of the FW Act. Accordingly in s 500 cases consideration needs to be given to the relevant Part 3-4 right that is in issue. In this case, s 484 is the relevant Part 3-4 right. Pursuant to this provision, the Applicant has to prove (on the civil standard) that there was an entry by a permit holder "*for the purposes*"[3] of holding discussions with employees who perform work on the premises, whose industrial interests the

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[2] As summarised by White J in the *Lend Lease SA* case (*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293) at [28]: "The Full Court has held that the words in s 500 "or otherwise act in an improper manner" comprehend acts other than those involving obstruction or hindering: *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at [30]. In a number of decisions, the Court has also held that the impropriety or otherwise of conduct for the purposes of s 500 is to be assessed objectively: *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106] (CFMEU (No 2)); *Director of Fair Work Building Industry Inspectorate v Bragdon* [2015] FCA 668 at [97] (Bragdon); and, further, that it is not necessary that the alleged contravenor intended to engage in conduct having that character: *Darlaston v Parker* [2010] FCA 771, (2010) 189 FCR 1 at [54]; *Setka v Gregor (No 2)* at [35]-[36]; *CFMEU (No 2)* at [106]; *Bragdon* at [96]".

[3] The rights in ss 481(1), 483A(1), 483D(1) and 484 explicitly refer to a required purpose for the permit holder. Sections 481(3), 483A(2) and 483D(1) also require an associated suspicion to be held by the permit holder.

permit holder's organisation is entitled to represent, and who wish to participate in those discussions.[4]

6. The Respondents' criticisms of the Applicant's construction to the effect that it merely requires the "doing" of an action[5] overlook that the Applicant must also prove that the permit holder engaged the relevant Part 3-4 right (in this case s 484 including holding the relevant purpose[6] referred to therein).[7]

7. In relation to "seeking to exercise", as used in s 500, the Applicant submits to the extent that there is a state of mind implied by the word "seeking", that state of mind requires only that the person is trying to perform the act in question, not consciously adverting to the right itself. To seek relevantly means "to try or attempt (to do something)"[8] or "endeavour or try".[9]

8. The Applicant submits that his construction of "*exercising, or seeking to exercise*" in s 500 should be preferred because:

   8.1. it is a plain and natural reading of the language of the section;

   8.2. it best reflects the purpose of the s 500 and of Part 3-4 more generally;

   8.3. it is consistent with the use of the term "exercise" elsewhere in the FW Act; and

   8.4. it is consistent with the authorities.[10]

**Plain and natural reading**

9. The words "*exercising, or seeking to exercise*" used in s 500 are not defined in the FW Act.[11]

10. The Applicant is content with the ordinary meanings of "do", "exercise" and "use" from the dictionary definitions cited by the Respondents: [RS 17 & 19-20].

11. The word "exercise" as a verb is well used in the law. In addition to the dictionary definitions cited by the Respondents, legal dictionaries can assist. For instance, *Black's Law Dictionary* (10th ed, 2014) defines "exercise" as:

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4 The admissions and evidentiary facts demonstrating that the Applicant has satisfied the matters in s 484 are dealt with in Section B of this reply.

5 See [RS 26-27] and [RS 69].

6 As to determining the purpose under s 484, see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [71] (White J) and *Director of the Fair Work Building Inspectorate v McDermott* [2016] FCA 1147 at [103-[111] (Charlesworth J).

7 See also [28]-[30] below.

8 Macquarie Dictionary (6th edition, 2013), meaning 4 of "seek" on p1325.

9 The Australian Oxford Dictionary (1st edition, 1999), meaning 3 of "seek" on p1220.

10 In particular, *Setka v Gregor (No 2)* (2011) 195 FCR 203 (Lander, Tracey & Yates JJ).

11 Cf *Evidence Act 1995*, where the dictionary in Part 1 states: "***exercise*** of a function includes performance of a duty".

1. To make use of; to put into action <exercise the right to vote>.

12. Outside the FW Act, the word "exercising", as a statutory word, has received little judicial consideration.[12] The Applicant has been unable to find many cases directly discussing the meaning of the phrase under the FW Act or its predecessor or related legislation.[13] The cases which the Applicant has found which have considered the term or concept "exercise" under the FW Act *support* the Applicant's construction.

    12.1. In relation to Part 3-4, see the Full Court in *Setka v Gregor (No 2)* (2011) 195 FCR 203 discussed in [20]-[21] below).

    12.2. In relation to a different section of the FW Act, namely s 340(1), see *McMaster v Qube Ports Pty Ltd* [2015] FCA 1385 discussed in [25] below.

13. In summary, there is no proper basis to construe the word "exercising" in s 500 as proposed by the Respondents: see [4] above. Indeed, the dictionary definitions relied on by the Respondents do not support the "*active mental element*" they seek to read (apparently implicitly) into the word "exercising": [RS 21]. The Respondents add the words "*actively decide*" to the dictionary definitions in order to extract the meaning they propound: [RS 21]. The Applicant's construction, on the other hand, can accommodate "avail" or "bring into use". A permit holder can avail him or herself of a right of entry without conscious reference, or "actively deciding" to do so, as long as the requirements of the relevant Part 3-4 right (such as 484) are met including any purpose element therein.

14. The Respondents do not grapple with the force of the propositions in [AS 67].

**Statutory context**

15. Like all statutory provisions, s 500 is to be construed according to its text, context and purpose.[14] The context includes that the entry permit regime provided for by Part 3-4 confers rights which significantly erode the common law of occupiers to exclude those to whom they do not wish to grant entry.[15] It is thus not surprising that the legislature has confined the category of persons who may be clothed with such powers to those persons who are "fit and proper".[16]

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12 In another and old legislative context, the word "exercising" (in relation to a lottery) was held to mean conducting or running a lottery: *Mutual Loan Agency Ltd v Attorney-General (NSW)* (1909) 9 CLR 72 at 81 (Griffiths CJ).

13 Section 146 of the *Work Health and Safety Act 2011* (Cth) states (emphasis added) that "*a WHS entry permit holder **exercising, or seeking to exercise,** rights in accordance with this Part must not intentionally and unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace, or otherwise act in an improper manner*". Our researches have not shown any cases to have considered this section.

14 *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) 256 CLR 1 at [57]-[62] (French CJ, Hayne, Kiefel and Nettle JJ).

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

16 *Maritime Union of Australia v Fair Work Commission* (2015) 230 FCR 15 at [16] (North, Flick and Bromberg JJ).

16. Section 500 is the only general provision in Part 3-4 regulating the conduct of permit holders attending on work sites.[17] Further, the restriction on the conduct of permit holders (ie, not to "*intentionally hinder or obstruct any person, or otherwise act in an improper manner*") is not onerous.

17. On the flipside, s 502 provides protection to permit holders.[18] A person must not intentionally hinder or obstruct a permit holder "exercising" rights in accordance with Part 3-4.

18. There is no need or basis to narrow the field of operation of Part 3-4, and the protections offered by ss 500 and 502, by construing "exercising" in the manner proposed by the Respondents: see [4] above. The statutory object of Part 3-4 set out in s 480 of balancing the rights of union officials and of employers and occupiers is best met if the regime applies whenever permit holders undertake the activities provided for under Part 3-4.

19. It is not "absurd" (as the Respondents contend [RS 26]) to give the meaning to "exercise" proposed by the Applicant: see [3] above.

20. Indeed, the Applicant's submission that there is no mental element in the word "exercising" in s 500 is supported by the manner in which the Full Court has dealt with the issue: see *Setka v Gregor (No 2)* (2011) 195 FCR 203. Setka had asserted that he was entering at the invitation of the safety committee (at [6]) and argued that the respondent had not proven that he was exercising his right under the OHS Act. The Full Court upheld the Federal Magistrate's reasoning that it was sufficient that the respondent had proven that Setka "was a permit holder and that he entered upon the premises with a view to investigating safety concerns in respect of members of his union": [22]-[25].

21. Thus, it was not necessary to prove that Setka had "actively decided", or consciously turned his mind, to relying on the existence of the right. It was enough that he had performed the relevant action with the purpose inherent in, and provided for by, the right. By analogy, the fact that Travers and Hall entered the premises for the purposes of holding a discussion with an employee (who was a CFMEU delegate and HSR with whom they had a representative relationship) is sufficient to enliven and exercise s 484.

22. Finally, the Respondents seek to support their construction on the basis that Division 2 of Part 3-4 was not intended to cover every circumstance in which a permit holder can enter a workplace: [RS 32, 35]. It is of course accepted that entry for a purpose not referred to in Part 3-4 is not a purpose to which Part 3-4 can apply. Acceptance of this says nothing about whether "exercising" in s 500 implicitly requires an active mental element. It is neutral on the point.

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[17] There are specific restrictions or requirements on permit holders in ss 487 and 491-493 of the FW Act.

[18] Permit holders also have the protection provided by s 501 of the FW Act. However that provision does not use the words "exercising, or seeking to exercise".

## "Exercise" elsewhere in the FW Act

23. The Applicant has submitted that the word "exercise" is used elsewhere in the FW Act in a way that does not require any mental element: [AS 69-76].

24. Sections 340 and 343 both contain references to the exercise of a workplace right. In both sections, it would not make sense for "exercise" to require an active deciding to avail oneself of the right, or a conscious intentional adverting to it.

25. In *McMaster v Qube Ports Pty Ltd* the Court (North J) held, in response to a submission that the term "exercising" a workplace right in s 340 **did** require that the person who was exercising the workplace right must seek to rely on it:[19]

> [188] Then, counsel for Qube argued that even if Mr McMaster had a right to refuse to upgrade he did not exercise the right because he did not intend to do so. Section 341 is an anti-victimisation provision. It was argued that in order to suffer victimisation, the victim must know of the right and seek to rely on it. Otherwise the curtailment of the right does not victimise the person.
>
> [189] This approach reads into the section a requirement which is not there, and fails to achieve the beneficial purpose which Qube itself asserts. The section requires the exercise of the right. That act may be achieved without knowledge of the right. The section could have stated that the right had to be exercised knowing of the right. The protective purpose of the section acknowledged by Qube is better served by a construction which does not add a requirement of the knowledge of the legal characterisation of the act as the exercise of the right.

26. Consistent with this analysis, the Applicant refers to the following as instructive examples:

    26.1. It would be a contravention of s 340(1)(b) for an employer to take adverse action[20] to prevent an employee engaging in protected industrial action even if the employee did not know that the action was protected, let alone that they had a workplace right to engage in the action.[21]

    26.2. It would be a contravention of s 340(1)(b) if an employer sought to prevent an employee from making a complaint to a union delegate about their wage entitlements, even if the employee did not know that they had a workplace right to make such a complaint or inquiry[22], let alone have consciously adverted to it.

    26.3. It is a contravention of s 340 for an employer to threaten to dismiss an employee if the employee seeks legal advice about her entitlement to a commission under her employment contract.[23] The protection of this provision would be significantly

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[19] [2015] FCA 1385 (underlining added). This analysis was noted but not disturbed in the Full Court: see *Qube Ports Pty Ltd v McMaster* [2016] FCAFC 123 per Jessup J at [23].

[20] See item 1 in the table to s 342(1) of the FW Act.

[21] See the meaning of workplace right in s 341(2)(c) of the FW Act.

[22] See the meaning of workplace right in s 341(1)(c) of the FW Act.

[23] See *Murrihy v Betezy* (2013) 238 IR 307; [2013] FCA 908 at [138]-[143] (Jessup J). The meaning of "exercise" was not directly considered in the case, and the judgment is silent as to whether or not the applicant was aware at the time she proposed to seek legal advice she was aware of the workplace right she relied on.

impaired if it only applied to those employees who are aware of, and turn their minds to, the fact that they have a workplace right to seek such advice.

27. Two propositions arise from this analysis. *First*, there is no inherent mental element in the term "exercise" when used in relation to rights. *Second*, the same term should be construed consistently in different parts of a statute unless the context requires otherwise.[24] Nothing in the context of Part 3-4 requires that "exercise" be construed differently than in Part 3-1.

**Other matters: Absolute and strict liability; strict construction?**

28. At points, the Respondents complain that the Applicant's position amounts to requiring "absolute liability" or "strict liability".[25] These labels do not assist in resolving the issues in the case, such as the correct interpretation of "exercising, or seeking to exercise".

    28.1. As already stated in relation to s 500, a breach of the first limb (intentionally hindering or obstruct) requires proof of a mens rea (ie, intention) while the second limb (improper manner) does not: see [5] above. The Applicant's construction of s 500 is consistent with this analysis.

    28.2. Section 484 itself is not a provision capable of contravention. To describe a particular construction of it as creating "absolute liability" does not make sense. No liability is created, absolute, strict, or otherwise.

29. Care must be taken with the Respondents' appeals to a strict construction of s 500 and reliance on statements from the criminal law: [RS 13-15]. Section 500 is a civil penalty provision. Civil penalty provisions can have protective and beneficial purposes.[26] Here, s 500 (and s 502) are protections forming part of a detailed scheme (Part 3-4) that has as an express object (s 480) the balancing of various, divergent and competing interests. As the Full Federal Court has said about entry permits under Part 3-4:[27]

> [14] … Entry permits confer rights which significantly erode the common law right of occupiers to exclude those to whom they do not wish to grant entry. …
> [15] … The rights conferred, however, are not "untrammeled" and are subject to both express and implied constraints. …

30. Section 500 of the FW Act is one of those constraints. The beneficial purpose of s 500 (and s 502) is enforced through a civil penalty and, in this way, the provisions are protective. When interpreting beneficial legislation, the rule of strict construction of

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[24] See the 1st sentence in [AS 69] and the cases in footnote 63 therein. See also *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J, Barwick CJ and Jacobs J agreeing); *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) CLR 633 at 643 (Gibbs J); *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1 at 10 (Gibbs J), 15 (Mason J, Aickin and Wilson JJ agreeing).

[25] In particular at [RS 27] and [RS 69].

[26] For example, the civil penalty provisions in the Australian Consumer Law.

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

penal provisions is one of last resort.[28] Of course, it is the words used in the section that the Court must critically focus; it is the words (here, "*exercising, or seeking to exercise*") that have paramount significance. Further, as the High Court recently reaffirmed, "to commence the process of construction by posing the type of construction to be afforded – liberal, broad or narrow – may obscure the essential question regarding the meaning of the words used."[29]

## B. APPLICATION OF "EXERCISING, OR SEEKING TO EXERCISE"

31. If the Court accepts the Applicant's construction of "exercising" in s 500 (see [3] above), that integer is satisfied by reason of the admissions and evidence showing Travers and Hall using, putting into action or performing the s 484 right.

32. It is significant that the facts in [AS 80] are *not* contested by the Respondents. Those facts and matters are sufficient to show that Travers and Hall "exercised" (within the Applicant's meaning of s 500) the right in s 484. Those admitted facts reveal a purpose of holding a discussion with Duggan: [AS 80.2].

33. If needed, the following facts and matters support the Applicant's submission that Travers and Hall "exercised" (within the meaning of s 500) the s 484 right.

    33.1. As to whether there was an exercise of the s 484 right, it is not to the point that the union officials did not show and advertently rely on their permits: [AS 84].[30] (The failure to show permits and give the statutory required notice is, and has in other cases found to be, relevant to the improper manner limb in s 500.)

    33.2. There is no evidence of MacDow having invited the union officials on site on 17 June 2014. To the contrary, the management of MacDow were trying to get Travers and Hall to leave. The Respondents' reference to Duggan having "invited" Travers is disingenuous: [RS 40]. It cannot seriously be contended that Duggan invited Travers on site on behalf of MacDow. In any event, the reality is that Travers invited himself on site (as is apparent from Duggan's evidence cited at [RS 47]).

    33.3. Irrespective of whether it was brief and general, there was discussion between Travers, a CFMEU official, and Duggan, a CFMEU delegate, about work: [AS 28]. This was on a site on which work was being conducted by employees who were either members of the CFMEU or eligible to be members of the CFMEU. Further, not only was there the *opportunity* for discussion about work (industrial, safety and other work issues) between the union officials and Duggan, but the evidence demonstrates this in fact occurred.

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[28] See, eg, *ACCC v Worldplay Services Pty Ltd* [2004] FCA 1138 at [94] (Finn J) (affirmed on appeal (2005) 143 FCR 345).

[29] See *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 at [33] (French CJ, Kiefel, Bell and Keane JJ) citing with approval *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1804; 201 ALR 260 at 269.

[30] See, in any event, the evidence of Travers at T 80:25-37.

33.4. It is not inconsistent with the Applicant's case that there was an exercise of the s 484 right that the union officials had other purposes (such as a social catch up) in addition to the purpose in s 484. As Dowsett J said in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2010) 186 FCR 88 at [39]:

> Of course, a person may have more than one purpose.

In the *Lend Lease* case, White J rejected a submission in relation to the Adelaide Oval incident involving Mr McDermott, that the Director had not proved that he had entered for the purpose of holding a discussion with workers. White J said:[31]

> [249] It is possible that Mr McDermott's principal purpose on 12 November 2013 was simply to check that safety precautions with respect to cricket balls would be in force during the forthcoming cricket match. It may also be the case that he spoke to the group of Laser Linings' employees only incidentally to the principal purpose of his visit, taking advantage of the opportunity to do so arising from Mr Stephenson's meeting with them.
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> [250] However, I infer that **at least one** of Mr McDermott's purposes was to hold discussions with the employees.

Similarly, in *McDermott* it was sufficient that "**at least one** of Mr Sloane's purposes for entering the Site" was the s 484 purpose.[32]

The Applicant submits that it does not matter if the s 484 purpose is not the primary or dominant purpose of entering the premises.

33.5. Naughton's evidence is clear that he saw 'Duggan with some colourful documents which appeared to be flyers and pamphlets of various sizes'.[33] There is no proper basis for the Respondents' submission that no leaflets were provided to Duggan: [RS 56].

34. In all of the circumstances, the Applicant submits that the Court should find, or infer, that the conduct engaged in by Travers and Hall was for purposes that included one provided for in Part 3-4 (namely, s 484). If the Court makes such a finding or inference, it follows that the Court should also find that Travers and Hall, as revealed by their conduct, "exercised" a right in accordance with Part 3-4; [cf RS 68].

35. In summary, the Court should make the finding or inference sought by the Applicant because:

35.1. the discussions took place on a work site, for which Duggan was the shop steward and HSR and Travers and Hall were the responsible CFMEU organisers;

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31 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 (emphasis added).

32 *Director of the Fair Work Building Inspectorate v McDermott* [2016] FCA 1147 at [115] (Charlesworth J) (emphasis added).

33 See Naughton's statement (Ex 3) at [26]: "Travers and Hall returned to their car which was parked at the Fulton Hogan site next door. I saw Duggan with some colourful documents which appeared to be flyers and pamphlets of various sizes." See also [AS 50.6].

35.2. it is inherent in the nature of such meetings that, even if they have a social purpose, work matters can or will be discussed;

35.3. Travers and Hall were attending during the course of their work day; and

35.4. Duggan acknowledged work was discussed: [AS 28].

36. The basis for the finding or inference sought by the Applicant is even stronger if the Court finds that Travers said words to the effect that "we're here to discuss a safety issue": [AS 47-50].

37. The Respondents have referred to the decision of Bromberg J in *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287:[34] [RS 59]. It is not clear to the Applicant how the Respondents seek to rely on that case in relation to s 484: [RS 70]. Powell concerned s 4**9**4 of the FW Act, which is not in identical or similar terms to s 4**8**4.

38. The Applicant's primary case is that there was an industrial or representational purpose to the visit, even if that was not its only or primary purpose: see [34] above.

39. A visit by two officials of the Construction and General Division of the CFMEU to a construction site during work hours for the purposes of seeing (to use a neutral term) an employee representative on that site (who also happened to be the representative of the CFMEU) is representational and industrial in character, especially in circumstances where the issue of progress of the site was discussed.[35] The Respondents' cannot escape from the inherent representational roles and relationships between Travers, Hall and Duggan by submitting that the visit was *purely social.*

40. The Applicant submits that the term "discussions" (in s 484) is not to be read down so as to exclude discussions which are predominantly of a social nature where the objective facts disclose an inherent representational character. To construe s 484 otherwise would require the Respondents to persuade the Court to read into it words of limitation which are not present in the section.[36] This submission is not inconsistent with anything said in *Powell.* If necessary, the Applicant will formally submit that the decision in *Powell* is wrong.

41. The tenor of the Respondents' Submissions is that union officials can choose not to invoke their entry rights and purport to enter an occupier's site under other bases, and thereby avoid the operation of Part 3-4. A submission is made at [RS 22] to the effect that a permit holder can simply choose not to rely on a statutory entitlement and instead enter work premises some other way (including by a social visit). The Applicant's submission at [AS 95] was to show that a narrow reading of "discussions" in s 500 would cause undesirable consequences. The Respondents nonetheless contend

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[34] The Applicant has appealed this decision and the appeal is expected to be heard in May 2017.

[35] When Duggan was asked in examination in chief what he was discussing with Travers, he replied: "*He might have asked how the job was going, but that was just – you know, of course he is going to ask that, yes*": T97:4-5. In cross examination Duggan further said: "*We would have mentioned the job – "How's it going?" – just general, but there was nothing, no specific issues at the time*": T101:7-9.

[36] See generally *Taylor v Owens — Strata Plan No 11564* (2014) 253 CLR 531 at [35]-[40].

that permit holders should be able to enter worksites *without* use of permits or the consent of or notice to the occupier and, thereby, without being bound by norm of conduct provided for by s 500. As a matter of general principle, this could have adverse effects on an occupier's ability to comply with their health and safety obligations.

## C. OTHERWISE ACT IN AN IMPROPER MANNER

### Legal issue

42. The Respondents submit that acting in an improper manner must have a "connection with an industrial issue" and that "[r]efusing 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": [RS 71-72].

43. It is unclear whether this submission is a further articulation of the proposition that the union officials were not exercising a right within the meaning of s 500, or whether a separate proposition is being put that even if they were, the improper conduct also had to have an industrial purpose.

44. If it is the latter, the Respondents' contention should be rejected by the Court. The industrial connection, if required at all, is satisfied once it is established that the permit holder is exercising, or seeking to exercise, a right in accordance with Part 3-4. For the improper conduct to *additionally* have an industrial character is not required by the section or supported by authority.

### Some factual matters

45. The assertion at [RS 72a] that it is not clear whether Travers or Hall refused to leave before an indication was given by Naughton that he would call the police is wrong. The evidence was given perfectly clearly by Naughton, both orally and in his statement. That evidence was not disputed either in cross-examination or by the Respondents' evidence. See [AS 11.5] and [AS 30]-[AS 33]. Indeed, the evidence given by Naughton matches Travers' evidence in chief at T 79:22-33.

46. In any event, when the police were mentioned is not the issue. Travers and Hall had ample time to decide to leave after the first request to leave was made but before the police were actually called.

47. Further, [RS 72a] misunderstands [AS 101.3]. The Applicant is contending that the waiting for the police was for a purpose different to a s 484 purpose (rather than converting it into a s 484 purpose): [AS 110]). The improper manner of the conduct is explained in [AS 111].

48. The Court should not entertain the submission that that the police were "unimpressed" with being called to the site: [RS 72c].[37] No weight can be given the cited evidence in

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[37] The references cited by the Respondents do not necessarily support their assertions. In relation to Carter's evidence at T 47, he does *not* give evidence that "*the police were unimpressed and made it*

circumstances where the police were not called and police records were not tendered. If it is relevant, it only goes to support the proposition that the law of trespass is not sufficient to regulate the conduct of union officials on worksites and the Part 3-4 regime should not be read down so as to leave occupiers with their only remedy against unlawful conduct on worksites by union officials to be self-help.

49. The submission at [RS 76] that Travers and Hall have not done an act they know or ought to have known they had no authority to do is belied by their own evidence. Travers accepted that he knew he had no legal right to be there, but he stayed.[38] Hall agreed that once Naughton had asked him to leave he had no legal right to be there.[39]

50. The submission in [RS 76a] that refusing to leave when asked by an occupier to do so imposes a "hair trigger" on s 500, apart from being contrary to authority,[40] is inapt. The Respondents' position in this matter appears to be that it is a matter for them to decide when and how they will leave another's premises when lawfully asked to do so by the occupier: [cf RS 76a, 2nd sentence]. This ignores the law of trespass and offences such as s 9(1)(f) of the *Summary Offences Act 1966*.[41]

## D. THE DISPUTED FACT FINDINGS: HOW TO RESOLVE THE CONFLICTS IN THE EVIDENCE

51. The Respondents accept that the Applicant's witnesses were giving their evidence honestly and in a genuine endeavour to assist the Court: [RS 6]. No submission is made which provides any basis for preferring the Respondents' witnesses to the Applicant's.

52. In contrast, there are three good reasons to prefer the Applicant's witnesses. *First*, the Applicant's witnesses evidence was supported by their near-contemporaneous statements.[42] *Second*, the Applicant's witnesses were independent; the Respondents' witnesses were not. *Third*, there is no conceivable reason that the Applicant's witnesses would either make up or imagine the relevant comments.

53. Rather than submitting that there is any basis to prefer their own witnesses, the Respondents submit that the Court should find that the controversial statements are

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*clear to the MacDow employees that they should not have been called out for such a matter*". When asked by the Respondents' counsel 'do you recall them not being too pleased about being called out to deal with this?, Carter replied: *'I guess so, but – yes, I don't really recall.'*
In relation to Naughton's evidence at T 28, the most that can be said is that the police left him with the impression that it was an inconvenience for them. They hardly "made it clear" that they shouldn't have been called out.

38 T 68:31-32. For the full context, see from T68:4.

39 T 86:28-29. See also T 87:7-8.

40 *McDermott* [2016] FCA 1147 at [118] (Charlesworth J); *SAHMRI case* [2016] FCA 414 at [33] (White J) and see also the *Lend Lease SA case* [2015] FCA 1287 at [175] (White J) and the declarations made in relation to that proceeding at [2016] FCA 413.

41 The reference in [AS 105] to s 9(6) of the *Summary Offences Act 1966* should be to s 9(1)(f).

42 For examples of the superior reliability of earlier statements (such as transcript of interviews), see *ABCC v CFMEU (The Abseal Case)* [2017] FCA 11 at [16] (Jessup J) and *DFWBII v CFMEU* [2015] FCA 1125 (*Red & Blue Case*) at [84] (Jessup J).

not proven to the required standard: [RS 7]. That submission is made by reference to s 140 of the *Evidence Act 1995* and the *Briginshaw* principles: [RS 5].[43]

54. However, there is nothing grave in finding that Travers said “we’re just having a chat about safety”.

55. Nor is there anything grave or discreditable in making a fact finding as to whether there was an exercising or a seeking to exercise of rights.[44]

56. There might be some need for restraint in finding that the officials had deliberately stayed on site, knowing that they had lawful right to do so. However, that is not in dispute, and has been admitted by both Travers and Hall: [AS 105].

57. The only real scope for restraint in accordance with the s 140 principles, then, is the factual dispute as to whether the Threat was made by Travers. There was nothing inexact, indefinite or indirect about White’s evidence as to the making of the Threat. His evidence was definite, consistent, unshaken by cross-examination and supported by his near-contemporaneous statement: [AS 53; see also 15 & 17]. It is a safe basis on which to draw a conclusion on the balance of probabilities that Travers said the relevant statement constituting the Threat.

58. In reply to [RS 81] where it is submitted that it “makes little sense that Mr Travers would say these things in a context where there was a longstanding good relationship”:

    58.1. such a comment is explicable in the light of Travers’ evidence at T83:37-17:

    > All right. Do you have any recollection now of the conversation you had with Mr White?---I would have just asked him, “Why are we going down this path for? We have never had to have any type of paperwork or anything before?” All of a sudden the tide has changed. We would have – other people, they had a few issues down Webb Dock, but that has got nothing to do with me.

    58.2. it makes even less sense that White would, out of the heat of the moment, 10 days later, falsely make such an allegation (see Ex 6 at [13] / [AS 38]).

## E. SECTION 348 ISSUES

59. The Respondents concede that if the words of the Threat were uttered, they may fulfil each of the elements of a breach of s 348 other than the intent to engage in industrial activity: [RS 82b]. No argument is made in the Respondents’ Submissions that the Threat, if made, was not a threat made with intent to coerce.

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[43] The Applicant notes that the observations of Branson J (French and Jacobson JJ agreeing) in *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [139] are apposite: ‘References to, for example, “the Briginshaw standard” or “the onerous Briginshaw test” … have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides.’

[44] *Setka v Gregor No 2* (2011) 195 FCR 203 at [26] (Lander, Tracey and Yates JJ): extracted in [AS 86].

60. The Applicant briefly addresses the Respondents' *de minimus* submission in Section F below. It suffices to rhetorically ask here how could it be said that conduct which is accepted to be a threat intended to negate the free choice of the target is "de minimus".

61. It is submitted by the Respondents that the "industrial activity" element is not made out because the "coercion … is to stop Mr White from having the police called in response to the Second and Third Respondents' presence… 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.": [RS 82b].

62. This submission does not grapple with the meaning of "engages in industrial activity" set out in s 347 of the FW Act or the way the Applicant's case is put in [AS 134]. It is unsupported by authority. It is also not an accurate reflection of the factual matrix.

63. First, in this case, the industrial activity relied on is that set out in s 347(b)(iv), complying with a lawful request made by an industrial association. As stated in [AS 134], the use of the word "we", and the nature of the Threat, demonstrate that it was made by the CFMEU, through the agency of Travers.[45] The action is connected to the activities of an industrial association. Nothing more needs to be shown.

64. Further or alternatively, the request not to call the police is, in context, industrial in nature. The Threat is not made along the lines of "if you don't call the police, we'll leave quietly". It is made in the context of a refusal to leave an occupier's premises despite a lawful request to do so. The content of the Threat is action by a union against an employer on its work site or sites. It is made pursuant to a union "policy" not to leave premises if the police are called.

## F. DE MINIMUS NON CURAT LEX

65. The contraventions are not to be regarded as *de minimus*.

    65.1. The Applicant is not contending that the s 500 contraventions are at the highest end of matters heard in this Court. However, aspects of the improper manner of the conduct are serious. Travers and Hall knowingly remained on the premises after having been asked to leave by the occupier more than once: [AS 107]. They knew they had no lawful authority to do so.[46] The Threat made by Travers was a significant one: [AS 115-117]. The fact that it was not acted on does not diminish that fact.

    65.2. It should be common ground that a s 348 contravention is not to be regarded as *de minimus*: see [59] above. The assertion in [RS 82c] that the words constituting the Threat were "hollow and inconsequential" ignores White's evidence about it:[47]

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[45] If necessary, the Applicant would rely on s 793 of the FW Act to attribute the request not to call the police as being made "by" the CFMEU.

[46] T 68:13-32; T 86:28-29 and T 87:7-8.

[47] T 52:1-9.

> Did you understand, or at least did you have an understanding, of what he might be referring to when he referred to Kane Constructions?---*At or about that same time there was an ongoing dispute at a Kane Site out in Ringwood or Box Hill at a swimming pool I recall, and there was almost daily disruption on that site. Yes.*
>
> And given that context, what did you understand him to mean when he said it would be like the situation with Kane?---*I – I expected he – he was – he was more or less intimating that they were going to be out on this PUG site on a daily basis giving us the same sort of industrial workover that they were giving Kane.*

65.3. In relation to the Threat, the Court should take judicial notice of the fact that the CFMEU has demonstrated a propensity to make good similar threats in the past (by way of a range of unlawful conduct) in order to achieve its goals and enforce its demands.[48] As Mortimer J said in a recent case:[49]

> The conduct [in this case] has in common features of abuse of industrial power and the use of whatever means the individuals considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abuse behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties.

66. The Respondents' submission that the conduct is not serious focuses on the preliminary stage of the events: [RS 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".)

67. The Respondents' characterisation of the alleged conduct ignores the practical and industrial context which was known to the CFMEU officials and MacDow. Even if the Respondents' characterisation of their conduct was accepted, that would be a submission relevant to penalty and not to liability. The notice requirements in s 487 are important, and other judges of the Court have not hesitated to find contraventions of s 500 based on failure to comply with them alone.[50]

68. In any event, the Respondents have not fully or fairly characterised the nature of the contraventions. A serious aspect of the impugned conduct is that Travers and Hall, on

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[48] See also *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226 at [34] (Tracey J); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [103] – [106]; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62 at [65]; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case*) [2015] FCA 1173 at [39].

[49] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 436 at [140]. The Full Court ([2016] FCAFC 184) cited this paragraph and rejected a ground of appeal challenging the conclusion that the trial Judge drew from it: see at [88] (Jessup J, with whom Allsop CJ and North J agreed on this ground of appeal). See also the comments of Jessup J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case)* [2016] FCA 772 at [48].

[50] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 (White J); *Director of the Fair Work Building Inspectorate v McDermott* [2016] FCA 1147 at [115] (Charlesworth J).

their own admission, remained on the premises despite knowing they had no legal right to do so. The Respondents' submissions effectively ignore the Threat which forms part of **both** the s 500 and s 348 contraventions.[51]

69. It is instructive that the Respondents have not been able to cite (and the Applicant is not aware of) any application of the *de minimus* principle under the FW Act or other civil penalty legislation in Australia.

70. Even assuming the principle may still apply, not all of the requirements set out at [RS 92] can be satisfied. In particular, the Respondents are not exposed to the infliction of *inflexibly* severe penalties: [RS 92d]. On the contrary, the relief sought is at the discretion of the Court, and penalties can be set at whatever level the Court thinks reflect the seriousness of the contraventions.

## G. LIABILITY OF THE CFMEU UNDER SECTION 550

71. The Applicant has submitted that the CFMEU is liable for any s 500 contraventions by Travers or Hall pursuant to s 793 ([AS 140-150]), common law ([AS 151-156]) or s 550 ([AS 157-161]). This reply is limited to its liability under s 550 of the FW Act.

72. The Respondents' Submissions suggest that s 550 cannot be applied to attribute the conduct of a natural person to a corporation, as distinct from the converse: [RS 127-128]. Nothing in the text of that provision supports such a restricted reading, and no reason of policy or aspect of the statutory context requires it.

73. Section 550 uses the word "person". Section 2C of the *Acts Interpretation Act 1901* provides:

> References to persons
> (1) In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.
> (2) Express references in an Act to companies, corporations or bodies corporate do not imply that expressions in that Act, of the kind mentioned in subsection (1), do not include companies, corporations or bodies corporate.

74. Further, s 2 of the *Acts Interpretation Act 1901* provides:

> Application of Act
> (1) This Act applies to all Acts (including this Act).
> (2) However, the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention.

75. No basis for a contrary intention is shown. Section 2C has been applied in the interpretation of s 75B(1) of the *Competition and Consumer Act 2010*, which is in the

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[51] During the hearing there was a comment about this allegation as a "latecomer". Whilst the legal characterisation of the Threat was not pleaded in the original Statement of Claim in relation to s 348, the factual allegation itself was always part of the s 500 case from the start of the proceeding.

same terms as s 550(2).[52] Section 75B has often been employed to hold corporations liable as being "involved in" contravening conduct. Section 550 has also been so employed.[53]

76. The knowledge and intention required to satisfy s 550(2)(c) can be established by imputation through the operation of s 793(2) of the FW Act.[54] Further, there is no difficulty in the fact that the CFMEU's conduct and state of mind for the purposes of s 550 derives from a natural person who is the principal contravenor.

77. The Respondents submit that a body corporate cannot possess the requisite intent to participate to be knowingly concerned in a breach of s 500, because it cannot intentionally participate in the element of being a permit holder: [RS 130]. The fallacy in this approach is that s 550 does not operate to attribute liability for an element of a contravention; rather, it deems that if a person is knowingly concerned in someone else's contravention, that person also contravenes that provision.

78. Whilst the CFMEU is not able to be a permit holder, it nonetheless can be knowingly concerned in someone else's contravention of s 500 and, thereby, it can be taken to have itself contravened the provision. That is the plain language of s 550(1). There is no authority requiring that the person involved must be capable of contravening the relevant provision, or any element of it, to be liable under s 550.

## H. OTHER MATTERS

### Comparison of cases

79. At several points in the Respondents' Submissions, they point to differences of fact between this case and other cases, including those relied on by the Applicant in the Applicant's Submissions.[55] The Applicant agrees that factual comparators are of limited use, however they are not irrelevant. In some cases the comparisons are not as different as the Respondents assert.

80. The Respondents submit that the Applicant will not be able to refer to a single case in which there has been a finding of breaches by permit holder for such clearly innocuous conduct: [RS 66]. However, the conduct of Mr Sloane in *McDermott* can be regarded

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52 *Norcast S.ár.L v Bradken Limited (No 2)* (2013) 219 FCR 14 at [289] (Gordon J).

53 Eg: *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 and [2016] FCA 832.

54 See, eg, *Fair Work Ombudsman v Offshore Marine Services Pty Ltd (No 2)* [2013] FCA 943 at [152]-[163] (Gilmour J). For cases arising under the equivalent provisions in the former *Trade Practices Act 1974* (Cth), see *Hamilton v Whitehead* (1988) 166 CLR 121 at 126-128 (Mason CJ, Wilson and Toohey JJ); and *Wheeler Grace & Pierucci v Wright* (1989) 16 IPR 189 at 195 (Neaves and Burchett JJ) and 206-210 (Lee J). Those cases involved a corporate person's primary contravention (committed through the conduct and state of mind of a natural person), and the natural person as an accessory (armed with the same conduct and state of mind of that natural person). That the present case involves the reverse scenario – that is, a natural person's primary contravention and a corporate person as accessory (armed with the conduct and state of mind of that natural person) – is of no consequence. *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 and [2016] FCA 832 is an example of a corporate person being a person involved in a contravention of another person (who in that case was a corporation too).

55 See RS [23], [59]-[66] and [83]-[84].

as comparable to, if not less serious than, the conduct of the Respondents in this case. Mr Sloane entered premises with the purpose of engaging in discussions with workers, ignored a request to leave the premises, and moved around the premises speaking with workers in what he described as a "meet and greet" where he said "hi" and "hello". He did not make a threat of any nature. The evidence did not establish that he personally said any words to any employees relating to any industrial issues. He was found to have contravened s 500.

81. Similarly, the conduct of a number of the officials found to have breached s 500 in the *Lend Lease* case was also less serious than the conduct in this case. For example, at the Adelaide Oval on 31 October 2013, Messrs Beattie and Long "for much of their period on the site, they did little more than sit waiting for Mr McDermott and inspected, apparently in the manner of tourists, the old Adelaide Oval scoreboard."[56] The only conduct of any consequence they engaged in was failing to respond to a statement from the occupier's representative that they were not permitted to enter the site.

**Mr White's understanding of right of entry law**

82. [RS 53] is irrelevant, as is whether or not White had an accurate understanding of the law ([RS 54]). However White's understanding of the law was accurate at least to this extent, that MacDow as occupier was entitled to ask the officials to leave, and, if they did not leave, to eject them. Whatever his basis for exercising that right on behalf of MacDow, it did not create any right in the officials to remain on the premises.

83. Further, no sanction was imposed on MacDow by the Fair Work Building Industry Inspectorate in relation to right of entry: [cf RS 52]. The reference to the Fair Work Building Industry Inspectorate is immediately followed by White's evidence which clarifies that MacDow were facing "sanctions by the Victorian Government": [RS 52].

**Costs**

84. The Respondents' submission on costs is premature and is not warranted: [RS 4].

27 February 2017

**DAN STAR**

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[56] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [232]; see generally at [220]-[233] (White J).