Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

Cross River Rail Case Study

BUNDLE 6

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

ABCC v CFMMEU (Boggo Road Cross River Rail Case) [2022] FedCFamC2G 574

File number(s):	BRG 365 of 2020
Judgment of:	**JUDGE VASTA**
Date of judgment:	28 July 2022
Catchwords:	**INDUSTRIAL LAW** – Contraventions of s500 of FW Act – improper behaviour – deterrence – maximum penalties awarded
Legislation:	*Fair Work Act 2009* (Cth):s 500, s 793 *Work Health and Safety Act 2011* (Qld): s 117
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine upgrade case) (No 2)* [2019] FCA 1737 *Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13 *Bunning v Centacare* [2015] FCCA 280 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 *Mason v Harrington Corporation Proprietary Limited t/as Pangaea Restaurant & Bar* [2007] FMCA 7
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Place:	Brisbane
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Solicitor for the Applicant:	Ashurst Australia
Counsel for the Respondents:	Ms Doust
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ORDERS

BRG 365 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	ANDREW BLAKELEY Second Respondent
	LUKE GIBSON Third Respondent

ORDER MADE BY: **JUDGE VASTA**

DATE OF ORDER: **28 JULY 2022**

THE COURT DECLARES THAT:

The Second Respondent (Andrew Blakely)

1. On 15 April 2020, at the Cross River Rail Project, Andrew Blakeley contravened s 500 of the Fair Work Act 2009 (Cth), in that he acted improperly in exercising a right conferred by Part 3-4 of the Fair Work Act 2009 (Cth) by:

   (a) refusing to provide his entry permit despite multiple requests by the occupier;

   (b) making patronising counter-requests for excessive description of the entry permits, coupled with comments such as "I thought CPB would have trained you better to know what permits to ask for, unless you tell me what specific permits, I am not going to show them";

   (c) breaching the OHS requirements that applied on site, and acting contrary to instructions of the occupier, by entering the construction area of the site unaccompanied, and refusing to return;

(d) standing in the path of a truck so as to delay it from proceeding down a road, whilst refusing requests to leave the area and claiming "I am just stretching my legs";

(e) walking towards a representative of the occupier on site with his chest puffed out in an aggressive stance;

(f) making a homophobic slur to Peter Cullen that suggested Mr Cullen was trying to look at his penis while in the toilet block; and

(g) accessing and inspecting crib rooms and meeting rooms against the requests of the occupier, and interrupting a site induction that was taking place.

The Third Respondent (Luke Gibson)

2. On 15 April 2020, at the Cross River Rail Project, Luke Gibson contravened s 500 of the Fair Work Act 2009 (Cth), in that he acted improperly in exercising a right conferred by Part 3-4 of the Fair Work Act 2009 (Cth) by:

(a) refusing to provide his entry permit despite multiple requests by the occupier;

(b) making patronising counter-requests for excessive description of the entry permits;

(c) insulting Peter Cullen with a homophobic slur that he was a "pumpkin eater";

(d) unreasonably refusing to deal with the occupier's industrial relations representative;

(e) breaching the OHS requirements that applied on site, and acting contrary to instructions of the occupier, by entering the construction area of the site unaccompanied, and refusing to return; and

(f) in response to a request that he return to the pre-start area, turning out his pockets and saying "what do you think I am a dog? You want me to pull my pocket out and lead me around like a dog?".

The First Respondent (CFMMEU)

3. The First Respondent contravened s 500 of the Fair Work Act 2009 (Cth) by the conduct of the Second Respondent, the subject of the contravention at Declaration 1.

4. The First Respondent contravened s 500 of the Fair Work Act 2009 (Cth) by the conduct of the Third Respondent, the subject of the contravention at Declaration 2.

THE COURT ORDERS THAT:

5. The Second Respondent (Andrew Blakeley):

   (a) pay a penalty of $12,600 in respect of the contravention of s 500 of the Fair Work Act 2009 (Cth) dealt with in Declaration 1; and

   (b) that penalty be paid personally in that he must not, whether before or after the payment of penalties:

      (i) seek to have or encourage the First Respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalty whether in whole or in part; and

      (ii) accept or receive from the First Respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part.

6. The Third Respondent (Luke Gibson):

   (a) pay a penalty of $12,600 in respect of the contravention of s 500 of the Fair Work Act 2009 (Cth) dealt with in Declaration 2;

   (b) that penalty be paid personally in that he must not, whether before or after the payment of penalties:

      (i) seek to have or encourage the First Respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalty whether in whole or in part; and

      (ii) accept or receive from the First Respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part.

7. The First Respondent (the Construction, Forestry, Maritime, Mining and Energy Union) pay the following pecuniary penalties:

   (a) $63,000 in respect of the contravention of s 500 of the FW Act dealt with in Declaration 3; and

   (b) $63,000 in respect of the contravention of s 500 of the FW Act dealt with in Declaration 4.

8. All penalties imposed by these orders are to be paid to the Commonwealth of Australia as follows:

   (a) The First Respondent pay such penalty within 28 days.

   (b) The Second Respondent 120 days of the date of this order.

   (c) The Third Respondent 120 days of the date of this order.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE VASTA

INTRODUCTION

1 On 30 June 2020, the Applicant, the Australian Building and Construction Commissioner ("ABCC"), applied to this Court seeking declarations and pecuniary penalties against the First Respondent, Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU"), the Second Respondent, Andrew Blakeley and the Third Respondent, Luke Gibson for contraventions of the *Fair Work Act 2009* (Cth) ("the FW Act"). There was originally a Fourth Respondent.

2 The matter had been set down for a four day trial commencing Tuesday, 12 July 2022. On 1 July 2022, the Applicant filed a notice of discontinuance against the Fourth Respondent and also filed an amended statement of claim. The three remaining Respondents each filed defences in which they admitted the facts contained in the amended statement of claim which thereby meant that they admitted the contraventions against the FW Act.

3 This meant that there was no need for a trial and the matter proceeded to a penalty hearing which was held on Thursday, 14 July 2022.

Background

4 The Cross River Rail project is one of the biggest infrastructure projects to proceed in Brisbane for decades. Part of the project involves building new train stations and tunnelling between those stations which will create a new train network. One of the sites of the project is the Boggo Road site.

5 CPB Contractors Pty Ltd ("CPB") are the principal contractor for the project. Peter Cullen is the safety advisor for CPB. Matthew Gallen is a senior supervisor for CPB. Tan Truong is the industrial relations advisor CPB.

6 Unsurprisingly, CPB had a duty to ensure the health and safety of any workers at the site as well as the health and safety of any visitors to the site. Again unsurprisingly, CPB had established and imposed Occupational Health & Safety requirements for the project that applied to the site. This included that all visitors to the site must:

- report to the site office,

- undertake induction training before leaving the pre-start area of the site,
- be escorted by fully inducted CPB representative at all times whilst on site and,
- not walk around the site unsupervised.

7 As there were workers who were engaged on the site who were eligible to be members of the CFMMEU, the CFMMEU was entitled to represent their interests and therefore was entitled to have its officers exercise rights pursuant to s 117 of the *Work Health and Safety Act 2011* (Qld) ("WHS Act") on that site.

15 April 2020

8 On 15 April 2020, the Second Respondent, Mr Andrew Blakeley, the Third Respondent, Mr Luke Gibson and another person, who were all organisers of the CFMMEU, arrived at the pre-start area of the Boggo Road site at about 7:45 AM. The trio were seen by representatives of CPB. Mr Gallen approached the trio and said, words to the effect of, "*How ya going, can I help you?*", to which the Third Respondent said that he wanted to use the toilet. Mr Gallen said "*Nah, who are you and what you want?*"

9 The Third Respondent became aggravated and spoke in a patronising way until Mr Gallen allowed him to use the toilet. Mr Gallen then left to locate Mr Cullen. Mr Gallen and Mr Cullen then approached the trio. The Second Respondent (in the presence of the Third Respondent) then advised Mr Cullen that they were "*here on some suspected contraventions*".

10 The following conversation then took place:

> **C**: Okay can I see your permits, please?
>
> **SR**: I have four permits, which ones do you want to see?
>
> **C**: I want to see the workplace health and safety permits and the permits you are authorised to show me.
>
> **SR**: I have four permits, which ones do you want to see?
>
> **C**: Okay, show me all four permits.
>
> **SR**: No, you don't get to see all four permits. I thought CPB would have trained you better to know what permits to ask for; unless you tell me what specific permits, I am not going to show them.
>
> **C** (turning to the Third Respondent): Can I see your workplace health and safety permits?
>
> **TR:** Which ones? I have four.

C: Show me all four.

TR: You're not entitled to see all four.

C: Until I see your permits, we won't be escorting you on site.

11 The Second Respondent advised Mr Cullen that he intended to contact WHS Queensland. He did this and requested that WHS send inspectors to the site.

12 Mr Cullen had told the trio that his name was "*Pete*". The following conversation then occurred:

SR: What do you do here, Pete?

C: I work in the Health and Safety Department and can I get your name?

SR: Not until you ask for the right permits.

G: Pete's giving you his name, can you give Pete your name?

SR: Not until you ask for the right permits.

TR: Well, what permits you want to see?

G: Your Workplace Health and Safety and Fair Work permits.

TR: Finally someone who knows what they're talking about.

TR: Pete, Pete pumpkin eater

G: Mate, no name-calling; we are not calling you guys names.

13 Mr Cullen then asked the Second and Third Respondents for their notice of entry. Both Respondents produced their WHS permit holder "Notice of Entry" pursuant to s 119 of the WHS Act. The notices were both dated 15 April 2020.

14 The notice of the Second Respondent listed the following suspected contraventions:

- safe systems of work into workers health (Covid-19)
- sufficient plant, pedestrian delineation
- adequate exclusion zone for high-risk works

15 The notice of the Third Respondent listed the following suspected contraventions:

- safe systems of works into workers health (Covid-19)
- access and egress
- safe systems of work in general work environment (SWIMS)

16 Mr Cullen then repeated his request to the Second and Third Respondents and the following conversation took place:

> **C**: Can I see the other two permits that are required?
>
> **SR**: What are those permits?
>
> **C**: Unless you show me those permits we will not be walking around site to look at those contraventions.

17 At this time, Mr Truong arrived on site. He and Mr Gallen again approached the two respondents who were still in the pre-start area. The following conversation then took place:

> **T**: Look, Matt has requested to see your Fair Work and Workplace Health and Safety permit. If you can't provide this, then you can't enter the premises. Are you refusing?
>
> **TR**: No, I'm not refusing. Wait, who are you?
>
> **T**: I'm Tan from IR.
>
> **TR**: We don't deal with IR.
>
> After a 10 second pause, the conversation continued:
>
> **T**: Well, are you going to show your Fair Work and Work Health and Safety permits?

18 There was no response from either respondent.

> **T**: Silence and no response is considered as a non-compliance.

19 The permits were not produced.

Entry into the site

20 At about 8:26 AM (which is approximately 40 minutes after the respondents arrived at the pre-start area of the site), the two Respondents simply left the pre-start area and entered the site.

Actions of the Second Respondent

21 Once the Second Respondent entered the worksite, he walked along a concrete path along the side of the site. Mr Gallen approached him and requested that he "*come back here*". The Second Respondent did not comply with the request.

22 Instead, the Second Respondent continued walking into the site and stopped in the middle of the roadway in front of the heavy vehicle gate opening. A truck approached the heavy vehicle gate but could not enter the gate because the Second Respondent was standing in the way.

23 Mr Cullen requested that the Second Respondent move out of the way of the truck so that the truck would be able to turn left. The Second Respondent moved in the opposite direction to that indicated by Mr Cullen, placing himself directly in the path of the truck's intended path to the left. Shortly afterwards, the Second Respondent did move so that the truck was able to turn left.

24 Throughout this incident, Mr Cullen had informed the Second Respondent that he needed to leave the area because heavy vehicles operated in that location. Mr Cullen had requested that the Second Respondent return to the pre-start area and repeated his request to see the entry permits of the Second Respondent. The Second Respondent ignored the requests and refused to comply but he did say that "*I am just stretching my legs*".

25 Mr Gallen then approached the area where the Second Respondent and Mr Cullen were. Mr Gallen said to the Second Respondent, "*Enough is enough; I need you to return back. You shouldn't be wandering around site*". The Second Respondent replied, "*I don't know where I was going, all these paths don't lead to where I want to go*".

26 With this, the Second Respondent walked directly towards Mr Gallen with his chest puffed and his arms bent at the elbows and raised from the sides of his torso in an imposing and aggressive stance. He stared at Mr Gallen and smirked.

27 In the toilet block on site, the Second Respondent made a comment in offensive terms to Mr Cullen that suggested Mr Cullen was trying to look at the penis of the Second Respondent.

28 The Second Respondent then accessed and inspected the crib rooms and meeting rooms on site. An induction was taking place inside one of the rooms. There were two staff inside. One was presenting the site induction to the other. The Second Respondent approached the room, opened the door, looked inside and interrupted the induction by saying "*See you are not keeping correct separation*". Mr Cullen said "*Yes we are. Please don't interrupt the induction*".

29 The Second Respondent walked away leaving the door open and entered the next room. He opened that door, looked around inside and then walked away, again leaving the door open. He did the same thing for another three rooms; opening the door, looking inside and then walking away leaving the door open.

30 At 9:27 AM, Mr Truong saw the Second Respondent walking away from the pre-start area again and heading towards the work front. He followed the Second Respondent and said to

him "*I need you to stop. You are not authorised to be here. I am giving you a reasonable direction. Mate, can I see your Fair Work and Workplace Health and Safety permit? You haven't shown this to as yet and therefore not allowed on site*". The Second Respondent replied "*Well, you two are up here, so I am allowed to be here as well*".

Actions of the Third Respondent

31 After the Third Respondent left the pre-start area, he was approached by Mr Gallen who requested that the Third Respondent return to the pre-start area. The Third Respondent replied, "*What do you think I am, a dog? You want me to pull my pocket out and lead me around like a dog*?"

32 The Third Respondent then turned out his pockets from his pants. Mr Gallen did not respond to this statement and the Third Respondent ignored the request from Mr Gallen. The Third Respondent remained where he was and made another phone call.

The WHSQ inspectors

33 The inspectors from WHS Queensland arrived about 9:39 AM. The Second Respondent and the Third Respondent actually produced their entry permits when requested to do so by these inspectors. CPB representatives, the inspectors and the two Respondents discussed the suspected safety breaches identified in the notices of entry.

34 Immediately following these discussions, the WHS inspectors and the two Respondents inspected various areas of the site.

35 The two Respondents left the site at approximately 10:55 AM.

Contravention of the FW Act

36 The three Respondents have admitted that they have contravened s 500 of the FW Act which states as follows:

> 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.

37 The Second and Third Respondents were seeking to exercise rights under Part 3-4 of the FW Act when they sought to exercise their rights pursuant to s 117 of the WHS Act. The Second and Third Respondents both acted in an improper manner.

38 The First Respondent has contravened s 500 by the conduct of the Second Respondent pursuant to s 793 and s 550 of the FW Act.

39 The actions of the Second Respondent that were improper were:

- refusing to provide his entry permit despite multiple requests by the occupier;
- making patronising counter requests for excessive description of the entry permits;
- breaching OHS requirements that applied on site and acting contrary to the instructions of the occupier by entering the construction area of the site unaccompanied, and refusing to return;
- standing on the part of a truck so as to delay it from proceeding down the road whilst refusing request to leave the area;
- walking towards a representative of the occupier on site with his chest puffed out in an aggressive stance;
- making a homophobic slur to Peter Cullen that suggested that Mr Cullen was trying to look at his penis while in the toilet block; and
- accessing and inspecting crib rooms and meeting rooms against the requests of the occupier and interrupting a site induction that was taking place.

40 The First Respondent has contravened s 500 by the conduct of the Third Respondent pursuant to s 793 and s 550 of the FW Act.

41 The actions of the Third Respondent that were improper were:

- refusing to provide is entry permit despite multiple requests by the occupier;
- making patronising counter requests for excessive description of the entry permits;
- insulting Peter Cullen with a homophobic slur that he was a "*pumpkin eater*";
- unreasonably refusing to deal with the occupier's IR represented;
- breaching OHS requirements that applied on site and acting contrary to the instructions of the occupier by entering the construction area of the site unaccompanied, and refusing to return;
- responding to a request to return to the pre-start area by turning out his pockets and saying words to the effect of "*What do you think I am, a dog? You want me to pull my pocket out and lead me around like a dog?"*

Homophobic slur

42 There was some consternation at the Bar table when I expressed that the term "*pumpkin eater*" was a homophobic slur. Counsel, who may have had a somewhat sheltered existence, did not understand that this term could be used in this manner.

43 At the hearing, I did not wish to explain what the term means because it is quite disgusting and I believed that the use of this term was common enough knowledge. I have absolutely no doubt that it was meant as a homophobic slur to Mr Cullen.

44 It was submitted to me that the term was a reference to the nursery rhyme. I cannot accept this submission. Firstly, the nursery rhyme would reference "Peter, Peter, pumpkin eater" and not "Pete, Pete, pumpkin eater". If it were simply a reference to a nursery rhyme, then there would be no cause for anyone to be upset or offended. But the immediate response of Mr Cullen's colleague, Mr Gallen, was to say, "*Mate, no name-calling; we are not calling you guys names*".

45 If this were simply a play on names and referencing a children's nursery rhyme, such a reaction by Mr Gallen would be excessive. If this were simply a reference to a nursery rhyme, why would Mr Gallen need to explain that there should be no "name-calling", as such a reference could never amount to "name-calling". There would also be no need for Mr Gallen to point out that CPB representatives were not calling the union officials "names".

46 Furthermore, if what was said by the Third Respondent was simply referencing a children's nursery rhyme, one would think that he would react to the rebuke from Mr Gallen along the lines of "*Why are you getting so upset? It's only a silly nursery rhyme*". The fact that there was no reaction to the admonition by Mr Gallen speaks volumes.

47 This illustrates that what was said by the Third Respondent was clearly meant to be an insult and it was taken that way by Mr Gallen (and presumably Mr Cullen).

48 The other aspect that points to this being a homophobic slur is that the Second Respondent, whilst in the toilet block with Peter Cullen, then made "offensive comment" to Mr Cullen that suggested that Mr Cullen was trying to look at the penis of the Second Respondent. This was clearly a reference to the earlier description by the Third Respondent of Mr Cullen being a "*pumpkin eater*" and was a homophobic slur in itself.

49 These actions speak to a targeting of Mr Cullen; one calls him a pumpkin eater and the other follows up with insinuations that Mr Cullen is trying to look at a penis. There cannot be any other realistic way to understand this behaviour.

50 Counsel for the Applicant quite properly conceded that he had not made any submission to suggest that the term "*pumpkin eater*" was a homophobic slur. With all due respect to Counsel, it was proper for him to inform the Court of this, however, that does not mean that the Court is fettered by the fact that Counsel has not understood the words that were said and what the term "*pumpkin eater*" actually refers to.

51 I am not criticising either Counsel in any way; I wish that I did not know what this term actually means because it is so disgusting. But I do know what the term means and given all of the surrounding circumstances (especially the later slur by the Second Respondent), I am in no doubt that this term was uttered by the Third Respondent as an insult of the homophobic kind.

52 Since reserving this decision, I thought back to an earlier decision of mine in *Bunning v Centacare* [2015] FCCA 280. In that decision, I unfortunately had to use terms identifying a number of paraphilias including copraphilia, urophilia and necrophilia. There were many queries afterwards by persons whom I would have considered "worldly" as to what these terms meant. It may be the same is true of "*pumpkin eater*". Whilst I do not wish to explain this term in the body of these Reasons, I have given an explanation in Annexure 1 to this judgement.

The Law regarding assessment of pecuniary penalties

53 Because the three Respondents have admitted contravening s 500 of the FW Act, the Court must now assess what the appropriate pecuniary penalty should be. When assessing the quantum of pecuniary penalties in the past, much of what the Court had done was a reflection of sentencing principles that applied in criminal law.

54 The decision of the High Court in *Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13 has been called a "game changer". This is because the High Court ruled that the notion of "proportionality" is so closely connected to the central role of retribution in criminal sentencing that it could not be translated coherently into the civil penalty context of the FW Act. The proposition of the criminal law, that a sentence must not be disproportionate to the seriousness of the offending for which the offender is

being sentenced, is part of the retributive aspect of sentencing which has no part to play in the civil penalty regime of the FW Act.

55 It is instructive to reiterate what the High Court had earlier said in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at paragraph 55 of that judgment,

> No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd, is primarily if not wholly protective in promoting the public interest in compliance:
>
> "Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."

56 The High Court had also earlier said in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3, at paragraph 116 of that judgment:

> As has been observed, the principal object of an order that a person pay a pecuniary penalty under s 546 is deterrence: specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners. According to orthodox sentencing conceptions as they apply to the imposition of civil pecuniary penalties, specific deterrence inheres in the sting or burden which the penalty imposes on the contravener. Other things being equal, it is assumed that the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or burden that a penalty imposes on a contravener, the less likely it will be that the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

57 At paragraph 46 (and following) of *Pattinson* (Supra), the High Court said:

[46] It is important to recall that an "appropriate" penalty is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case. …

[47] The penalty that is appropriate to protect the public interest by deterring future contraventions of the Act may also be moderated by taking into account other factors … where those responsible for a contravention of the Act express genuine remorse for the contravention, it might be considered appropriate to impose only a moderate penalty because no more would be necessary to incentivise the contravenors to remain mindful of their remorse and their public expressions of that remorse to the court. Similarly, where the occasion in which a contravention occurred is unlikely to arise in the future because of changes in the membership of an industrial organisation, a modest penalty may be appropriate having regard to the reduced risk of future contraventions.

[48] It is not necessary to multiply examples further. It is sufficient to say that a court empowered by section 546 to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.

…

[50] This Court's reasoning in the Agreed Penalties Case is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the court reasonably to do.

…

[55] The maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed". This relationship of "reasonableness" may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

58 In *Mason v Harrington Corporation Proprietary Limited t/as Pangaea Restaurant & Bar* [2007] FMCA 7, which is known as the *Pangaea case*, the Court went through, in effect, a

number of factors the Court should be mindful of when imposing pecuniary penalties. One must be careful, though, in looking at the *Pangaea case* (Supra), that one does not simply look at those matters as some form of checklist to see whether or not the facts of the case with the particular factors either aggravate or mitigate the penalty. As such, the list compiled in *Pangaea* (Supra) is extremely useful, but it should not be a formula used by the Court to slavishly come up with some sort of almost mathematical guide for the imposition of penalties.

59 Notwithstanding what has now been said in *Pattinson* (Supra), there is still a place for a Court to consider these aspects. This is so given that the Court must look at both the circumstances of the contravention and the circumstances of the contravenor.

Deterrence and seriousness

60 The maximum penalties that apply in this case are $12,600 for the Second Respondent and $12,600 for the Third Respondent. For each of those contraventions, the maximum penalty for the First Respondent is $63,000 giving a total maximum penalty for the First Respondent of $126,000.

61 It has been submitted to me that the seriousness of the conduct of the Second and Third Respondents is not particularly great when one analyses what it is that they have done.

62 It has been submitted that the conduct of the Second and Third Respondents was not a result of prior planning. It was submitted that the behaviour was a spontaneous response to the initial interaction where the Third Respondent was denied use of the toilet. I cannot accept this submission. Such a submission attempts to reverse what truly happened and put the blame on Mr Gallen and Mr Cullen.

63 The Respondents were visitors and were asked to tell the occupier who they were and why they were there. There is no excuse for the failure to do so. The belligerent response and subsequent behaviour of the two Respondents speaks of a sense of entitlement and a recalcitrance to behaving as ordinary decent human beings.

64 It was submitted that the conduct was limited in scope and occurred over a period of less two hours. Whilst the conduct may have caused aggravation and inconvenience to the CPB staff, the conduct itself did not cause any stoppage of work at the site, any financial loss to CPB or any significant involvement of CPB's workforce.

65 It was submitted that the conduct of the Third Respondent was less serious than that of the Second Respondent. It was submitted that neither the Second Respondent nor the Third Respondent profited or benefited in any way from the contravention.

66 All of this ignores the blatant homophobic slur uttered by the Third Respondent to Mr Cullen and the subsequent homophobic slur to Mr Cullen by the Second Respondent. This behaviour is not just "*improper*"; it is illustrative of a bullying and demeaning of Mr Cullen that simply cannot be tolerated in a civilised society.

67 What has occurred is that the two Respondents have arrived at a worksite and decided to do anything and everything to frustrate and annoy Mr Cullen, Mr Gallen and Mr Truong or any other representative of the occupier. When I asked why the two Respondents didn't just simply show the staff their permits when asked, there was no answer from Counsel for the Respondents.

68 The two Respondents knew that they could not wander around the site unless they had been inducted or were accompanied by CPB staff. Yet, they endangered themselves as well as staff, who had to try to corral them back to the pre-start area, by wandering off as they pleased. They had absolutely no regard for anyone else on the site and acted as if their desires trumped the safety and good order of the worksite.

Mitigation

69 It has been submitted that there should be some mitigation for the fact that the Respondents admitted the contraventions. It was conceded by the Applicant that the case against the three Respondents did change; such is evident by the amended statement of claim filed on 1 July 2022. That document shows exactly what allegations were now not relied upon by the Applicant; most notably that the Applicant did not wish to proceed further against the person who was originally the Fourth Respondent.

70 However, I am not of the view that this circumstance is a factor that is significant in looking at the matter as a whole. While it is true that the case against the First Respondent changed in a significant way (in that it was responsible for two of its employees and not three), the main allegations against the Second and Third Respondents remained the same. There was no explanation as to why the bulk of these allegations were originally pleaded by the Second and Third Respondents as "not admitted" but were re-pleaded as "admitted". It defies logic to suggest that this reason was simply because other allegations were withdrawn.

71 It begs the question why the original pleadings of the Second and Third Respondents did not "admit" the allegations that have now been admitted and "not admit" the allegations that were subsequently withdrawn.

72 Whilst I acknowledge that there has been cooperation with the administration of justice, this aspect carries little weight in the consideration of the appropriate penalty.

Antecedents

73 The antecedents of the First Respondent are notorious. I have previously described them as the "*greatest recidivist offenders in Australian corporate history*" and many other judges have also noted their infamous past.

74 Their conduct can be compared and contrasted with that of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The CEPU has a very proud history of representing its members and vigorously standing up for their rights but doing it in a lawful and responsible way. When there have been transgressions of the law, the CEPU put in place education programs to ensure that their members understand their rights but also their responsibilities under the law. Those transgressions can be seen as "aberrations". In contrast, the First Respondent treats contraventions of the FW Act as "occupational hazards" in the way it conducts business while transgressions are seen as "a way of life".

75 The Applicant has provided a large document which describes the unenviable history of the First Respondent before the courts. There is no pleasure in reading such a document.

76 The Second Respondent is no stranger to these Courts either. The actions in the current matter occurred on 15 April 2020.

77 On 30 April 2020, the Second Respondent also contravened s 500 of the FW Act. On that occasion, he entered into a worksite at Marine Parade in Labrador. The Second Respondent entered into an exclusion zone and a concrete pump zone. The Second Respondent stood between a concrete truck and the concrete pump. He was physically blocking the truck from reversing back to the concrete pumps. This delayed the delivery of concrete to the site.

78 On 5 November 2020, the Second Respondent again contravened s 500 of the FW Act. On that occasion, he entered the worksite at the Southbank new performing arts complex project. He entered the site without giving 24 hours written notice and remained on site in

circumstances where he had no lawful basis to do so. He failed to comply with the Occupational Health & Safety requirements on that site and attended the meeting which was not authorised to be held on the site. He facilitated the entry of 10 to 12 people onto the site in circumstances where he knew that those people were not authorised to be on the site.

79 On 3 February 2022, His Honour Judge Egan awarded a pecuniary penalty of $7,992 against the Second Respondent for the contravention which occurred on 5 November 2020.

80 On 11 March 2022, I awarded a pecuniary penalty of $7,000 against the Second Respondent for the contravention which occurred on 30 April 2020.

81 On 28 July 2022, I will be imposing the present pecuniary penalty against the Second Respondent for this contravention which occurred on 15 April 2020.

82 This means that the Second Respondent had contravened s 500 of the FW Act on three separate occasions during 2020. He has been extremely fortunate that the courts have dealt with him in "reverse order". Even though the contravention before Judge Egan was the third occasion in which the Second Respondent had contravened s 500 of the FW Act, it was the first in time which was dealt with by the Courts. The Second Respondent had the benefit of being treated by His Honour Judge Egan as having committed no previous contraventions.

83 I noted this fact at the time I was dealing with the Second Respondent on 11 March 2022.

84 The Third Respondent is also no stranger to these Courts. As noted, the events that led to the present contravention occurred on 15 April 2020.

85 On 2 May 2018, the Third Respondent contravened s 500 of the FW Act. The circumstances of this contravention were the subject of discussion by Her Honour Justice Collier in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2)* [2019] FCA 1737. Her Honour gave her judgement on 23 October 2019.

86 The Third Respondent also contravened s 500 of the FW Act on 30 April 2020. He was involved in the same incident in which the Second Respondent also contravened s 500 of the FW Act that same day. The Third Respondent also stood behind a concrete truck to disrupt the pouring of concrete. His behaviour was aggravated by his taunting of workers on the site to "hit" him. On that occasion, I ordered that the Third Respondent pay a pecuniary penalty of $10,000.

87 This means that the Third Respondent has also contravened s 500 of the FW Act in a reasonably short period of time.

Discussion

88 As the High Court have said *Pattison* (Supra), the Court must consider the circumstances of the contravenor as well as a circumstances of the contravention.

89 The submission has been made that when one looks at the circumstances of the contravention, the Court would consider that it is in a "less serious" category. Whilst acknowledging that the actions of both the Second and Third Respondents did not have the same potential for damage and harm as their actions at Labrador on 30 April 2020, the actions in the present case were still serious in, and of, themselves.

90 The behaviour of uttering quite disgusting homophobic slurs has been consigned to the chapters of the dark history of Australia where the hurling of vitriolic insults which targeted a person's sexuality, race or religion were unfortunately tolerated as if such belittling and bullying was something that a victim just "*had to cop*". Those days are thankfully gone and only troglodytes would attempt to resurrect them. For the Second and Third Respondents (who are supposedly fit and proper persons to hold an entry permit pursuant to s 512 of the FW Act) to utter such slurs to bully and belittle a person simply must be deterred by all means available to a Court.

91 Even though the Second Respondent has been dealt with in "reverse order" chronologically with respect to his commission of contraventions of s 500 of the FW Act, and even though the Third Respondent has committed one of his contraventions after he committed the present contravention, the fact is that both the Second and the Third Respondent have now committed three contraventions of s 500 of the FW Act.

92 It is within the power of the Court to order that the Second and Third Respondents personally pay the penalty imposed upon them. The penalty that will be imposed upon both the Second and Third Respondent must be such that the order acts as a deterrent both specifically and generally. This simply cannot be achieved if the First Respondent "picks up the tab" because this is simply part of the "cost of doing business".

93 There will be no "sting" to any penalty and no sufficient deterrent effect to prevent repetition by them, or like-minded others, of the appalling behaviour they displayed in this case unless the Second and Third Respondents personally pay the penalty. I acknowledge that there will

be a real "sting" in the penalties that I award against these two Respondents and for this reason I have allowed a far longer than usual period in which the penalties must be paid.

Conclusion

94 I have taken into account both the circumstances of the contravention itself and of each of the contravenors. There is clearly a persistent adherence to a strategy of non-compliance by all three Respondents. As the High Court said in *Pattison* (Supra),

> A greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy and will be necessary to persuade a poorly resourced contravenor that it is unlawful policy preference is not sustainable. The more determined a contravenor is to have its way in the workplace and the more deliberate its contravention is, the greater will be the financial incentive necessary to make the contravenor except that the price of having its way is not sustainable.

95 There is no other "appropriate" penalty that will achieve the deterrent effect necessary other than the imposition of the maximum penalty.

96 I acknowledge that this penalty will still be insufficient to deter the First Respondent who will, as I remarked during the hearing, regard such a sum as "chump change". But this is the only tool that the Parliament has given to the Court to deter such contraventions. It is a matter for the Parliament as to whether they wish to give the Court sufficient power to actually deter such contraventions of the FW Act or whether they are content with the status quo.

Orders

97 I order that the First Respondent pay a pecuniary penalty of $126,000. I order that this penalty be paid within 28 days.

98 I order that the Second Respondent pay a pecuniary penalty of $12,600 and that this be paid personally by the Second Respondent. I order that this penalty be paid within 120 days.

99 I order that the Third Respondent pay pecuniary penalty of $12,600 and that this be paid personally by the Third Respondent. I order that this penalty be paid within 120 days.

100 I will make the declarations that are appropriate.

I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for

Judgment of Judge Vasta.

Dated: 28 July 2022

ANNEXURE 1

Pumpkin Eater

When a person commits an act of anal cunnilingus upon another, the stimulation of the muscles of the receiver of this act, will sometimes lead to an accidental release of faecal material.

A "pumpkin eater" is a person who, when committing an act of anal cunnilingus upon another, will not cease that act even if there is an involuntary discharge of faecal material by the receiver of the act.

FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (Boggo Road Cross River Rail Case) [2023] FCA 507

File number(s):	QUD 291 of 2022
Judgment of:	**ABRAHAM J**
Date of judgment:	25 May 2023
Catchwords:	**INDUSTRIAL LAW** – appeal against quantum of penalties – where respondent conceded three grounds of appeal – where primary judge erred in finding homophobic conduct – appeal allowed – redetermination of penalties – where conduct was deliberate and churlish – where discount for utilitarian value of admissions and co-operation – where second and third appellants involved in other contraventions – where first appellant is a recidivist offender – where first appellant is large and well-resourced – where revocation of second and third appellants' permits relevant
Legislation:	*Evidence Act 1995* (Cth) ss 144, 191 *Fair Work Act 2009* (Cth) ss 497, 500, 546 *Workplace Health and Safety Act 2011* (Qld) ss 19, 117
Cases cited:	*ABCC v CFMMEU (Boggo Road Cross River Rail Case)* [2022] FedCFamC2G 574 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 40 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 156 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2)* [2019] FCA 1737; (2019) 292 IR 259 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case) [2017] FCA 62

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case) [2017] FCA 1235

Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; (2022) 175 ALD 383

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1997] FCA 450; (1997) 145 ALR 36

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 159; (2017) 258 FCR 312

Australian Opthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560

Civil Air Operations Officers' Association of Australia v Airservices Australia (No 2) [2023] FCA 104

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman [2023] FCA 72

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (The Botany Cranes Case) [2023] FCAFC 40

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 1173

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (Kiama Aged Care Centre Appeal) [2023] FCAFC 63

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) (No 3) [2023] FCA 219

In the matter of the Entry Permit of Andrew Robert Blakeley [2022] FWC 1730

In the matter of the Entry Permit of Luke Johannes Gibson [2022] FWC 1692

Kelly v Fitzpatrick [2007] FCA 1080; (2007) 166 IR 14

Mill v The Queen [1988] HCA 70; (1988) 166 CLR 59

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; (1996) 71 FCR 285

Pattinson v Australian Building and Construction Commissioner [2020] FCAFC 177; (2020) 282 FCR 580

	R v McInerney (1986) 42 SASR 111 *Rojas v Esselte Australia Pty Ltd (No 2)* [2008] FCA 1585; (2008) 177 IR 306 *Trade Practices Commission v CSR Ltd* [1990] FCA 762; (1991) ATPR 41-076
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	92
Date of hearing:	21 April 2023
Counsel for the Appellants:	Mr J Agius SC with Ms L Doust
Solicitor for the Appellants:	Hall Payne Lawyers
Counsel for the Respondent:	Mr C Murdoch KC with Mr S Mackie
Solicitor for the Respondent:	Ashurst

ORDERS

QUD 291 of 2022

BETWEEN:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Appellant
	ANDREW BLAKELEY Second Appellant
	LUKE GIBSON Third Appellant
AND:	**FAIR WORK OMBUDSMAN** Respondent

ORDER MADE BY: **ABRAHAM J**

DATE OF ORDER: **25 MAY 2023**

THE COURT ORDERS THAT:

1. The appeal is allowed.

2. Declaration 1(f) made by the Federal Circuit and Family Court of Australia (Div 2) on 28 July 2022 be varied to read:

> (f) making an offensive comment to a manager on site that suggested the manager was trying to look at his penis while in the toilet block;

3. Declaration 2(c) made by the Federal Circuit and Family Court of Australia (Div 2) on 28 July 2022 be varied to read:

> (c) making insultingly childish comments to staff of the occupier, in particular saying "Pete, Pete, pumpkin eater";

4. Orders 5, 6, 7 and 8 made by the Federal Circuit and Family Court of Australia (Div 2) on 28 July 2022 are set aside.

5. The first appellant pay a pecuniary penalty of $50,000 for each of its two contraventions of s 500 of the *Fair Work Act 2009* (Cth), a total of $100,000, to the Commonwealth of Australia within 28 days of the date of this order.

6. The second appellant pay a pecuniary penalty of $7,000 for his contravention of s 500 of the *Fair Work Act 2009* (Cth) to the Commonwealth of Australia within 28 days of the date of this order.

7. The third appellant pay a pecuniary penalty of $7,000 for his contravention of s 500 of the *Fair Work Act 2009* (Cth) to the Commonwealth of Australia within 28 days of the date of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ABRAHAM J:

1 This is an appeal from *ABCC v CFMMEU (Boggo Road Cross River Rail Case)* [2022] FedCFamC2G 574 (the primary judgment), in which the primary judge imposed civil penalties on the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and two of its employed organisers, Andrew Blakely and Luke Gibson, for contraventions of s 500 of the *Fair Work Act 2009* (Cth) (the FW Act) when they entered the Boggo Road site (the site) on 15 April 2020.

2 The appellants admitted the contraventions and the proceedings were conducted on the basis of agreed facts pursuant to s 191 of the *Evidence Act 1995* (Cth) (Evidence Act). The Court was only required to determine the orders to be made in consequence of those admitted contraventions.

3 The primary judge:

(a) declared that the second and third appellants, Mr Blakely and Mr Gibson, had contravened s 500 of the FW Act, and imposed on each the maximum civil penalty being $12,600 (also making personal payment orders in respect of that penalty); and

(b) declared that the first appellant, the CFMMEU, had contravened s 500 of the FW Act by each of the contraventions of the second and third appellants, and imposed the maximum penalty, being $63,000, on it in respect of each of its contraventions.

4 The primary judge also found, and declared, that each of the second and third appellants had engaged in homophobic conduct. The appellants contended that those findings and declarations involved appellable error and should be set aside. They were also critical of the primary judge's assessment of the conduct, contending that his Honour's discretion in the imposition of the penalty miscarried.

5 The appellants plead ten grounds of appeal, the first three being directed to the primary judge's conclusion that the second and third appellants had engaged in homophobic conduct, the remaining relating to the imposition of the penalties. The first three grounds are as follow:

The Pumpkin Eater Grounds

1. His Honour erred (at Judgment [41], [42]-[52]) in finding that the third

respondent had made a homophobic slur by calling Peter Cullen "Pete Pete Pumpkin Eater" because:

a. that conclusion was not open on the pleaded facts of the matter;

b. there was no evidence before the Court that "pumpkin eater" is a homophobic slur; and

c. "pumpkin eater" having either a meaning as referring to sexual conduct or a meaning as a homophobic slur was not knowledge to which his Honour was entitled to have regard pursuant to s.144 of the *Evidence Act* 1995 (Cth) as:

i. it was not knowledge that is:

1. not reasonably open to question; and

2. common knowledge in Queensland or any other locality; or

3. capable of verification by reference to a document the authority of which cannot reasonably be questioned; and

ii. his Honour did not comply with the requirements of s.144(4) of the *Evidence Act 1995* (Cth) as he did not disclose the contents of Annexure 1 and give the respondents an opportunity to respond to it.

2. Alternatively, his Honour denied the respondents procedural fairness by declining to disclose to them the meaning of the term "pumpkin eater" to which he proposed to have regard in reaching the conclusion that it was a homophobic slur.

The Homophobic Slur Grounds

3. His Honour erred in finding that the second respondent made a homophobic slur by suggesting that Mr Cullen was trying to look at his penis in the toilet block as that conclusion was not open on the pleaded facts of the matter.

6 The respondent conceded that those first three grounds are established, and as a result the remaining grounds were not pressed by the appellants. I am satisfied on the material before me that that concession was properly made. As explained below, the finding that the second and third appellants had engaged in homophobic conduct did impact on the penalties imposed. Accordingly, the penalties are to be re-determined.

7 For the reasons below:

(a) In relation to the second appellant, Mr Blakely, I impose a penalty of $7,000.

(b) In relation to the third appellant, Mr Gibson, I impose a penalty of $7,000.

(c) In relation to the first appellant, the CFMMEU, I impose a penalty of $50,000 in relation to each of its two contraventions, resulting in a total penalty imposed of $100,000.

8 I also vary the following declarations made by the primary judge as follows:

(a) Declaration 1(f) which was to the effect that the second appellant had contravened s 500 of the FW Act by "making a homophobic slur to Peter Cullen that suggested Mr Cullen was trying to look at his penis while in the toilet block", should be varied to read that the second appellant contravened s 500 of the FW Act by "making an offensive comment to a manager on site that suggested the manager was trying to look at his penis while in the toilet block".

(b) Declaration 2(c) which was to the effect that the third appellant had contravened s 500 of the FW Act by "insulting Peter Cullen with a homophobic slur that he was a 'pumpkin eater'", should be varied to read that the third appellant contravened s 500 of the FW Act by "making insultingly childish comments to staff of the occupier, in particular saying 'Pete, Pete, pumpkin eater'".

Factual background

9 The events of 15 April 2020 can be summarised as follows.

10 At or around 7:45am, the second and third appellants attended the site and were observed by representatives of the occupier, CPB Contractors Pty Ltd (CPB). To enter the site, they walked past signs requesting that they comply with site occupational health and safety (OHS) requirements.

11 The second and third appellants were approached by a senior supervisor for CPB. When asked why they were present, they did not give a meaningful answer. Instead, the third appellant asked to use the toilet. The senior supervisor then approached the second and third appellants with a safety advisor (a manager) for CPB, Mr Peter Cullen. The second and third appellants advised that they wished to enter the site pursuant to s 117 of the *Workplace Health and Safety Act 2011* (Qld) (WHS Act) but, upon a request to do so, did not produce their entry permits for inspection (instead, inter alia, asking which of their permits was sought). Mr Cullen advised that until he had seen their permits, he would not be escorting the second and third appellants on site. The second appellant advised Mr Cullen that he intended to contact Work Health and Safety Queensland (the regulator) and request that they send inspectors to the site.

12 A brief conversation about names followed, then another request that the second and third appellants provide their entry permits. During which the third appellant said to Mr

Cullen "Pete, Pete Pumpkin Eater". Upon request by the senior supervisor for their notices of entry, the second and third appellants did each produce a "WHS Permit Holder Notice of Entry" under s 19 of the WHS Act (the notices of entry).

13 Mr Cullen then repeated his request for the second and third appellants' entry permits, followed by another request for the same by the senior supervisor and the industrial relations advisor for CPB. It was stated each time that no entry would occur unless the permits were shown. The second and third appellants did not produce their entry permits.

14 At or about 8:26am, the second and third appellants left the pre-start area and entered further into the site. The second appellant did not comply with the senior supervisor's request to "come back here". He then stopped in the middle of a roadway in front of the heavy vehicle gate opening, preventing the entry of a truck. Mr Cullen requested that the second appellant move out of the way of the truck, but instead he placed himself in its intended path for a short time. During that time, Mr Cullen: repeated his request to see the second appellant's entry permits; and requested that he return to the pre-start area, as did the senior supervisor. The second appellant either ignored the requests, or otherwise refused to comply, saying words to the effect of "I am just stretching my legs". He then engaged in aggressive behaviour towards the senior supervisor, walking directly towards him, puffing his arms bent at the elbows, raising the sides of his torso and smirking.

15 In the toilet block on site, the second appellant made a comment in offensive terms to Mr Cullen, suggesting that Mr Cullen was trying to look at his penis. The second appellant then accessed and inspected each of the crib rooms and meeting rooms on site. In doing so, he interrupted a site induction taking place. The industrial relations advisor then repeated his request for the second appellant to show his entry permit and requested that he return to the pre-start area. The second appellant did not comply with either request.

16 After leaving the pre-start area, the third appellant was approached by the senior supervisor, who requested that he return to the pre-start area. He did not comply with the request and replied in a belligerent manner, saying words to the effect of "what do you think I am, a dog? You want me to pull my pocket out and lead me around like a dog?".

17 At around 9:39am, inspectors from the regulator arrived at the site. The second and third appellants produced their entry permits when requested by the inspectors. The inspectors and the second and third appellants then discussed the suspected safety breaches

identified in the notices of entry with representatives of CPB, and inspected various areas of the site. At approximately 10:55am, the second and third appellants left the site.

The finding

18 It is necessary to refer, albeit briefly, to the circumstances in which the primary judge found and then imposed penalties on the basis that the second and third appellants had engaged in homophobic conduct.

19 In the primary judgment at [42]-[43], the primary judge described the circumstances in which his Honour raised the issue:

> [42] There was some consternation at the Bar table when I expressed that the term "*pumpkin eater*" was a homophobic slur. Counsel, who may have had a somewhat sheltered existence, did not understand that this term could be used in this manner.
>
> [43] At the hearing, I did not wish to explain what the term means because it is quite disgusting and I believed that the use of this term was common enough knowledge. I have absolutely no doubt that it was meant as a homophobic slur to Mr Cullen.

20 At [48], the primary judge found that the second appellant's comment in the toilet block was "clearly a reference" to the third appellant's earlier use of the term "pumpkin eater".

21 At [50]-[52], the primary judge stated that:

> [50] Counsel for the Applicant quite properly conceded that he had not made any submission to suggest that the term "*pumpkin eater*" was a homophobic slur. With all due respect to Counsel, it was proper for him to inform the Court of this, however, that does not mean that the Court is fettered by the fact that Counsel has not understood the words that were said and what the term "*pumpkin eater*" actually refers to.
>
> [51] I am not criticising either Counsel in any way; I wish that I did not know what this term actually means because it is so disgusting. But I do know what the term means and given all of the surrounding circumstances (especially the later slur by the Second Respondent), I am in no doubt that this term was uttered by the Third Respondent as an insult of the homophobic kind.
>
> [52] Since reserving this decision, I thought back to an earlier decision of mine in *Bunning v Centacare* [2015] FCCA 280. In that decision, I unfortunately had to use terms identifying a number of paraphilias including copraphilia, urophilia and necrophilia. There were many queries afterwards by persons whom I would have considered "worldly" as to what these terms meant. It may be the same is true of "*pumpkin eater*". Whilst I do not wish to explain this term in the body of these Reasons, I have given an explanation in Annexure 1 to this judgement.

22 The impact of this finding on the penalties imposed is obvious from [90]:

> [90] The behaviour of uttering quite disgusting homophobic slurs has been consigned to the chapters of the dark history of Australia where the hurling of vitriolic insults which targeted a person's sexuality, race or religion were unfortunately tolerated as if such belittling and bullying was something that a victim just "*had to cop*". Those days are thankfully gone and only troglodytes would attempt to resurrect them. For the Second and Third Respondents (who are supposedly fit and proper persons to hold an entry permit pursuant to s 512 of the FW Act) to utter such slurs to bully and belittle a person simply must be deterred by all means available to a Court.

23 As a consequence, the primary judge imposed the maximum penalty on each appellant.

24 As is evident from the above, and the appellants' admissions, there was no allegation made by the respondent that the conduct included a homophobic slur or homophobic conduct. The appellants' admissions to the contraventions therefore did not encompass an admission to such conduct. The primary judge found not only that there was such conduct, but that it was intended by the second and third appellants to be homophobic conduct.

25 A consideration of the transcript of the proceedings below reflects the following:

(a) It was the primary judge who raised the matter of homophobia of his Honour's own volition.

(b) His Honour raised the topic during the appellants' submission explaining the conduct admitted to, by interrupting and saying "[a]nd when you don't get your own way, you resort to homophobic slurs".

(c) As soon as it was raised, the appellants' counsel took issue with the interpretation, submitting, inter alia, "that the description 'pumpkin eater' is not a phrase that is in common use as a homophobic slur". The appellants' counsel then repeatedly tried to put their submission on the topic.

(d) The primary judge refused to explain to counsel the meaning of the term his Honour was referring to, or explain the source of his knowledge as to that meaning. His Honour only said that he had "heard these terrible epithets" because of his background as a Crown Prosecutor. His Honour repeatedly asserted that his understanding was common knowledge and that counsel "just [didn't] understand it". The primary judge was well aware that neither party understood the meaning of the term "pumpkin eater", stating:

> … I understand that, you know, I may be a bit more worldly than you are, and I may understand how those things affect sections of the community

> more than you are, but that's the way it is. That's why, you know, I'm asked to be a judge because (a) there are things that I have in my experience that allows me to look at these things and see what it is, even if it something that escapes, you know, both counsel, but anyway, all right.

(e) The appellants' submissions included that there was no material before the Court to enable the primary judge to make the finding that the term "pumpkin eater" is a homophobic slur.

(f) The primary judge responded to the appellants' submissions, inter alia, by saying that they had not put on any evidence as to the meaning of the conduct. That is, they had not led evidence that the term was not a homophobic slur.

(g) The respondent did make the submission that it was not alleged by them, and that it was not their case, that "pumpkin eater" was a homophobic slur. It was apparent that the respondent also did not understand the meaning of the conduct to be as asserted by the primary judge.

(h) The appellants submitted that the allegation that the comment made by the second appellant in the toilet block had some homophobic character was not understood from the pleadings and was not the case advanced against him. They also reiterated that the second appellant had not had the opportunity to consider whether he might want to rebut that reading or understanding of the conduct. The primary judge took issue with that, asserting that "he has had the opportunity" and that he had just not taken it.

26 Simply put, as apparent from the grounds of appeal, it is contended that: there was no evidence and there were no pleaded facts to make the finding in relation to "pumpkin eater" being a homophobic slur; the primary judge did not comply with s 144 of the Evidence Act if his Honour was taking judicial notice of the meaning of "pumpkin eater"; the appellants were denied procedural fairness by the primary judge's refusal to disclose the meaning of "pumpkin eater"; and there were no pleaded facts to make the finding in relation to the second appellant's comment in the toilet block being a homophobic slur.

27 In the circumstances described above, it was obvious to the primary judge from their repeated statements that counsel did not understand or agree with his Honour's approach to the meaning of the term "pumpkin eater". In that light, the primary judge refused to provide the meaning his Honour was referring to, or the basis of his knowledge. There was nothing in the pleadings or evidence that indicated that meaning, or that it was the case the appellants had to meet. It was not admitted by the appellants and was positively disavowed by the

respondent. Further, the primary judge did not raise s 144 of the Evidence Act with counsel. In any event, given counsel's lack of knowledge as to the meaning of the term, the primary judge could not proceed under that provision (on the basis that the meaning of the term was common knowledge). That is particularly so given that s 144(4) requires the judge to give the parties an opportunity to make submissions, and to refer to relevant information, relating to acquiring or taking into account knowledge of that kind as is necessary to ensure that a party is not unfairly prejudiced. His Honour did not do so. To proceed to make the adverse findings his Honour did, without informing the parties of the meaning of the term, and the basis of his Honour's knowledge as to that meaning, to enable them to address the issue was an obvious denial of procedural fairness. I note that even the annexure to the primary judgment, which describes a sexual act, does not identify a source and the definition there given, without more, does not support the conclusion drawn by the primary judge.

28 It is plain the impugned findings impacted on the assessment of the penalties imposed.

29 Accordingly, the appeal must be allowed.

Redetermination of the penalty

30 As I have concluded that the penalties imposed by the primary judge are to be set aside, the Court must determine the appropriate penalties for itself: *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312 at [573].

31 Each of the second and third appellants committed one contravention of s 500 of the FW Act, covering the entirety of each of their respective conduct. As a result, the first appellant committed two contraventions of s 500 of the FW Act.

Relevant principles

32 The primary purpose of any civil penalty regime is to ensure compliance with the statutory regime by deterring future contraventions: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*Agreed Penalties Case*) at [24]. Civil pecuniary penalties are "primarily if not wholly protective in promoting the public interest in compliance [with the statute]": *Agreed Penalties Case* at [55] and [59], [68], [110], also see *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 175 ALD 383 (*Pattinson (High Court)*) at [15]-[16], [43] and [45]. The principal object of a pecuniary penalty is directed to deterrence. That is,

specific deterrence of the contravenor and, by that example, general deterrence of other would-be contravenors: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 at [116].

33 The process of assessing a penalty is guided by a consideration of a number of well-accepted factors: *Kelly v Fitzpatrick* [2007] FCA 1080; (2007) 166 IR 14 at [14], and see *Trade Practices Commission v CSR Ltd* [1990] FCA 762; (1991) ATPR 41-076 at 52,152-52,153; *Rojas v Esselte Australia Pty Ltd (No 2)* [2008] FCA 1585; (2008) 177 IR 306 at [64]-[65]. It is important to remember that those lists of factors are judicial descriptions of likely relevant considerations applicable to the task of coming to the appropriate penalty, and such lists are useful as long as they "do not become transformed into a rigid catalogue of matters for attention": *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 at [91]; *Pattinson (High Court)* at [19]. Relevant factors in a case of this nature include:

(a) the nature and extent of the contravention;

(b) the circumstances in which the contravention took place;

(c) the nature and extent of loss and damage suffered as a result of the contravention;

(d) whether the contravenor has engaged in any similar conduct in the past;

(e) the size and nature of the contravenor;

(f) whether the contraventions involve senior management;

(g) any contrition or corrective action taken; and

(h) any cooperation with authorities which has been shown.

34 The principle of totality requires the Court to make a "final check" of the penalties to be imposed on a wrongdoer, considered as a whole, to ensure that the total penalty does not exceed what is proper for the entire contravening conduct: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 at 53, citing *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59.

35 Finally, I note that the maximum penalty for each of the second and third appellants is $12,600. For each of the two contraventions by the first appellant, it is $63,000.

Consideration

36 There is significant dispute between the parties as to the proper characterisation of the seriousness of the contravening conduct.

37 On the one hand, the appellants submitted that the conduct is at the very bottom of the range of seriousness. On the other hand, the respondent contended that the conduct is objectively very serious, as reflected by the amounts of the pecuniary penalties sought.

Nature and circumstances of the contraventions

38 In summary, the appellants submitted that although their conduct was deliberate, the behaviour of the second and third appellants did not show any hallmarks of prior planning. It was submitted that the conduct occurred over a period of less than two hours. While the contravening conduct caused aggravation and inconvenience to the CPB staff involved, it was said not to have caused any stoppage of work or financial loss. It was also said that none of the appellants profited or benefitted in any way from the contraventions. It was said to be a one off event. It was also submitted that the conduct of the third appellant was of a significantly more limited scope, and less serious than that of the second appellant.

39 The appellants submitted that the conduct did not involve senior management. It was also submitted that there is no evidence that anybody at the CFMMEU other than the second and third appellants, who were involved, had any knowledge that the conduct was going to take place or that it was in any way directed by anybody in senior management.

40 The respondent accepted that the second and third appellants held entry permits under both the relevant Commonwealth and State legislation. It was also accepted that in the course of their activities on the day in question they were seeking to exercise those rights of entry. The respondent submitted that the entry powers that are given to such officials provide them with an important power under the law, namely to enter the premises of another without the permission of another and to inspect the premises. With that important right was said to come responsibility. It was also submitted that, notwithstanding that the appellants' interest in attending the site that day was to conduct a right of entry in respect of alleged or suspected contraventions of the WHS Act, they actually engaged in belligerence and game-playing over a considerable period of time. The conduct was said to have involved: breach of safety directions; rude and aggressive behaviour; and simply a wasting of the time of the appellants and the employees of CPB. The respondent submitted that the conduct can only be described

as "rank irresponsibility and recklessness on behalf of persons acting pursuant to a right to enter". The respondent also submitted that it is difficult to understand what was to be achieved by the conduct, apart from seeking to bully and dominate the employees of CPB and the situation.

41 The respondent described the conduct as follows. Upon entry to the site, the second and third appellants met with representatives of CPB and:

(a) refused to provide their entry permits despite multiple requests;

(b) made patronising counter-requests for excessive description of the entry permits, coupled with comments such as "I thought CPB would have trained you better to know what permits to ask for being requested, unless you tell me what specific permits, I am not going to show them";

(c) made insultingly childish comments to Mr Cullen, referring to him as "Pete, Pete Pumpkin eater";

(d) refused to deal with the industrial relations advisor because "[w]e don't deal with IR";

(e) in breach of the site OHS requirements and, contrary to the instructions of CPB representatives, entered the construction area of the site unaccompanied, and refused to return to the pre-start area;

(f) in the case of the second appellant, stood in the path of a truck so as to delay it from proceeding down a road, and refused requests to leave the area, claiming "I am just stretching my legs";

(g) in the case of the second appellant, aggressively "chested" the senior supervisor;

(h) in the case of the second appellant, made a comment in offensive terms to Mr Cullen that suggested Mr Cullen was trying to look at his penis while in the toilet;

(i) in the case of the second appellant, accessed and inspected crib rooms and meeting rooms, and in doing so interrupted a site induction that was taking place; and

(j) in the case of the third appellant, in response to a request that he return to the pre-start area, turned out his pockets and said "what do you think I am a dog? You want me to pull my pocket out and lead me around like a dog?".

42 I accept that description.

43 The second and third appellants' presence was based on their entry permits pursuant to Part 3-4 of the FWA. There is no proper basis to suggest that there was any confusion on their part as to the permits being requested. There is no requirement for an occupier to identify the legislation under which entry permits are issued when requesting to see them. Given the events that occurred, the appellants' submission that the conduct of the second and third appellants was directed to testing the knowledge of the CPB managers as to the industrial relations system cannot be accepted. In context, the submission that they were testing the managers about the precise permits they were seeking to examine is rather disingenuous. In any event, it was not for them to do so.

44 There is no dispute that the second and third appellants held both Commonwealth and State entry permits and that they were seeking to exercise those rights of entry in respect of alleged or suspected contraventions of the WHS Act. There is no suggestion that those concerns were not genuinely held. It is a significant power to have a right to enter premises to investigate suspected issues relating to workplace safety. If concerns are genuinely held, it is a serious matter.

45 Yet in that context, instead of going about their business in a responsible manner commensurate with the task at hand, the second and third appellants chose to act in a manner which was at times belligerent, antagonistic, obstructionist and childish, and did involve game-playing for no apparent purpose, other than that it appears they chose to behave in that manner. By their actions, they attempted to exercise control over the situation, in an intimidatory manner. They ignored reasonable requests and breached safety requirements. The underlying admitted conduct was deliberate. Their conduct was also not conducive to facilitating the purpose of their attendance.

46 It may be accepted, as advanced by the appellants, that the conduct did not carry with it features which aggravate the conduct in some other cases. That said, the absence of those aggravating features is not a matter of mitigation. Rather, the appellants are to be penalised for the conduct undertaken, considered in its proper context.

47 The appellants also submitted that the behaviour of the third appellant was less significant than that of the second appellant. It is unclear what the purpose of that submission is, as it was not suggested that different penalties should be imposed on each of them as a consequence. In any event, that approach, given the conduct undertaken, is artificial.

48 It may also be accepted that there was no senior management involved in this conduct. It was conduct undertaken by the second and third appellants. That said, as explained below, the nature and number of prior contraventions by the first appellant, as reflected in a schedule prepared by the respondent, bespeaks an organisational culture, where contraventions are normalised, and condoned: see, for example, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173 at [29].

Admissions and cooperation

49 The appellants submitted that they should be entitled to a utilitarian benefit based on their cooperation and admission to the contraventions which, it was submitted, occurred promptly on an amended statement of claim being filed by the respondent. The amendments to that pleading withdrew a number of the previous allegations. The appellants noted that utilitarian value was not a matter taken into account by the primary judge.

50 The respondent submitted that although the appellants did ultimately cooperate and admit contraventions, such admissions were made only two weeks before the hearing of the proceeding (which was instituted in 2020) was to commence. It was also submitted that it does not explain the approach taken by the appellants up until that point, which included putting on a positive defence. The respondent accepted that the late admissions must be taken into account, and may operate to reduce the penalty that would otherwise be imposed. However, it was said that "[a]ny mitigation of penalty should be small at best". The respondent also submitted that absent evidence of contrition, an agreement to settle the proceeding by making admissions implies a forensic and pragmatic decision, as distinct from any acceptance of wrongdoing or a willingness to facilitate the course of justice.

51 Further, the respondent stressed that in respect of the extent to which a discount ought to be given for cooperation, there are a number of features missing that a court would ordinarily expect were there to be a significant discount given. That is, evidence of: remorse or contrition; any corrective action undertaken; any explanation of the conduct; the first appellant's attitude to the actions of the second and third appellants or the contraventions; or any education program going forward.

52 It may be accepted that there is an absence of evidence of those factors. However, that is not relevant to whether a discount for the utilitarian value of the plea should be given and if so, to what extent. Those factors, if there was evidence of them, would be relevant to the

assessment of the appropriate penalty. However, the utilitarian value is based on the saving of court time, regardless of the existence of the matters identified by the respondent. It is based on the advantages to the administration of justice that flow from the admissions. It may be impacted by the stage of the proceedings that the admissions are made, meaning the closer to the hearing it occurs, it may result in a lesser discount than an early admission: see, for example, *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 282 FCR 580 (*Pattinson (Full Court)*) at [207]-[209] (on a ground which was not the subject of a grant of special leave). That authority requires that the utilitarian value of admissions, even unaccompanied by contrition, must be taken into account and may operate to reduce the penalty that would otherwise have been imposed, accepting *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at [163]-[165] and *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 291. Accordingly, that the decision to make the admissions which settle the proceedings may be a pragmatic forensic choice (as submitted by the respondent), does not reduce their utilitarian value.

53 I accept that although the admissions were made close to the date this matter was listed for hearing, they followed promptly after an amended statement of claim was filed, where that pleading withdrew a number of the allegations previously made.

54 I propose to give a discount for the utilitarian value of the admissions and cooperation.

Antecedents

55 A penalty has been imposed on the second appellant on two prior occasions: in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 40 on 3 February 2022, in respect of conduct on 5 November 2020, with the pecuniary penalties re-determined on 10 February 2023 in *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman* [2023] FCA 72; and in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 156, on 11 March 2022, in respect of conduct on 30 April 2020. The conduct the subject of the present proceeding occurred prior to the imposition of any penalty on the second appellant. He submitted that his conduct in the present matter could not be said to evidence defiance in

the face of the penalties imposed by the Court on each occasion, which would warrant further specific deterrence.

56 As the respondent submitted, although these are not prior contraventions, it is notable that the conduct on 30 April 2020 was only 15 days after the conduct the subject of this case. On 30 April 2020, the second appellant contravened s 500 of the FW Act by entering areas of a site without authorisation (an exclusion zone) and standing behind concrete trucks, blocking the delivery of concrete to pumps. In that case, a penalty of $7,000 was imposed on the second appellant: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 156. Further, the conduct on 5 November 2020 occurred after the proceedings in relation this matter had been commenced. There, the second appellant contravened s 500 of the FW Act by: entering a site without giving 24 hours' notice as required by the FW Act; entering and remaining on the site when he had no lawful basis to do so; failing to comply with OHS requirements; attending a meeting which was not authorised to be held on site (in direct contradiction to the occupiers' request that the meeting be conducted off-site); and facilitating the entry of approximately 10 to 12 people onto the site where he knew they were not authorised to be on site. Upon redetermination, a penalty of $6,000 was imposed on the second appellant: *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman* [2023] FCA 72.

57 The Fair Work Commission revoked the second appellant's entry permit as a result of his conduct on 5 November 2020, describing it as objectively serious: *In the matter of the Entry Permit of Andrew Robert Blakeley* [2022] FWC 1730 at [44].

58 The third appellant was also involved with the second appellant in the contravention on 30 April 2020, for which he had a penalty of $10,000 imposed on him in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 156. The conduct the subject of the current proceeding occurred prior to the imposition of that penalty on him. It also involved him entering areas of a site without authorisation (an exclusion zone) and standing behind concrete trucks, blocking the delivery of concrete to pumps.

59 The third appellant was also found to have contravened s 497 of the FW Act on 11 and 12 April 2018 in *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) (No 3)* [2023] FCA 219. The contravening conduct involved entering and remaining on a site without producing

an entry permit issued under the FW Act. The third appellant was found to have had a genuine and reasonable belief that his conduct was lawful, at least in relation to entry to the site: see [28]. The appellants submitted that, given that formed part of a legal issue that was not resolved until 2023, the third appellant has never demonstrated defiance of an earlier attempt to deter him from contravening the FW Act. The Court found that the third appellant's two contraventions were each in the low to mid-range, and imposed a penalty of $3500 in respect of each (a total of $7,000). Although the pecuniary penalties imposed in respect of that conduct were not imposed until March 2023, as the respondent submitted, in October 2019 there was a finding by this Court that the third appellant had contravened s 500 of the FW Act: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2)* [2019] FCA 1737; (2019) 292 IR 259 at [128]-[131]. The contraventions the subject of this case occurred only a few months later, in April 2020. Further, the conduct the subject of that case was not dissimilar to at least some of the conduct in this matter. It involved: refusing a request to produce for inspection his entry permit; refusing a request to leave a site; refusing to comply with site OHS requirements (by walking around the site without supervision or accompaniment); and failing to comply with requests from police to leave the site, resulting in his arrest for trespassing.

60 The conduct by the third appellant led to the Fair Work Commission suspending his entry permit, describing his contravening conduct as "serious, deliberate, abusive, intimidatory" and involving "a flagrant abuse of the power and a blatant flouting of the Project site safety rules": *In the matter of the Entry Permit of Luke Johannes Gibson* [2022] FWC 1692 at [19].

61 Although the conduct referred to above, of both the second and third appellants, did not result in prior contraventions, in that it had not occurred or the contravention had not been penalised before the conduct the subject of this case, it is nonetheless relevant. In *R v McInerney* (1986) 42 SASR 111 at 112-113, King CJ observed the following (citations omitted):

> As to convictions recorded after the offence for which sentence is being imposed, for offences committed before that offence, it is pertinent to observe that the Full Court has treated admitted offences for which there has been no conviction, as operating to impair the good character for which the offender could otherwise have been allowed credit. *The Queen v. Carbone*, per White J. at pp. 310 and 315.
>
> If an offence for which no conviction is recorded has that effect, it must follow that

> the same offence must have the same effect where there is a conviction but that conviction is subsequent to the offence for which sentence is being passed.
>
> In my opinion the true rule is that a sentencing court may take into account in an appropriate way and for appropriate purposes, offences committed by an offender whether such offences were committed before or after the commission of the offence for which sentence is being passed and whether the convictions for such offences occurred before or after the commission of the offence for which sentence is being passed.
>
> …
>
> Where the other offences have been committed before the commission of the immediate offence, their relevance is clear in the generality of cases. The offender has committed the offence not as a first offender but as a person whose character is affected by previous offending. He must be sentenced against the background of his record: *Director of Public Prosecutions v. Ottewell*. The effect of the prior offences is more cogent if they have been the subject of conviction before the immediate offence. In such cases, the offender has committed the immediate offence notwithstanding the formal judgment and condemnation of the law in respect of the earlier offences and notwithstanding the warning as to the future which the conviction experience implies.
>
> Where the other offences have been committed after the immediate offence, they are relevant only in special circumstances. The offender has not committed the immediate offence with his character already affected by the offences nor after the experience of conviction. In circumstances, however, in which the offender might otherwise have been given credit for having lived a law abiding life in the period between crime and sentence, it is relevant that he has not so lived but has committed an offence or offences in that period. In some circumstances, the nature of the subsequent offences may be such as to suggest that a greater degree of personal deterrence than would otherwise have been contemplated, is required. It seems to me that the circumstances in which offences subsequent to the commission of the offence for which sentence is being passed, are relevant to the sentence, are more restricted than those in which prior offences are relevant. No doubt that is what Wells J. meant by his reference to "special circumstances" in *McAllisters* case.

62 Although King CJ was discussing those principles in a criminal context, the observations are equally applicable to the imposition of a civil penalty: see, for example, *Civil Air Operations Officers' Association of Australia v Airservices Australia (No 2)* [2023] FCA 104 at [32] and *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman* [2023] FCA 72 at [120].

63 As to the first appellant, the table annexed to the respondent's submissions reflects that it has been found to have contravened industrial legislation on very many occasions since around 2002. The respondent also extracted from that table what it submitted were 53 separate proceedings in which the first appellant and its officials have been found to have contravened s 500 of the FW Act. It is unnecessary to detail those cases here. The

contravention record speaks for itself in evidencing the first appellant's recidivism. Its repeated failure to obey Commonwealth workplace relations legislation is self-evident.

64 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68, the Full Court observed at [159]:

> [159] The most significant point to emerge from the schedules of past cases is that the CFMEU is a recidivist when it comes to contravening industrial laws. No penalties that have been imposed in the past have appeared to reduce its willingness to breach the law. It continues to thumb its nose at the industrial laws, including the BCII Act. The Court should nevertheless not shy away from imposing stern sentences with a view to attempting to deter the CFMEU from engaging in, or encouraging others to engage in, further unlawful industrial action. Considerations of deterrence, both specific and general, undoubtedly loom large in fixing the appropriate penalties.

65 Also see *Pattinson (Full Court)* at [20]-[21].

The size, status and resources of the CFMMEU

66 As the respondent submitted, this Court has previously observed that the first appellant is large, asset-rich and well-resourced: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62 at [65] and *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235 at [25]. The first appellant accepted that the Court may legitimately observe that it is well-resourced.

67 The respondent also drew attention to the observation in *Pattinson (High Court)* at [60] (citations omitted):

> [60] … it is simply undeniable that, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable. It is equally obvious that, the more determined a contravenor is to have its way in the workplace and he more deliberate its contravention is, the greater will be the financial incentive necessary to make the contravenor accept that the price of having its way is not sustainable.

68 That said, the second and third appellants submitted there is no basis to reason that way in relation to them, as individuals. I accept that submission.

Other matters

69 The appellants relied on a number of other submissions.

70 *First*, it was submitted that as the second and third appellants no longer have entry permits (because they have been suspended or revoked), the element of specific deterrence has less significance in this case. That is, those appellants are not in a position to commit further contraventions of a like nature.

71 The respondent took issue with that submission, contending that the fact the second and third appellants no longer hold entry permits is not a matter that should result in a reduction of the penalties to be imposed on them. That submission was based on their serious and egregious conduct, and both of them being able to re-apply for entry permits in the future.

72 However, the fact that the second and third appellants may be able to apply for permits in the future is not a relevant matter as it is entirely speculative (both as to the application for a permit and that it would be granted). Noting the nature and extent of the other contraventions involving the second and third appellants, together with these contraventions, a pattern of behaviour has been demonstrated. The second and third appellants have shown no remorse or contrition for any of their conduct. No doubt if an application was made for a permit, this would all factor into deciding whether it would be granted.

73 In any event, in *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman* [2023] FCA 72, the respondent had conceded it was an error for the primary judge not to have taken into account an argument that the contravenor no longer held a permit (which was said to reflect on specific deterrence): see [54]. Rangiah J observed at [55]:

> [55] It was an agreed fact before the primary judge that [the contravenor] no longer held an entry permit under Pt 3-4 of the Act. In *Pattinson (HC)*, the plurality observed at [47] that a penalty may be moderated by changes in the membership of an industrial organisation which reduce the risk of similar contraventions arising in the future. That [the contravenor] no longer had an entry permit and could no longer contravene s 500 of the Act was a matter that could bear upon the need for specific deterrence and, consequently, the appropriate penalty. It is apparent that the primary judge overlooked that argument. The respondent's concession was correctly made.

74 I note that his Honour did take the matter into account on the redetermination: see [145]. It is a matter relevant to specific deterrence.

75 *Second*, the appellants submitted that it was relevant to take into account that there has been a significant delay in the resolution of the proceedings, and that specific deterrence has less work to do in such a case where there is a three-year delay between the action and the imposition of the penalty. It was submitted that the proceedings had been hanging over the appellants' heads for three years and that they have faced penalties for that period. The appellants were not aware of any authority to support their submission on this topic.

76 I do not accept that these proceedings have been delayed in any relevant sense. It is also important to recognise that a civil penalty is not about punishment, and therefore concepts such as having the proceedings hang over a person's head, as referred to in the criminal context and in the appellants' submissions in this case, may not have the same resonance in this context. That said, what has occurred in the time between the contraventions and the imposition of the penalty may be relevant. Apart from the appellants' permits having been revoked or suspended (which is taken into account as described above), nothing else is relied on by the appellants that occurred during that time and that could be said to lessen the need for specific deterrence. In fact, each appellant committed other contraventions during that time and there is still no expression of remorse or contrition for the conduct the subject of this case. I note that although the appellants contended that they had penalties imposed for the other contraventions and had learnt their lesson and been deterred from such conduct, there is no evidence to support that submission. The fact of three years having passed, by itself, does not assist the appellants.

77 *Third*, the second and third appellants each affirmed an affidavit which addresses the impact of the primary judge's erroneous findings on them. This includes matters personal to the appellants, and the experience of being found by the primary judge to have engaged in homophobic conduct. The appellants submitted that it cannot be assumed they have not been deterred by that. It was said to be extra-curial detriment from the contraventions, referring to *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at [104]. I note that passage is one that deals generally with factors for consideration, rather than specifically to this topic. After the hearing, I was also referred to *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (Kiama Aged Care Centre Appeal)* [2023] FCAFC 63

which does address the topic of extra-curial detriment: see, for example, [49]-[50]. However, as the respondent submitted, there is nothing in the affidavits that supports the submission that the erroneous findings of the primary judge have deterred the second and third appellants, or any like statement. The appellants' submission that it should not be assumed that they have not been deterred, is not supported by any evidence. This is in a context where the affidavits were read, but are silent on what is said to be a significant matter. It would have been expected that the matter would have been addressed, given what is now said to be the relevance of the affidavits.

Further analysis

78 As explained above, there is a dispute between the parties as to the seriousness of the appellants' conduct.

79 The respondent contended that the conduct is objectively very serious. The penalties sought were: in respect to each of the second and third appellants, $10,000; and in respect to the first appellant, two penalties of $59,850.

80 The reasons advanced in support were: in respect of the first appellant, the inability of prior penalties to drive any behavioural change; the deliberateness of the contraventions and the vulnerability of the victims of those contraventions considering the nature of the Part 3-4 entry regime; the separate and distinct obligations on the second and third appellants in respect of each of their permits, and their differing conduct, which is such that no discount for totality ought be made in respect of the first appellant; that the contravening conduct of the first appellant must be viewed as another manifestation of allowing its officers and employees to contravene workplace laws of this kind without taking any meaningful steps to address an organisational culture that tolerates and normalises such unlawful conduct by its permit holders; the need for specific deterrence given the first appellant has not demonstrated contrition, is a recidivist offender and is large, asset-rich, and well-resourced, meaning a small penalty risks being ineffective as a deterrent; and a small discount for admissions, bearing in mind the lack of contrition.

81 It was submitted that no reduction in respect of totality is warranted. The deliberate nature of the contraventions and the particular history of the first appellant were said to be such that the total penalties are "just and appropriate".

82 The appellants submitted that the contraventions were nowhere near a high level of objective seriousness, as contended by the respondent. They submitted that the second and third appellants: held permits, albeit which they did not produce; produced the notices of entry; indicated that they were going to call the regulator; were on site for a legitimate reason (as there is no suggestion that when the regulator arrived they did not point out the matters of interest to them which, on the pleadings, were set out in the notices of entry); and did not engage in further contravening conduct after the regulator arrived at the site. It was submitted that those facts significantly impact on the question of the objective seriousness of the appellants' conduct, which should be considered to be "quite low".

83 The appellants submitted that the appropriate penalty on each of the second and third appellants should be less than half of the $10,000 sought by the respondent. In relation to the first appellant, it was submitted that a penalty which reflects totality should be no higher than half of the maximum in respect of each contravention.

84 It is appropriate to return to consider how *Pattinson (High Court)* has been applied. It will be recalled that in that case, the High Court considered the scope of the power conferred by s 546 of the FW Act to order a person to pay a pecuniary penalty that the court considers "is appropriate".

85 In *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (The Botany Cranes Case)* [2023] FCAFC 40 at [142], the Full Court observed that:

> [142] … it is incumbent upon the Court to proceed on the basis of the admissions made, not least because the focus of deterrence, both general and specific, needs to be on the conduct proven or agreed to have been engaged in, including the state of mind, and therefore sought to be deterred. To do otherwise may be seen to breach the proscription on oppression articulated by the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 399 ALR 599 at [46] that the penalty imposed "strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case".

86 At [207], the Full Court further observed:

> [207] In that respect, whilst not intended to be exhaustive of the guidance provided by *Pattinson*, we consider the following observations made in *Pattinson* by Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ as of most significance to our present task:
>
> (a) The purpose of a civil penalty is primarily, if not solely, the deterrence (both specific and general) of future contraventions (at

[9]);

(b) The maximum available penalty is not to be reserved for only the most serious examples of offending but is available to be imposed where it is reasonably necessary to achieve the deterrence of future contraventions (at [10]). However, it does not follow that the power to impose a penalty "must be taken to require the imposition of a penalty approaching the maximum in relation to any and every contravention by a recidivist offender" (at [46]);

(c) An "appropriate" penalty is one that strikes a "reasonable balance between oppressive severity and the need for deterrence in respect of the particular case" (at [46]);

(d) Both the circumstances of the contravener and the circumstances of the contravention (i.e. the seriousness of the contravention) may be relevant to the assessment of the appropriate penalty (at [19] and [57]);

(e) The penalty appropriate to protect the public interest by deterring future contraventions may be "moderated" by a range of factors of the kind adverted to by French J in *Trade Practices Commission v CSR Limited* (1991) ATPR 41–076 (at [47]). However, the list of possible relevant considerations set out by French J ought not be treated as if it were a legal check list (at [19]).

87 The appellants downplay the seriousness of the contravening conduct.

88 Although the features relied on by the appellants, as referred to above at [82], are relevant, they serve to highlight the unnecessary and pointless nature of their contravening conduct. The second and third appellants attended the site for proper reason. That they chose to conduct themselves in this manner is inconsistent with carrying out the responsibilities granted to them as permit holders. The contravening conduct occurred over a period of about two hours. That no such conduct is alleged to have occurred after the regulator arrived is not a matter of mitigation. Again, it reflects the deliberateness, and churlish nature of the conduct, directed to those on the site. The inference open is that the conduct was to belittle or intimidate those at the site. It involved childish games inconsistent with effectively achieving the purpose of their entry.

89 As the respondent submitted, being entrusted with an entry permit, with what that entails, involves responsibility. That said, the respondent's submissions as to the appropriate penalties in respect to the second and third appellants overstate the seriousness of their conduct, and fail to properly reflect what are, albeit limited, factors which may moderate the penalty in this case. For example, as discussed above, in this case there is the utilitarian effect of the appellants' admissions. Further, although the second and third appellants' other contraventions, as described above at [55]-[60], are relevant in the manner previously

described, nonetheless they are not prior contraventions such that the conduct the subject of this matter was committed in the face of penalties having been previously imposed by the Court. I also accept that the fact of revocation of the permits is relevant to issue of specific deterrence.

Conclusion

90 I recognise that the penalty imposed should strike "a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case": see *Pattinson (High Court)* at [46]. Taking into account all of the relevant circumstances, I impose a penalty of $7,000 on each of the second and third appellants for their respective admitted contravention of s 500 of the FW Act.

91 In relation to the first appellant, the importance of general and specific deterrence in imposing this penalty is unquestionably high. The conduct occurred in a context where such conduct is plainly condoned. The only relevant fact in mitigation is the admission. Taking into account the relevant circumstances of the contraventions and the contravenor, I impose a penalty of $50,000 in relation to each contravention, resulting in a total penalty of $100,000. The fact that there are two people who committed the same contravention, is not, contrary to the appellants' submission, a basis in this case to reduce the penalty having regard to the principle of totality. The penalty to be imposed on the first appellant is not reduced simply because more people are involved. To do so would undermine the notion of general deterrence.

92 I also vary the declarations in the manner and terms referred to above at [8].

I certify that the preceding ninety-two (92) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham.
Associate:

Dated: 25 May 2023

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union [2023] FedCFamC2G 101

File number:	BRG 81 of 2022
Judgment of:	**JUDGE EGAN**
Date of judgment:	21 February 2023
Catchwords:	**INDUSTRIAL LAW –** Whether provisions of s. 499 of the FWA contravened – whether provisions of s. 500 of the FWA contravened – where entry upon site by union official in contravention of reasonable requirements given prior to entry – contraventions established - where union accessorily liable – claim granted
Legislation:	*Fair Work Act 2021* (Cth) ss. 497, 499 and 500 *Work Health and Safety Regulation 2011* (Qld) Chapter 6 and s. 119.
Cases cited:	*R v Byrnes* (1994 – 1995) 183 CLR 501
Division:	Division 2 General Federal Law
Number of paragraphs:	44
Date of last submissions:	24 January 2023
Date of hearing:	24 January 2023
Place:	Brisbane
Counsel for the Applicant:	Mr A Smith
Solicitor for the Applicant:	K&L Gates
Counsel for the Respondents:	Mr H Clift
Solicitor for the Respondents:	Hall Payne Lawyers

ORDERS

BRG 81 of 2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**FAIR WORK OMBUDSMAN** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	DEAN LESLEY RIELLY Second Respondent

ORDER MADE BY: **JUDGE EGAN**

DATE OF ORDER: **21 FEBRUARY 2023**

IT IS DECLARED THAT:

A. In contravention of section 499 of the *Fair Work Act 2009* (Cth) (the FWA), on 1 July 2021 at Lot 3, 142 Albert Street, Brisbane (the Site), Mr Rielly failed to comply with reasonable requests made by representatives of the CBGU JV, the occupier of the Site, to comply with occupational health and safety requirements that applied to the Site, while exercising a State or Territory OHS right, namely to:

(a) sign the Visitor Register;

(b) complete a visitor induction;

(c) not enter the tower crane pad;

(d) leave the tower crane pad;

(e) not enter a restricted area; and

(f) having entered a restricted area, refusing to leave it when requested to do so.

B. In contravention of section 500 of the FWA, on 1 July 2021 at the Site, Mr Rielly acted in an improper manner while exercising or seeking to exercise a right of entry, by:

(g) failing to comply with the Visitor Entry Requirements other than the requirement to make a Covid-19 Mandatory Health Declaration, namely by:

(i) failing to sign the Visitor Register;

(ii) failing to complete a Visitor induction.

(h) failing to comply with the Visitor Conduct Requirements, namely by:

(i) failing to be accompanied by an escort from CBGU JV;

(ii) failing to read and obey all safety signs on the Site; and

(iii) not entering any areas on Site to which access was restricted.

C. By reason of the operation of sections 793 and 550(2)(c) of the FWA, the CFMMEU was directly or indirectly, knowingly concerned in or party to the contraventions set out at paragraphs A and B above and, as a result, the CFMMEU contravened sections 499 and 500 of the FWA.

AND IT IS ORDERED THAT:

1. Pecuniary penalties be imposed upon Mr Rielly pursuant to the provisions of s. 546(1) of the FWA as a result of his contraventions of the provisions of s. 499 and s. 500 of the FWA as set out in paragraphs A and B of the declaratory orders made herein.

2. Pecuniary penalties be imposed upon the CFMMEU pursuant to the provisions of s. 546(1) of the FWA as a result of its contraventions of the provisions of s. 499 and s. 500 of the FWA as set out in paragraphs A and B of the declaratory orders made herein.

3. The date for the hearing of any application for the imposition of pecuniary penalties be adjourned to a date to be fixed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

Judge Egan

Introduction

1 The applicant commenced proceedings against the first respondent (CFMMEU) and the second respondent (Rielly) as a result of events which occurred on 1 July 2021 on and about land being Lot 3, 142 Albert Street Brisbane CBD. The land formed part of the Cross River Rail construction project site.

2 The Construction Work was being conducted by CBGU Joint Venture, an unincorporated joint venture comprised of:

(a) CPB Contractors Pty Ltd (**CPB**);

(b) BAM International Australia Pty Ltd (**BAM**);

(c) Ghella Pty Ltd (**Ghella**); and

(d) UGL Engineering Pty Ltd,

(collectively **CBGU JV**).

3 The Court finds that CPB had been appointed principal contractor for the purposes of Chapter 6 of the *Work Health and Safety Regulation 2011* (Qld) (WHS Regulation), and that as such it had management and control of the site, including duties in relation to the health and safety of all people on site. [1]

4 The Court further finds that each of the CBGU JV participants, as co-occupiers of the site, held duties in relation to the health and safety of persons on the site. [2]

5 Rielly was employed by the first respondent in the position of a State Organiser, and was accordingly an officer and official of the CFMMEU. He arrived at Lot 3 at or about 2.30 pm on 1 July 2021, and produced to employees of the CBGU JV (namely Messrs, Hinrichsen, Bekkers and Maher) a Notice of Entry to the site in his capacity as a permit holder within the meaning of ss. 497 and 500 of the *Fair Work Act 2021* (Cth) (FWA). [3] The Notice of Entry

[1] Duties under Part 2, Divisions 2 and 3 of the *Work Health and Safety Act 2011* (Qld) (WHS Act) and under Chapter 6 of the WHS Regulation.
[2] Duties under Part 2, Divisions 2 and 3 of the WHS Act
[3] See Exhibit 1 Notice of Entry document.

was given pursuant to the provisions of s. 119 of the WHS Act, and relevantly provided as follows:

> *"I reasonably suspect that the PCBU has not complied with s. 19(3)(A,B,C,D,E,F,G)*
>
> *- Primary Duty of Care*
>
> *- Risk Assessment in regards to working in inclement weather."*

6 The applicant's pleaded case as to the occupation health and safety requirements which needed to be complied with for persons visiting the site was as set out in [12] of the Amended Statement of Claim (ASOC) filed on 18 October 2022 as follows:

> "[12] The following requirements were imposed on persons visiting the Site to protect their health and safety (OHS Requirements):
>
> (a) a requirement to do the following prior to entering the Site:
>
> (i) sign the Visitor Register;
>
> (ii) complete a visitor induction; and
>
> (iii) make a COVID-19 Mandatory Health Declaration
>
> (**Visitor Entry Requirements**);
>
> (b) a requirement to do the following at all times while on the Site:
>
> (i) be accompanied by an escort from CBGU JV;
>
> (ii) read and obey all safety signs on the Site; and
>
> (iii) not enter any areas on the Site to which access was restricted
>
> (**Visitor Conduct Requirements**);
>
> (c) to comply with the demarcation between areas of the Site that are suitable for visitors and areas that have restricted or no access; and
>
> (d) to comply with the various signage containing health and safety warnings and directions to persons on the Site.
>
> Particulars
>
> Those requirements were recorded in a suite of documents including: WHS Management Plan of 23 September 12 May 2021, COVID-19 Project Management Plan of 31 March 2020 28 June 2021, Security Management Plan of 23 April 2021, COVID-19 Mandatory Health declaration and the Visitor Induction Declaration."

7 At trial, Mr Rielly elected to claim privilege against self-incrimination and did not give evidence on his own behalf. No other witness was called on behalf of the respondents.

8 The evidence in support of the allegations as set out in [12] of the ASOC relating to Visitor Entry Requirements was accepted by the Court to the extent that it represented intended best practice. [4]

9 The evidence in support of the allegations as set out in [12] of the ASOC relating to Visitor Conduct Requirements was also accepted by the Court to the extent that it represented intended best practice. [5]

10 It was further pleaded at [13] – [16] inclusive of the ASOC that there was a restricted area on the project site as follows:

> **"Restricted Area**
>
> [13] The southern end of the Site contained a restricted area that was designated for excavation works (**Restricted Area**).
>
> [14] The excavation works being performed in the Restricted Area:
>
> (a) involved the use of work vehicles and mobile plant and equipment, such as trucks, excavators and drills; and
>
> (b) created a risk of collisions and falls to persons on the Site that may cause serious injury or death.
>
> [15] By reason of the matters pleaded in paragraph 14, the Restricted Area was subject to additional health and safety requirements to manage the risks to health and safety.
>
> [16] The Restricted Area was:
>
> (a) demarcated by fencing to keep persons on the Site separated from the excavation works;
>
> (b) marked by signage at the front;
>
> (c) restricted to workers, unless they:
>
> (i) obtained clearance from a Site Supervisor; and
>
> (ii) informed any machinery operators of their intended entry;
>
> (d) restricted to visitors and other persons on the Site, unless accompanied by an authorised person who followed the procedure pleaded in sub-paragraph (c) above.

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4 Affidavit of Bekkers filed on 12 August 2022 at [25], [26], [27], JLB – 7 and JLB – 8
Affidavit of Hinrichsen filed on 12 August 2022 at [18]
Affidavit of Taylor filed on 12 August 2022 at MDT – 1 and MDT – 2
Exhibit 2

5 Affidavit of Maher filed on 12 August 2022 at [43]
Affidavit of Bekkers filed on 12 August 2022 at [21], [22], [29] – [33], [36] and JLB – 7
Affidavit of Hinrichsen filed on 12 August 2022 at [16] – [17]
Affidavit of Taylor filed on 12 August 2022 at [16]
Exhibit 2

11 At [19] – [43] inclusive of the ASOC, it was pleaded that after his arrival at Lot 3 at or about 2.30 pm on 1 July 2021, Rielly contravened the provisions of ss. 499 and 500 of the FWA as follows:

> **"Notice of Entry**
>
> [19] At or about 2:30pm on 1 July 2021, Mr Rielly had a conversation with the following people on Albert Street, outside of Lot 3:
>
> (a) Mr Hinrichsen;
>
> (b) Mr Bekkers; and
>
> (c) Mr Maher.
>
> [20] During that conversation, Mr Rielly:
>
> (a) gave written notice of entry to the Site to Mr Bekkers and Mr Maher as required by section 119 of the WHS Act **(Entry Notice)**; and
>
> (b) produced his WHS entry permit and FW Act entry permit for inspection by Mr Bekkers and Mr Maher.
>
> [21] The Entry Notice provided that Mr Rielly reasonably suspected a contravention of section 19 of the WHS Act occurred.
>
> **Entry by Mr Rielly**
>
> [22] After Mr Rielly provided the Entry Notice, an exchange to the following effect occurred between him and Mr Maher:
>
> *Maher: "Could we please head over to the Lot 1 compound so that we can sign you in, complete a Covid-19 declaration and undertake a visitor induction?*
>
> *Rielly: "I don't need to do that, I want to go onto site".*
>
> [23] Following that exchange, Mr Maher and Mr Bekkers each made further requests to Mr Rielly to attend the Lot 1 compound to complete the Visitor Entry Requirements with Mr Taylor.
>
> [24] Mr Rielly instead walked around Mr Maher and Mr Bekkers and moved towards Gate 1 at the main entrance to the Site (**Gate**).
>
> [25] A traffic controller engaged by Altus Traffic Pty Ltd on the Project was working at the Gate and upon seeing Mr Rielly, the traffic controller:
>
> (a) pointed to a sign on the fence that said "All visitors must report to the site office; and
>
> (b) said to Mr Rielly *"Read the sign mate"*, or words to that effect.
>
> [26] Mr Bekkers then said to Mr Rielly: *"Don't go in there, we need to wait for Mark".*
>
> [27] Mr Rielly then entered the Site through the Gate without undertaking any of the Visitor Entry Requirements.
>
> [28] At no point did Mr Rielly undertake any of the Visitor Entry Requirements

prior to leaving the Site on 1 July 2021.

[29] By reason of the matters pleaded in paragraphs 3 and 19 to 27 on 1 July 2021, Mr Rielly entered the Site while exercising, or seeking to exercise:

(a) a "*State or Territory OHS right*" for the purposes of section 499 of the FW Act; and

(b) rights in accordance with Part 3-4 of the FW Act for the purposes of section 500 of the FW Act.

Conduct on Entry

[30] Shortly after entering Lot 3 of the Site, Mr Rielly walked up a set of scaffold stairs onto a tower crane pad.

[31] While Mr Rielly was walking up the scaffolding stairs to the tower crane pad Mr Bekkers said words to the following effect to him: "*Don't go up there, come back down, you're not authorised to go up there*".

[32] Mr Rielly did not comply with Mr Bekker's request.

[33] When Mr Rielly was on the tower crane pad:

(a) Mr Bekkers repeated his request for Mr Rielly to come down from the tower crane pad on at least one further occasion; and

(b) Mr Rielly did not comply with Mr Bekker's repeated request.

[34] Mr Rielly remained on the tower crane pad for two to three minutes before coming down from it.

[35] Mr Rielly then walked towards the Restricted Area.

[36] Mr Bekkers said to Mr Rielly words to the effect of: "Where are you going? How is this relevant to your section 117 notice?"

[37] Mr Rielly did not respond and instead entered the Restricted Area.

[38] While Mr Rielly was in the Restricted Area:

(a) Mr Bekkers said to Mr Rielly words to the effect of *"You are in a restricted area, you need to leave for your own safety"*;

(b) Mr Bekkers then walked over to the Restricted Area and said to Mr Rielly words to the effect of: *"For your own safety we need you out of here, it's a restricted area"*;

(c) Mr Rielly proceeded to walk into the swing radius of an excavator within the Restricted Area;

(d) Mr Bekkers said to Mr Rielly words to the effect of: *"You need to get out of there, you're in a poz comms zone. This is outside of your 117 notice"*; and

(e) Mr Rielly did not respond to Mr Bekkers at any time.

[39] Mr Taylor then entered the Restricted Area and spoke with Mr Rielly.

[40] At or around 3.10pm, Mr Rielly subsequently left the Restricted Area and the Site.

Contraventions of Dean Rielly

[41] By reason of the matters pleaded in paragraphs 22 to 40, Mr Rielly contravened section 499 of the FW Act by:

(a) entering the Site having refused reasonable requests to comply with the Visitor Sign In Requirements.

(b) further or alternatively, refusing a reasonable request

(i) not to enter the tower crane pad; and/or

(ii) to leave the tower crane pad; and/or

(iii) not to enter the Restricted Area; and/or

(iv) to leave the Restricted Area.

[42] Each of the requests to Mr Rielly pleaded in paragraphs 41(a) and 41(b) above was a reasonable request made by the occupier of the Site to comply with the OHS Requirements that applied to the Site.

[43] By reason of the matters pleaded in paragraphs 22 to 40, Mr Rielly contravened section 500 of the FW Act by behaving in an improper manner on the Site, by:

(a) failing to comply with the Visitor Entry Requirements;

(b) further or alternatively, failing to comply with the Visitor Conduct Requirements;

(c) further or alternatively, accessing areas of the Site unrelated to his purpose for entry, namely:

(i) the tower crane pad; and

(ii) the Restricted Area;

(d) further or alternatively, demonstrating a lack of regard for the OHS Requirements for the Site, by the matters pleaded at sub-paragraphs (a) to (c) above; and

(e) further or alternatively, engaging in unsafe behaviour on the Site, by the matters pleaded at sub-paragraphs (a) to (c) above."

12 Sections 499 and 500 of the FWA relevantly provided as follows:

"499 Occupational health and safety requirements

A permit holder must not exercise a State or Territory OHS right unless he or she complies with any reasonable request by the occupier of the premises to comply with an occupational health and safety requirement that applies to the premises.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1))

500 Permit holder must not hinder or obstruct

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.

Note 1: This section is a civil remedy provision

Note 2: a permit holder, or the organisation which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502)."

13 At [8] – [36] inclusive of the affidavit of Maher, Mr Maher set out what relevantly transpired after he met Mr Rielly outside Lot 3 at about 2.30 pm on 1 July 2021. His affidavit was as follows:

"Joint Venture Project

[8] BAM is part of a joint venture with other companies (CPB Contractors Pty Ltd, Ghella Pty Ltd, and UGL Engineering Pty Ltd) that have formed the CBGU Joint Venture (CBGU). CBGU was established for the purposes of servicing the tunnels, stations, and development works on the Cross River Rail Project (Project) in Brisbane. CPB is the joint venture entity that has been appointed as the Principal Contractor on the Project. However, CBGU is a seamless joint venture and the employees of each entity work together co-operatively to deliver the Project together.

[9] During my employment with BAM, I have worked at various Project sites, including Boggo Road, the Gabba, and Albert Street. I was responsible for managing the construction teams that are developing the new Albert Street Station as at 1 July 2021. This component of the Project commenced in August 2019 and is scheduled for completion at the end of 2023. The Albert Street Station works on the Project are carried out over three lots:

(a) Lot one is the main site office, located at 96 Albert Street, Brisbane City;

(b) Lot two is where the underground cavern excavation is being performed by the tunnelling team. I am not involved in this arm of the project; and

(c) Lot three is where excavation works are taking place, located at 142 Albert Street, Brisbane City.

[10] Lots one and three will serve as the southern and northern entrances (respectively) to the new Albert Street station once the construction works have been completed.

[11] CGBU occupies lots one, two and three under the contractual arrangements for the Project. CGBU is therefore responsible for all aspects of health and safety relating to the Project, including ensuring the safety of all persons on the sites, such as workers and visitors.

Site safety requirements

[12] There are inherent safety risks in construction projects. For excavation and retention works, these risks include collision with heavy machinery, falls

from heights, and becoming trapped.

[13] Everyone is responsible for safety, including visitors to the site. This means that everyone should take reasonable care for their own safety and ensure that their conduct does not create risks to the safety of other people on the site.

[14] As the occupier of the site, CBGU has a number of control measures in place to eliminate or minimise safety risks on the Project. These control measures include:

(a) delineated access ways for heavy vehicle movements;

(b) entry gates to prevent members of the public from accessing the site; and

(c) pre-start meetings each day where works and major site risks are discussed with workers that are engaged on the site that day.

[15] There are additional safety requirements for visitors to the Project. This is because visitors are exposed to greater safety risks because they are not familiar with the Project, works being undertaken, features of the site, communication protocols on site, or the access and egress routes, including in the event of an emergency.

[16] The main site safety requirements for visitors at Albert Street Station on 1 July 2021 were as follows:

(a) when a visitor arrives, they are required to report to the sign-in area at lot one and undertake a visitor induction. The induction sets out the main risks and rules that apply to the Project, including not to enter any restricted areas on their own;

(b) the visitor must then complete the mandatory visitor COVID-19 declaration, which confirms whether they are experiencing COVID-19 symptoms or have potentially been exposed to COVID-19; and

(c) after the induction and COVID-19 safety requirements are completed, the visitor must be escorted by a representative of CBGU at all times while they are on the Project, comply with any directions given to them, and follow safety signage on the Site.

[17] I am authorised to give directions to workers that report to me and visitors to the Project on behalf of the CBGU, including in relation to the occupational health and safety matters, such as the site safety requirements.

Site conditions on 1 July 2021

[18] On 1 July 2021, CBGU and Queensland Pre-Stressing Pty Ltd **(QPS)** were undertaking formwork activities on lot three. These activities involved excavation and retention work as part of the construction of an underground shaft, which will form the base of the Albert Street station. There are 5-meter-high fences surrounding the site to keep members of the public out and to prevent unauthorised access.

[19] There had been intermittent showers in the morning. CBGU does not require people to work in the rain and many activities cannot be conducted in the rain, for example with power tools or electric leads. Where workers insist on continuing to work and can safely do so, additional safety measures are able to be put in place.

[20] Some workers were working between the periods of rain. The traffic controllers continued to work in the rain, but they had options for shelter as the buildings next to the road had awnings. The traffic controllers were dressed in wet weather gear, including raincoats, long pants, and gumboots that were supplied by their employer. I was satisfied that the measures in place for the traffic controllers were suitable for the conditions.

[21] Inside lot 3, there was a communal area for workers next to the entrance gate. Behind this area was an excavator and a tower crane base. The tower crane base was accessible by a set of scaffold stairs, but was not in use at the time. The excavator was not in use at the time that I was on the site.

[22] Due to the excavation works, a restricted area was set up with a gravel road for heavy vehicles to transport materials in and out of lot three (Restricted Area). The Restricted Area was marked with hard barricading and delineated walkways that ran parallel on either side of the Restricted Area. The barricading was made up of yellow tripod barriers and orange bollards. There was also signage posted on the barricading that identified the area as a restricted access zone and directed persons not to enter.

[23] Only certain persons were authorised by CBGU to enter the Restricted Area. A person must be specifically trained to be in a restricted area and have signed on to the safety start card to be allowed inside the Restricted Area. These requirements apply even if work is not in progress in the Restricted Area.

First CFMMEU visit

[24] On 1 July 2021 at around 5:30am, I arrived at the site office. I attended a pre-start meeting there before walking to lot three and undertaking a further pre-start meeting. Dewatering works were planned to take place as there had been rain that week. There were also excavation and retention activities taking place.

[25] At around 9:00am, lot one was visited by two officials from the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). I am unable to recall the full names of these officials, however, one was named Beau and the other was Andy. I had previously dealt with Andy on the Project.

[26] Jonathan Bekkers, Industrial Relations Advisor for CBGU led the discussions with Beau and Andy and escorted them through lots one and three. I was also present for the discussions along with Mark Taylor, the site safety lead for CBGU.

[27] Beau and Andy complied with directions from CBGU personnel in relation to the site safety requirements. They completed the visitor induction and complied with the site safety rules while they were on site, including by remaining escorted at all times.

[28] Beau and Andy inspected access and egress and remained on site for approximately 90 minutes. At the end of the visit, they left the site.

Second CFMMEU visit

[29] At around 2:30pm, I was in in the main site office when I received a call from Lyndon Hinrichsen, Project Supervisor. Mr Hinrichsen said to me: "There is another union official on site, this one is on his own." I understood that this meant that a union official was on lot three as Mr Hinrichsen

supervises the works there.

[30] I immediately walked down from the office and began walking up Albert Street towards lot three. I met Mr Bekkers at the junction of Albert Street and Charlotte Street, approximately 50 metres from lot three. Mr Bekkers was also making his way to lot three. I reached the footpath area just outside the northern corner of lot three where I saw Mr Hinrichsen standing with his arms folded.

[31] Mr Hinrichsen was standing with a man called Dean, whose name I learned through conversations during the day. I do not recall his last name. Dean had a fair complexion, was around 6'1" in height and had a broad build and light-coloured beard. Dean was wearing a black hardhat that was covered in stickers with "CFMEU', dark tinted sunglasses and was carrying a black folder which was also covered in union stickers. I understood that Dean was a union official from the CFMMEU.

[32] Mr Bekkers and I arrived outside lot three. Dean began speaking with Mr Bekkers regarding persons working in wet weather, access and egress, and post-rain events. I had the following conversation with Dean:

Me: *"We need to take you the induction area at the lot one entry so that we can check you in and walk through the visitor induction process with the safety lead."*

Dean *"I don't want to go back to the office, I want to go on site."*

Me: *"Our procedures require all visitors to report to the main site office."*

[33] At around this time I briefly stepped away to contact Mr Taylor by phone. I said to Mr Taylor: "There's a member of the CFMEU down here quizzing us around working around de-watering and post-rain activities." I am unable to recall what Mr Taylor said he was doing, however I do recall him saying: "I'm just wrapping up, I will be down there as soon as possible."

[34] After I had finished speaking with Mr Taylor, I again asked Dean to complete the sign in process for visitors:

Me: *"What is this visit regarding?"*

Dean: *"I have a few concerns regarding workers in the rain, also I want to take a look at your access and egress."*

Me: *"We're happy for you to continue onto site, but first we need to get you to come back to lot one and sign in."*

Dean: *"I don't need to do that, I want to go onto site."*

Me: *Our procedures require this of all out visitors. If you can wait here, Mark Taylor is out safety guy, he's on his way down here and can work through the process with us."*

[35] We remained at the front of the lot three site for about 10 - 15 minutes. During this time Mr Bekkers and I repeated our request that Dean return to the office to sign in and complete the visitor induction. During this time, I also sighted Dean's entry notice and entry permits.

Entry to Lot Three

[36] After being outside of lot three for 10 - 15 minutes, a subcontractor worker entered through an entry gate for workers. Dean pushed his way in behind the worker. As Dean was doing this, Mr Bekkers said: "You can't go in there, you don't have permission, you need to go back to lot one and sign in." Dean did not respond to this direction."

14 The affidavit evidence of Mr Maher was supported by the evidence of Mr Bekkers, [6] Mr Hinrichsen, [7] and Mr Taylor. [8] The Court accepts the evidence of the witnesses called on behalf of the applicant insofar as that evidence went to visitor entry and visitor conduct requests and requirements not having been complied with by Mr Rielly. Each of the applicant's witnesses were forthright, appeared honest, and gave evidence to the best of their ability bearing in mind the passage of a significant period of time.

15 At [8] – [74] inclusive of the affidavit of Bekkers, Mr Bekkers set out what relevantly transpired after he met Mr Rielly outside Lot 3 at about 2.30 pm on 1 July 2021. His affidavit was as follows:

"Joint Venture

[8] I perform work for the joint venture between CPS Contractors Pty Ltd, BAM International Australia Pty Ltd, Ghella Pty Ltd, and UGL Engineering Pty Ltd (**CBGU JV**)

[9] The CBGU JV was formed to undertake the CRR TSO Project. Annexed and marked "JLB1" are true and correct copies of relevant extracts of clauses 14.1(b) and 17 of the O&C Subcontract Agreement for the CRR TSO Project between CBGU and Pulse Partnerships Pty Ltd, which outline that CBGU JV has a non-exclusive sublicense to use the land and is responsible for work, health and safety obligations on the CRR TSO Project.

[10] CBGU JV does not directly employ any persons to work on the Project. The companies that form part of the CBGU JV engage workers to perform work for the benefit of the CBGU JV.

Construction project

[11] The CRR TSO Project involves the construction of an underground railway line from Roma Street to Dutton Park with four new underground stations being constructed at:

(a) Roma Street;

(b) Woolloongabba;

(c) Boggo Road; and

(d) Albert Street.

6 Affidavit of Bekkers filed on 12 August 2022 at [8] – [74]
7 Affidavit of Hinrichsen filed on 12 August 2022 at [11] – [38]
8 Affidavit of Taylor filed on 12 August 2022 at [9] – [27]

[12] The CRR TSO Project commenced on 30 September 2019. The total cost of the CRR TSO Project is approximately $4 billion, with the new Albert Street Station costing approximately $650 million.

[13] I am currently allocated to the Albert Street site of the CRR TSO Project, where I am the only industrial relations advisor who is working at that site.

[14] The Albert Street component of the CRR TSO Project involves the construction of a new underground railway station on Albert Street in the Brisbane CBO. This station will have two entrances located at 96 Albert Street and 142 Albert Street with capacity to build residential and retail facilities above the station entrances.

[15] The Albert Street compound comprises three lots:

a) Lot one is located at 96 Albert Street Lot one houses a site office and is the main mustering point for all workers on site. It is a site requirement that all visitors to the Albert Street Station attend lot one to complete the visitor induction. Annexed and marked "JLB2" is a true and correct copy of the Albert Street lot one map as it was on 1 July 2021.

b) Lot two is located at 98 Albert Street, Brisbane City and is adjacent to lot one. Lot two is the primary lot for the tunnelling arm of the project.

c) Lot three is located at 142 Albert Street, Brisbane City, and has been set up for demolition and excavation activities in order to clear the lot and construct the northern entrance to the future Albert Street Station.

Lot Three

[16] Lot three is surrounded by buildings on three sides. The front of the block faces Albert Street. Annexed and marked **"JLB3"** is a true and correct copy of the Albert Street lot 3 map as it was on 1 July 2021. with an evacuation diagram that marks the exits and emergency muster points.

[17] Lot three had the following physical features as of 1 July 2021:

a) two separate access gates for authorised persons and authorised vehicles to enter;

b) steel fencing at the front of the block;

c) a blue gazebo over a communal area for workers, which contained a water cooler, bins, permits, and spare personal protective equipment;

d) scaffold stairs to the right of the communal area led to a platform that was a tower crane erection pad, which overlooked an excavation area; and

e) an excavation area where excavation works were taking place, part of which was marked and fenced as a restricted area **(Restricted Area).**

[18] Annexed and marked **"JLB4" - "JLB5"** are true copies of photographs of the above taken on or around 1 July 2021.

[19] Lot three also had three major pieces of plant located there on 1 July 2021, being:

a) a five-tonne excavator, which was parked at the George Street end of an Exclusion Zone, outside of the Restricted Area;

b) a drill rig, which was behind the excavator; and

c) another five-tonne excavator, which was operating in the north-western corner of the site.

Site Safety Measures

[20] There are a number of requirements that persons on site must comply with to ensure CBGU JV meets its obligations and responsibilities under work health and safety legislation.

[21] These site safety requirements include:

a) access to the site is restricted to persons authorised by the CBGU JV and persons with a statutory right of entry; and

b) a requirement that any person on the site must not enter a restricted area unless they're authorised to do so or receive clearance from a supervisor and establish communication with any machinery operators in the area to inform them that they are entering the restricted area (referred to as positive communications or Plant Operating Zone Communications (**POZ comms**)).

[22] Signs, which are placed on the outside of the fencing, are visible to any persons outside of the site, including a sign that states: "DANGER - CONSTRUCTION SITE DO NOT ENTER'

[23] Annexed and marked "**JLB6**" is a true and correct copy of a photograph of the signage on steel fencing as it was visible to the public from Albert Street.

[24] There are also specific site safety requirements for persons who are visiting the site.

[25] All visitors to the site must complete a site induction before entering a work area (such as lot 3). The site induction sets out the major hazards oh the site, the PPE required to be worn, and the safety rules applicable to visitors. Annexed and marked "**JLB7**" is a true and correct copy of the visitor Induction questionnaire for the Albert Street station site.

[26] Visitors are also required to sign in and sign out when entering and leaving the site. This ensures that CBGU JV has a record of who is onsite in the event of an emergency.

[27] In addition to the visitor site induction, site visitors were also required to check into the site via the CBGU JV COVID-19 check-in declaration. This check-in required visitors to make a declaration regarding a number of matters, including whether they were experiencing symptoms of COVID-19. This questionnaire wc1s a requirement under CBGU JV's COVID-19 Project Management Plan and must be completed by all persons on-site daily.

[28] Annexed and marked "JLBB" 1s a true a17d correct copy of the COVID-19 check-in declaration questionnaire.

Restricted Area

[29] A Restricted Area for excavation works was in place at the Albert Street Station s1te on lot three on 1 July 2021. The Restricted Area had been established in accordance with CBGU JV's standard practice.

[30] The Restricted Area was a corridor of approximately 10 metres x 4 metres to the left of the communal area at the southern end of the site. The Restricted Area did not change day-to-day because it also had moving plant and vehicles regularly using it to move between the excavation area and the nearby gate.

[31] The Restricted Area had been established to ensure that persons on site do not walk within the operating zones of the mobile plant and vehicles, where there is a risk of collision, which may cause a fatality or serious injury. Annexed and marked "JLB9" is a true and correct copy of a diagram of lot 3 with my handwritten markings indicating the dimensions of the exclusion zone. The initials "GE'1 show the location of the gates and "PS" indicates the location of the communal area.

[32] The Restricted Area was surrounded by steel barriers that were approximately one metre high. The Restricted Area was marked with four signs that were posted on the steel barriers, which stated:

a) "KEEP CLEAR OF MOVING MACHINERY"

b) "NO PEDESTRIAN ACCESS",

c) "RESTRICTED ACCESS AUTHORISED PERSONNEL ONLY"; and

d) "POSITION OF SAFETY

STAND BEHIND BARRIER

KEEP CLEAR OF PLANT SWING RANGE

KEEP CLEAR OF PLANT TRAVEL PATH"

[33] Annexed and marked "JLB10" - "JLB11" are true copies of photographs of the signs referred to above.

Union entry

[34] I manage the engagements with union officials for the Albert Street compound on the CRR TSO Project. My day-to-day duties involve liaising with union officials in relation to industrial relations matters and facilitating their lawful rights of entry.

[35] I provide support and assistance to the safety and site management team, who are responsible for ensuring union officials comply with the CBGU JV's site safety requirements and are safe on the site. I have authority to give directions and instructions to union officials on behalf of the CBGU JV.

[36] If a union official wishes to enter the site, my role is to confirm that they hold a right of entry to do so and are exercising it lawfully. This generally involves me:

a) verifying their right of entry documentation and entry permits;

b) ensuring that union officials have completed the sign-in procedures to safely enter the site;

c) escorting union officials while they are on s1te to ensure their safety; and

d) giving directions to union officials, where necessary, to ensure both their safety and the safety of workers around them.

[37] I have facilitated numerous union officials to enter the Albert Street work sites, including union officials from the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).

First CFMMEU visit - morning of 1 July 2021

[38] On 1 July 2021 at approximately 6:25am, I arrived at the lot one site office and attended the lot two pre-start at 6:30am, which went for 10-15 minutes. I did not attend the lot one or lot three pre-starts that morning.

[39] At approximately 9:20am, I was walking towards lot one when I saw that Beau Sieffert (Mr Sieffert) and Andrew Blakeley (Mr Blakeley) from the CFMMEU were there. I recognised them both from my previous dealings with them at the CRR TSO Project sites. These officials produced their entry permits and a notice of entry under section 119 of the Work Health' and Safety Act 2011 (Qld) (WHS Act). To the best of my recollection, Mark Taylor provided them with a verbal visitor induction and they were taken through the questions in the COVIO-19 declaration but refused to sign either document. After this discussion, they inspected two staircases and the access and egress to the excavation works on lot one until 9:55am.

[40] Mark Taylor (Senior Safety Advisor) (Mr Taylor), James Maher (Site Manager) (Mr Maher), and I escorted Mr Sieffert and Mr Blakeley while they were on lot three. They left lot three at about 10:28am.

[41] After Mr Sieffert and Mr Blakeley left, I did not see them for the remainder of the day.

Second CFMMEU visit - afternoon of 1 July 2021

[42] At approximately 2:30pm, I was sitting at my desk in the lot one site office when Lyndon Hinrichsen, a Supervisor working for the CBGU JV (Mr Hinrichsen), advised me that there was "another black hat standing out front lot three ... a Dean".

[43] I understood that Mr Hinrichsen was referring to Dean Rielly (Mr Rielly) of the CFMMEU as he has often visited the CRR TSD Project and is the only official named Dean that I have dealt with on this site. I said to Mr Hinrichsen: 'it's probably Dean Rielly."

[44] I immediately left lot one and walked to lot three. While walking to lot three, I contacted Mr Maher to alert him to Mr Rielly's presence. Mr Maher responded: "No worries, I'll be there soon." I said to Mr Maher: "Also, give Mark (Mr Taylor) the heads up because we might need him down here."

Wet weather work

[45] I recognised Mr Rielly outside of the lot three site gate under the awning of "JD Sports", a shop adjacent to lot three. I approached Mr Rielly and had the following conversation with him:

Me: *"Hi Mate, how are you going"*

Mr Rielly: *"who is in charge here?"*

(pointing to labourer from Austructure Pty Ltd) "Is that person in charge?"

Me: *"No, James Maher is the site's superintendent and Lyndon (Mr Hinrichsen) is the sites supervisor. They're both on their way now."*

[46] Around this time, I saw Mr Hinrichsen walking towards us and said to Mr Rielly "Here's the supervisor coming over now."

[47] When Mr Hinrichsen arrived, Mr Rielly enquired about the traffic controllers working outside the site (who were engaged by a subcontractor on the CRR TSO Project, called Altus Pty Ltd (**Altus**)):

Mr Rielly: *"Why are these traffic workers standing out in the rain?"*

Mr Hinrichsen: *"They've been told to get undercover but they have chosen not to."*

[48] That discussion continued for approximately two minutes until Mr Maher arrived. Mr Rielly continued the conversation about the traffic controllers with Mr Maher:

Mr Rielly: *"Are you the man in charge of everything here? They tell me you're the man in charge."*

Mr Maher: *"Who said that? I am the site's Superintendent "*

Mr Rielly: *"Why do you have traffic controllers working in the rain? I've been standing here for 45 minutes ... I haven't seen anyone tell them to head off."*

Mr Maher: *"We use radios to communicate with our TCs (traffic controllers), and I was walking around just 30 minutes ago speaking to them."*

Mr Rielly: *"Why are there no undercover areas for them to stand under, other than the buildings' awnings you are luckily enough to have around you."*

Mr Hinrichsen: *"We've told them they don't have to work in the rain and directed them to go undercover, but they want to remain at their posts."*

[49] While it was raining, the weather was not severe. I did not consider it unsafe for the traffic controllers to continue to work if they wished to. I also informed Mr Rielly that wet weather work may be regulated by an industry award for those workers and they may be entitled to additional pay or benefits for performing that work, such as a wet weather allowance.

Notice of Entry

[50] The conversation with Mr Rielly about the traffic controllers continued, back and forth, for another minute or two. I said to Mr Hinrichsen and Mr Maher: "We don't need to stand here and keep debating this with him ... unless Dean reasonably suspects a safety contravention and wants to issue us with an s117 notice of entry, then let's let him be."

[51] Mr Maher, Mr Hinrichsen and I began to walk away from Mr Rielly. I then heard Mr Rielly call out: "hold up, here's my notice." I turned around and saw him reach into his satchel and pull out a Notice of Entry.

[52] Annexed and marked **"JLB12"** is a true and correct copy of the Notice of Entry that Mr Rielly provided on 1 July 2021.

[53] I sighted Mr Rielly's State and Federal right of entry permits. These were valid and in date.

[54] The discussions under the awning of JD Sports went on for approximately five to eight minutes. During this time, Mr Maher and I had the following discussion with Mr Rielly:

Me: *"As this is a safety entry, I will organise for our Senior Safety Advisor to come down to discuss these suspected contraventions with you."*

Mr Rielly: *"Who's that?"*

Me: *"His name is Mark Taylor."*

Mr Rielly: *"Mark Taylor? He used to be a great cricketer back in the day."*

Me: *"Can you quickly talk me through the suspected contraventions you've listed here? What do you mean by risk assessments?"*

Mr Rielly: *"It's pretty self-explanatory mate, you mustn't speak English very well."*

Me: *"Perhaps not, maybe you could assist me then so we can better understand what you are after?"*

Mr Rielly: *"Alrighty ... I want to see all your documents and procedures relating to wet weather and I want to make copies of them."*

Me: *"We will not be handing over documents until our Senior Safety Advisor has discussed your concerns and ascertained if and what documents are relevant to your suspected safety concerns."*

Mr Rielly: *"Well, when is he getting here?"*

Me: *"He is on his way and will be here shortly."*

Mr Maher: *"Could we please head over to the lot one compound so we can sign you in, complete a COVID-19 declaration and undertake a visitor induction?"*

Mr Rielly: *"I won't be doing any of that as I am not required to."*

[55] Both Mr Maher and I asked Mr Rielly two to three times to come with us to the lot one compound so we could carry out the sign in, COVID-19 declaration and induction for his entry to the site in accordance with the site safety requirements.

Unauthorised entry to Lot Three

[56] Mr Rielly then proceeded to walk around the front of the site to the gate entrance. The traffic controller at the site entrance pointed to a sign on the fence which stated: "ALL VISITORS MUST REPORT TO SITE OFFICE". The traffic controller said to Mr Rielly: "Read the sign, mate." I said to the traffic controller: "Don't get involved."

[57] I said to Mr Rielly: "Don't go in there, we need to wait for Mark (Taylor)." Mr Rielly did not respond fa my direction and opened the front pedestrian gate and walked into lot three.

[58] Once Mr Rielly entered the gate, he walked to a yellow lectern which was being used as a stand for the gate sign-in, hand sanitiser, and sunscreen. Mr Rielly then began looking through the sign-in sheet and started rummaging through the lectern. Mr Rielly did not say why he was doing this. Annexed and marked **"JLB13"** is a true and correct copy of a photograph of the lectern which was standing in lot three inside the entry gate.

[59] As this was occurring, I had the following conversation with Mr Rielly:

Me: *"What are you looking for?"*

Mr Rielly: *"Where are the SWMS kept for this area?"*

Me: *"You'll have to talk to Mark about that, I think they're kept in the main office on Lot one."*

[60] Our discussion continued as Mr Taylor arrived at lot three.

Me: *"This is Mark Taylor. He is the site safety manager."*

Mr Rielly: *"Are you a good cricketer?"*

[61] After about two minutes, Mr Rielly stopped looking through the lectern and walked through the communal area up the scaffold stairs and onto the tower crane pad. I witnessed Mr Rielly walk up the stairs and said: "Don't go up there, come back down, you're not authorised to go up there."

[62] Mr Rielly did not respond to this and continued to look around the tower crane pad and into the excavation box. I repeated my direction for Mr Rielly to come down another one or two times. Mr Rielly did not respond to either request. While Mr Rielly was on the tower crane pad, Mr Taylor, Mr Maher, Mr Hinrichsen and I remained at the communal area, however, we ensured that Mr Rielly was always within our line of sight. After approximately two minutes, Mr Rielly walked back down the scaffold stairs and into the communal area.

[63] While Mr Rielly was on the scaffold stairs; Mr Maher said: "Please come down from there, we need to discuss your 117 notice." Mr Maher repeated this direction again at least two times during the time Mr Rielly was on the tower crane pad.

Unauthorised entry into Restricted Area

[64] Mr Rielly walked down off the scaffold stairs and through the communal area towards the Restricted Area. I said to Mr Rielly: "Where are you going? How is this relevant to your 117 notice?" Mr Rielly did not respond to me and proceeded to walk to the other side of lot three towards the Restricted Area.

[65] Mr Rielly walked up to the Restricted Area and walked in between the

fencing that had been placed around the area. I am unable to recall whether Mr Rielly physically shifted the fencing or simply touched the fencing as he walked into the Restricted Area.

[66] I said to Mr Rielly "You are in a restricted area; you need to leave for your own safety." Mr Rielly did not respond to this. Mr Maher also said to Mr Rielly: "You can't go in there. It's a restricted area," Mr Maher repeated this direction approximately two times.

[67] Once Mr Rielly was in the Restricted Area, he walked down towards the excavator parked at the western boundary of the Restricted Area.

[68] I walked towards Mr Rielly, keeping .abreast with him, using the designated walkway adjacent to the Restricted Area. I said to Mr Rielly: "For your own safety we need you out of here, it's a restricted area."

[69] Mr Rielly did not respond to this and continued to walk around in the Restricted Area. He walked into the swing radius of the excavator, which was stationary at the time and not in use. Mr Rielly also walked around the excavator, which was also not in use at the time. I said to Mr Rielly: "You need to get out of there, you're in a poz comms zone. This is outside your 117 notice."

[70] It was around this time that I walked out of the walkway and towards the Albert Street end of the site. I stood near the vehicle entrance and spoke with Mr Hinrichsen, Mr Taylor and Mr Maher. Mr Taylor said: "I'll go down there and try to get him out." Mr Taylor walked down towards the excavator in the Restricted Area and spoke to Mr Rielly. I was unable to hear the conversation between Mr Taylor and Mr Rielly, but it continued for two to three minutes.

Departure

[71] Mr Taylor and Mr Rielly left the Restricted Area and moved onto the walkway that runs along the Charlotte Street side of lot three. After Mr Rielly and Mr Taylor finished their conversation, Mr Rielly began walking towards the site exit. As Mr Rielly was leaving, I heard Mr Taylor say to Mr Rielly; "If you ever have any concerns about people[1]s safety on this site, give me a call" and "my number is on the sign there." I do not recall if Mr Rielly took down Mr Taylor's number.

[72] Mr Rielly left the site at approximately 3:10pm and began walking towards Charlotte Street I did not hear from Mr Rielly for the remainder of the day or anytime afterwards.

[73] At 3:14pm I reported Mr Rielly's entry to Mr Forde.

[74] On the following day, I prepared a note of my recollections of what had occurred with Mr Rielly. The purpose of these notes was to maintain a record of the entry for internal reporting purposes. Annexed and marked "JLB14" is a true and correct copy of those notes. The notes remain true and correct to the extent of my knowledge and belief, except where I have corrected or added to them in this affidavit."

Arguments Advanced on Behalf of Respondents in Respect of Entry On To Site

16 As to the claim that Mr Rielly contravened the provisions of s. 499 of the FWA, it was submitted on behalf of the respondents that directions given to Mr Rielly were not uniformly

enforced, or had been waived, and that, accordingly, the visitor entry requirements did not have the character of, and did not constitute, an occupational health and safety requirement as provided for under the section. It was submitted that the Court ought to find:

(a) That the visitor entry requirements were nothing more than the occupier's preference, or desired state of affairs; and

(b) That such preferences were not uniformly enforced.

(c) That the applicant was therefore unable to establish a breach of the section insofar as it was claimed that there had been non-compliance with the visitor entry requirements.

17 Alternatively, it was submitted that if it be found that the visitor entry requirements were in fact requirements for the purposes of s. 499 of the FWA, Mr Rielly could not have contravened the provisions of the Act because the evidence established that such requirements were not uniformly enforced, and that therefore any request to comply with them could not be reasonable insofar as he was concerned.

18 Turning first to the question as to whether the visitor entry requirements were "requirements" under the Act or not, it is of note that two CFMMEU Union Officials who first attended at Lot 3 on the morning of 1 July 2021 agreed to requests duly made of them to comply with visitor entry requirements then given to them by representatives of the JV before entering onto the site. It can be inferred that by complying with the requests and requirements made of them, they acknowledged that there were valid requirements which had to be complied with by each of them prior to their attending on-site. The different approaches adopted on the first site visit by the two union officials who attended at that time, as opposed to the second site visit by Mr Rielly, were starkly at odds as set out at [24] – [46] of the affidavit of Mr Maher.

19 The word "requirement" connotes *"The act of requesting or demanding; a request, a demand; a summons, a requisition."* [9]

20 Non-compliance with a requirement duly given does not mean that such requirement ceased to have the quality of a valid request or demand. Even if a representative of an occupier of a site might have differentiated between different people in terms of the making of a requirement, or even if, for whatever reason, compliance by visitors with written requirements was waived by such representatives or were otherwise not enforced in respect

[9] Oxford English Dictionary

of certain people entering upon the site, that does not detract from the fact that, as in the instant case, compliance with the relevant visitor entry requirements was requested and demanded in respect of Mr Rielly. The making of such requirements were requests and demands required to be complied with under the provisions of s. 499 of the FWA. No hard and fast rule ought to apply as to the nature of enforceable and valid requirements able to be made at any one point in time. Much will of course depend upon the prevailing circumstances in that regard.

Visitor Entry Requirement Requests and Demands

21 The Court finds that Mr Rielly failed to comply with the visitor entry requirements duly given to him on 1 July 2021. It is of no moment that the two union officials who attended onsite for the first visit were given an oral onsite induction, as well as being orally signed in and given a requirement to make oral COVID declarations. The requirement for compliance with basic entry requirements was recognised by such union officials and complied with, albeit that the mode of compliance differed from the normal visitor written sign-in entry requirement procedures contained in the written procedures manual. As a matter of construction, a valid requirement may be made or given under s. 499 of the FWA, notwithstanding that the actual requirement which was given differed from earlier requirements given to other different visitors earlier on the same day.

22 The necessity for occupational health and safety requirements to be complied with prior to the entry onsite of visitors was obvious, as explained by Mr Maher, particularly in circumstances such as the present where Mr Reilly's lack of familiarity with the conditions on site from day to day could have led him to suffer an injury. The lack of familiarity arose simply by reason of the fact that conditions were different on 1 July 2021 from the conditions which pertained at the time of his previous visit.

23 Save for the making of a COVID declaration requirement which the Court finds was unnecessary - the Court has taken judicial notice of the fact that at the relevant time on 1 July 2021, no such requirement existed for an open air setting such as Lot 3 [10] - the Court finds that it was reasonable for the other visitor entry requirements to be imposed and complied with.

[10] See Chief Health officer Direction of 28 June 2021 provided to Judge's Chambers by the lawyers for the respondents which has been marked Exhibit 19.

24 It was submitted on behalf of the respondents that there was evidence of non-compliance by employees of the CBGU JV with the sign in requirement, [11] the site induction requirement, [12] and the COVID-19 declaration requirement. [13] Those submissions at [35] – [37] inclusive of the respondents' written submissions going to the alleged lack of uniform enforcement of entry requirements were as follows:

> "[35] In respect of the sign-in requirement
>
> (a) Mr Maher said that he often did not sign in or sign out from site; [14]
>
> (b) Mr Hinrichsen said that the requirement was enforced, but not much; [15]
>
> (c) Mr Taylor said that the requirement was enforced for visitors, but not necessarily for staff [16] and that he had to practice of signing people in orally; [17] and
>
> (d) Mr Bekkers said that there were times he did not routinely follow the requirement. [18]
>
> [36] in respect of site induction requirement:
>
> (a) Mr Maher agreed that he could have given Mr Rielly an oral induction himself, although it would be a deviation from process; [19]
>
> (b) Mr Hinrichsen agreed and said that there was no safety reason why Mr Rielly could not have been orally signed in and do the induction and declaration that way; [20]
>
> (c) Mr Taylor's evidence was that his usual process was to give visitors an oral induction if they refused to sign in; [21] and
>
> (d) Mr Bekkers said that oral sign in and induction processes had occurred previously and that there was a practice of performing oral sign ins and inductions on site. [22]

11 [35] of Respondents' Written Submissions.
12 [36] of Respondents' Written Submissions.
13 [37] of Respondents' Written Submissions.
14 Transcript (T) p. 59.21 - .27
15 T – p. 99.20-.21; and note T – p. 113.07-.11
16 T – p. 137.24 - .34
17 T – p. 140.07
18 T – p. 156.10 - .14
19 T – p. 76.25 - .34
20 T – p. 119.33 - .43
21 T – p. 140.07
22 T – p. 162.31 - .46

[37] In respect of the COVID-19 declaration requirement

(a) Mr Hinrichsen said that the declaration requirement was enforced in respect of visitors but mainly not the workers/salary staff; [23]

(b) Mr Taylor's evidence was that it was not consistently enforced: [24]

That policy of people having to make a COVID declaration was also not uniformly enforced, was it?---It was encouraged, promoted.

But not enforced? --- There was an expectation that it would happen.

There wasn't a requirement that it happen, though, was there?--- Was a requirement that it would happen, yes.

HIS HONOUR: Well, did it happen?---Realistically, consistently, no.

(c) Mr Taylor also confirmed that health directives issued by the Queensland Government at the time did not require people visiting construction sites to make a Covid declaration; [25] and

(d) Mr Bekkers said that it was only enforced by giving reminders to people at pre-starts and other forums. [26]"

25 What is of note, however, was that in respect of the sign-in requirement, Mr Taylor's unchallenged evidence was that though not necessarily enforced for staff, a sign-in requirement was enforced for visitors. It cannot be said that Messrs Maher, Hinrichsen, Taylor or Bekkers – each of them being employees of the JV partners which occupied the site – were visitors who were required to comply with the visitor entry requirements. The same applies to other employees of the JV partner employees.

26 The Court finds that to the extent that the evidence established that employees of the joint venture did not routinely, or at all, comply with the visitor entry requirements, such evidence did not absolve Mr Rielly, in his capacity as a visitor, from complying with the request and demand given to him for the purpose of his entering onto Lot 3 on the day in question.

27 It was alternatively submitted on behalf of the respondents that Mr Rielly could have been given the opportunity of orally complying with the visitor entry requirements, but that he was given no chance to do so. The Court finds that the fact that he wasn't given that opportunity

23 T – pp. 115.42 – 116.02
24 T – p. 138.23 - .31
25 T – p. 137.40
26 T – p. 158.14 - .21

was, in the circumstances, of no significance. Mr Rielly had been directed to comply with the requirements but steadfastly refused to do so. The Court finds that even if he had been given the opportunity to orally undertake visitor entry requirements, he would have been unlikely to have agreed. Requests and requirements given to him were treated with disdain and ignored.

28 The intransigent stance taken by Mr Rielly when first approached by representatives of the occupiers of the site clearly indicated his intention to be obstructionist and non-compliant from the outset. In such circumstances, and having regard to the relatively short period of time between when Mr Rielly arrived at the site and when he entered the site over the objections of the JV representatives then present, the Court finds that the representatives of the JV occupiers on site didn't unreasonably fail to canvas with Mr Rielly whether he would, or would not, undertake visitor site entry requirements orally.

29 The Court finds that in respect of the visitor entry requirements, the requests made by representatives of the occupiers of the site were reasonable, and that there was relevantly a contravention by Mr Rielly of the provisions of s. 499 of the FWA.

Mr Rielly's Conduct after He Entered upon the Site

30 At [37] – [46] inclusive of the affidavit of Maher, Mr Maher set out what the Court finds relevantly transpired after Mr Rielly made his way onto Lot 3. His affidavit was as follows:

> "[37] Dean walked straight to a lectern in the common area, which contained the pre-start sheet for workers and some safety documents, permits, and emergency equipment. As Dean looked through the documents, we had the following discussion:
>
> *Dean:* "Where are the risk assessments for the area?"
>
> *Me:* "They are stored at lot one, that's where we want you to go."
>
> *Dean:* "I need to have a look at the risk assessments and the SWMS."
>
> *Mr Bekkers:* "We keep them at lot one, we need you to go over there to go through the sign in process."
>
> [38] Dean did not respond to Mr Bekkers' request and continued to look through the lectern for 2 - 3 minutes.
>
> **Access to the tower crane base**
>
> [39] Dean then walked around the side of the common area and up the staircase leading to the tower crane base. Dean walked to the edge of the tower crane base and looked down over the site.
>
> [40] Neither Mr Bekkers nor I followed Dean and I did not repeat Mr Bekkers' directions to follow the correct induction process or make any comments to

him as I felt it would be futile to attempt to change his behaviour. There was also no significant risk to Dean's safety as the tower crane was not in use. However, I ensured that Dean remained within my view so I was able to monitor him without escalating the situation. There was still some risk in Dean's actions as there are always risks on a construction site if people do not follow the correct procedures, for example, if Dean had entered an unstable area.

[41] Dean remained on the tower crane base for two to three minutes. During this time, he was just looking around. While Dean was in this area, he did not physically obstruct any workers, but his conduct distracted the remaining workers on site who saw him moving around.

Entry to the Restricted Area

[42] Dean then walked around to the other side of the site, where the Restricted Area had been set up. Mr Bekkers said to Dean: "Where are you going? We need you to come back to the office and sign in." Dean did not respond to this direction and continued to walk to towards the Restricted Area. Mr Bekkers said: "You are entering a work area, you have not been inducted." Again, Dean did not respond to this direction.

[43] Dean walked around the barriers that marked the Restricted Area and into the Restricted Area. Dean walked around inside the Restricted Area for 3 - 4 minutes. As Dean was walking around the Restricted Area, Mr Bekkers said: "You need to get outof there, you have come through the gate, you have not completed a sign on." It was not clear to me what Dean was doing as there was no work occurring in the Restricted Area for him to observe.

[44] While Dean was in the Restricted Area, Mr Taylor arrived at the site. I said to Mr Taylor: "We have tried to get him to go back to the office but he won't listen." Mr Taylor then walked down towards Dean. Both Dean and Mr Taylor then left the Restricted Area and had a conversation on the walkway.

[45] I was unable to hear the conversation between Mr Taylor and Dean. After about 2 minutes, Dean and Mr Taylor began to walk back towards the site gate entrance where Mr Bekkers, Mr Hinrichsen and I were standing. Dean walked past us and left the site.

[46] I did not see or hear from Dean for the remainder of the day. There was no further action taken by Dean with respect to the visit. Mr Bekkers informed me that he would document and report the incident."

31 As to Mr Rielly's conduct after he entered upon the site, the evidence clearly established that he disobeyed instructions and requests given to him by JV representatives not to move around the site, namely by refusing reasonable requests:

(i) not to enter upon the tower crane pad; [27] and

(ii) to leave the tower crane pad; [28] and

(iii) not to enter the Restricted Area; [29] and

[27] Bekker's affidavit at [56] – [63] and at T p. 162.16
[28] Bekker's affidavit at [61] – [63]

(iv) to leave the Restricted Area. [30]

32 It was not put to Mr Bekkers during cross-examination that there had not been a demand for Mr Rielly:

(a) to not enter upon the site.

(b) to leave the tower crane pad.

(c) to not enter the restricted area.

(d) to leave the restricted area.

33 Again, the reason for the giving of the said instructions, and the making of the requests, was for the purpose of ensuring that Mr Rielly did not suffer an injury on-site. One can well imagine the legal ramifications which could have flowed had Mr Rielly suffered any such injury. Mr Bekkers in cross-examination pointed out that though the excavators were not working at the time, vehicles were frequently traversing the site, and that the walking areas had become quite uneven along those access points, such that Mr Rielly could have slipped and fallen into such a rut or uneven piece of ground. [31]

34 Submissions advanced on behalf of the respondents were to the effect that there could have been no contravention of the provisions of s. 499 of the FWA after Mr Rielly entered upon the site because:

(a) he was escorted;

(b) there was no safety risk from excavators;

(c) there was no danger to Mr Rielly when he was in the restricted area.

35 Dealing with each of those submissions, the evidence establishes that at no time during Mr Rielly's site visit was any close presence to Mr Rielly of any of the occupiers' representatives consensual from Mr Rielly's perspective. From the outset, Mr Rielly was told not to go on site but he ignored such reasonable requests, unilaterally deciding to enter upon Lot 3 when an opportunity first presented itself. As to the excavators, though they were not operative at the time, the engines were nevertheless in unfamiliar surroundings to Mr Rielly, and he could

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29 Bekker's affidavit at [64] – [67]
30 Bekker's affidavit at [68] – [70]
31 T p. 167.8 - .15

have slipped on uneven ground and come into contact with one. As to Mr Rielly being in the restricted area, Mr Bekkers drew a distinction between traffic controllers being able to control the risk of injury from traversing vehicles, and to there being no risk at all as a result of the presence of such traffic controllers. [32] It is one thing for a traffic controller to control traffic, but quite another thing for a traffic controller to prevent injury to an unauthorised visitor who is found to be on-site. Mr Hinrichsen gave supportive evidence that aggregate had been placed in and about the site, and that that could also have been the source of danger to Mr Rielly due to his unfamiliarity with the site when walking around when on it. [33] Mr Hinrichsen confirmed that Mr Rielly entered onto the site unescorted, but that Messrs Taylor, Maher and Bekkers followed him. The Court finds that the only likely way that Mr Rielly would have been effectively discouraged from entering upon the site, or otherwise going where he wanted to when he had entered upon the site, would have been for him to have been physically restrained. Employees in the position of those present on the day shouldn't be put in that position of possible physical harm to themselves when they have already given reasonable instructions relating to visitor entry requirements, and had made other requests, for Mr Rielly to leave the site once he had entered upon it.

36 The Court finds that Mr Rielly's failures to:

(a) comply with reasonable requests for him to not enter upon the site unaccompanied;

(b) read and obey all safety signs on the site;

(c) not enter any restricted area on the site;

(d) confine himself when upon the site to areas suitable to visitors as opposed to areas within a restricted area;

were unreasonable and constituted contraventions of s. 499 of the FWA.

37 The Court finds that had Mr Rielly complied with the reasonable requests made of him, both before and after the time of his unauthorised entry upon the site, Mr Rielly would not have been unduly delayed or frustrated in the carrying out of his workplace health and safety site inspection which he was qualified to undertake. The Court does not accept the respondent's submissions to the contrary.

[32] T p. 166.35 – 167.15
[33] T p. 123.20 - .37

Whether Mr Rielly Contravened Section 500 of the FWA

38 The Court has found that the allegations in [41] of the ASOC have been made out. The failure by Mr Rielly to take heed of, and comply with, what was asked of him after he had entered upon the site was improper in all of the circumstances. No reason was advanced by or on behalf of Mr Rielly as to why he was not required to comply with the requests and demands legitimately made of him by representatives of the occupiers. He simply stated that he didn't have to comply. No evidence was advanced to the effect that Mr Rielly had any time constraints upon him, or that he could not have duly carried out an inspection of the site after he had complied with the requests and demands made of him. Mr Rielly placed the employees in an invidious position by his unwavering refusal to act reasonably.

39 The Court adopts what was held by Brennan CJ, Deane, Toohey and Gaudron JJ in *R v Byrnes* (1994 – 1995) 183 CLR 501 at [25] on the question of what constituted improper conduct, where it was said:

> "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 offender by reasonable persons with knowledge of the duties, powers and authority of the position and the 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 (14): 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 important factors in determining the question whether the power has been abused. But impropriety is not restricted to 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."

40 The Court finds that in the face of reasonable requests being made of him, Mr Rielly knew or ought to have known that he had no valid reason for failing to comply with the reasonable visitor entry requirements made of him, or requests made to him not to enter upon the site.

41 The Court finds, as a consequence, that Mr Rielly acted in an improper manner in contravention of the provisions of s. 500 of the FWA.

42 By reason of this Court's findings that Mr Rielly has contravened the provisions of ss. 499 and 500 of the FWA, the CFMMEU is thereby taken to have also engaged in such contraventions.

43 As a consequence of the Court's findings, it is appropriate that pecuniary penalties be imposed upon each of Mr Rielly and the CFMMEU because of their respective contraventions of the provisions of s. 499 and s. 500 of the FWA.

44 The Court will hear further submissions from the parties as to the timing of further hearings in the proceeding.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Egan.

Associate:

Dated: 21 February 2023

FEDERAL COURT OF AUSTRALIA

Construction, Forestry and Maritime Employees Union v Fair Work Ombudsman (Cross River Rail Appeal) (No 2) [2024] FCAFC 55

Appeal from:	*Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2023] FedCFamC2G 101 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2023] FedCFamC2G 564
File number(s):	QUD 322 of 2023
Judgment of:	**HALLEY, GOODMAN AND MCELWAINE JJ**
Date of judgment:	9 May 2024
Catchwords:	**INDUSTRIAL LAW** – appeal from a decision of the Federal Circuit and Family Court of Australia (Division 2) – redetermination of pecuniary penalties following limited success of appeal and setting aside of penalty order – consideration of course of conduct and totality principles – need for specific deterrence – where pecuniary penalties have previously been imposed on each of the respondents for breaches of the *Fair Work Act 2009* (Cth)
Legislation:	*Crimes Act 1914* (Cth) s 4AA *Fair Work Act 2009* (Cth) ss 499, 500, 546, 557
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53; 249 FCR 458 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Pacific Highway Upgrade Case) (No 4)* [2022] FedCFamC2G 608 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 *Australian Building And Construction Commissioner v Rielly (No 3)* [2022] FedCFamC2G 1 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)*

	[2018] FCAFC 126; 265 FCR 208 *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (Cross River Rail Appeal)* [2024] FCAFC 1 *Construction, Forestry, Maritime, Mining and Energy Union v Richard Crookes Constructions Pty Ltd* [2022] FCA 992 *Darlaston v Parker* [2010] FCA 771; 189 FCR 1 *Fair Work Ombudsman v Construction, Forestry, Maritime and Energy Union (No 2)* [2023] FedCFamC2G 564 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 101 *Fair Work Ombudsman v Rielly* [2023] FCA 1144]
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	41
Date of last submission/s:	5 March 2024 (Respondent) 19 April 2024 (Appellant)
Date of hearing:	Determined on the papers
Counsel for the Appellants:	Mr H Clift
Solicitor for the Appellants:	Hall Payne Lawyers
Counsel for the Respondent:	Mr M McKechnie and Ms N Abdalla
Solicitor for the Respondent:	K&L Gates

ORDERS

QUD 322 of 2023

BETWEEN:	**CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION** First Appellant
	DEAN LESLEY RIELLY Second Appellant
AND:	**FAIR WORK OMBUDSMAN** Respondent

ORDER MADE BY: **HALLEY, GOODMAN AND MCELWAINE JJ**

DATE OF ORDER: **9 MAY 2024**

THE COURT ORDERS THAT:

1. Pursuant to s 546 of the *Fair Work Act 2009* (Cth):

   (a) The Construction, Forestry and Maritime Employees Union must pay a pecuniary penalty in the amount of $60,000 to the Commonwealth of Australia; and

   (b) Mr Dean Lesley Rielly must pay a pecuniary penalty in the amount of $6,300 to the Commonwealth of Australia;

2. Each pecuniary penalty must be paid within 14 days of the making of these orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 For the reasons published on 29 January 2024, we ordered that the appeal in this matter be allowed in part, that the declarations made in the Federal Circuit and Family Court of Australia (Division 2) (**FCFCOA**) be varied in one respect by deleting therefrom that the second appellant, Mr Rielly, contravened s 500 of the *Fair Work Act 2009* (Cth) (**FW Act**) on 1 July 2021 when, on entering a **worksite** known as the Brisbane Cross River Rail Construction Project, he failed to comply with a relevant visitor conduct entry requirement to be accompanied by an escort from the site occupier: *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (Cross River Rail Appeal)* [2024] FCAFC 1. In these reasons, each reference to a statutory provision is to the FW Act unless otherwise stated.

2 We otherwise dismissed the appeal. However, the appellants' limited success necessarily resulted in a consequential order that the penalty orders made in the FCFCOA on 29 June 2023 were set aside: *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2023] FedCFamC2G 564 (**PJ**). The agreed position before us was, in the event that not all findings of the primary judge were upheld, we should redetermine the penalties following the receipt of supplementary written submissions. Those submissions have been received and considered.

3 We do not repeat in detail the relevant background, the evidence before or the findings that were made by the primary judge as set out in our reasons. What follows should be read with those reasons. It is sufficient to state that Mr Rielly was employed as a State Organiser by the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), as it was then known, who exercised a right of entry to the worksite as a permit holder within the meaning of ss 497 and 500. In doing so he failed to comply with reasonable requests made by representatives of the occupier to comply with Occupational Health & Safety Requirements that applied to the worksite when he failed to sign the visitor register and to complete a visitor induction, entered an area known as the tower crane pad and refused to leave it when requested to do so, failed to read and obey all safety signs at the worksite, entered a restricted area without permission and, having done so, refused to leave upon request each contrary to

s 499. Mr Rielly also contravened s 500 by acting in an improper manner while exercising his right of entry by failing to sign the visitor register and complete a visitor induction, by failing to read and obey all safety signs on the worksite and by entering areas of the worksite to which access was restricted. Pecuniary penalties cannot be imposed for the same conduct (s 556) and the respondent has elected to seek penalties only for the contraventions of s 499. The Construction, Forestry and Maritime Employees Union (**CFMEU**), as it is now known, is liable for the imposition of pecuniary penalties by operation of s 550(2)(c) and 793.

4 The primary judge ordered those penalties be paid in the amounts of $5,500 by Mr Rielly and $37,500 by the CFMMEU. Each penalty was imposed implicitly on the assumption that Mr Rielly engaged in a single contravention (his conduct prior to entering the worksite and thereafter within it). It would not appear that submissions were put to the primary judge on that question. Although the course of conduct provision at s 557 was not engaged (ss 499 and 500 are not listed as relevant civil remedy provisions at s 557(2)) his Honour's attention was not drawn to multiple relevant decisions of this Court where it had been held that s 557 does not cover the field and the common law single course of conduct principle may be applied, for example: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53; 249 FCR 458 and *Construction, Forestry, Mining, Maritime and Energy Union v Australian Building and Construction Commissioner* ***(The Broadway on Ann Case)*** [2018] FCAFC 126; 265 FCR 208. As we explain, the *Broadway on Ann Case* is factually analogous to the present.

5 The maximum penalty for the contravention of s 499 by Mr Rielly at the time was $13,320 and $66,600 for the CFMMEU as the prescribed penalty unit was $222 as at 1 July 2021: ss 539 and 546 (2) when read with s 4AA of the *Crimes Act 1914* (Cth).

6 The respondent submits that the appropriate penalty "approaching the maximum" should be imposed on the CFMEU and one within a range of $6,000-$7,560 on Mr Rielly. In contrast, the appellants submit that the appropriate penalty for the CFMEU is one within the range of $27,500-$32,500 and for Mr Rielly less than $3,150.

7 Section 546 permits the imposition of pecuniary penalties for contravention of a civil penalty provision in an amount that this Court considers appropriate. The principles are well-understood. The quantum must reflect an assessment amounting to "no more than might be considered to be reasonably necessary to deter further contraventions of a like kind" by the

respondents or others: *Australian Building and Construction Commissioner v* ***Pattinson*** [2022] HCA 13; 274 CLR 450 at [9] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). The primary purpose is to achieve deterrence, both specific and general: *Pattinson* at [15].

8 The respondent submits that Mr Rielly's conduct was objectively serious and deliberate, that he repeatedly ignored requests that were made of him, treated such requests with disdain and engaged in obstructionist behaviour. The primary judge in his liability reasons relevantly found that Mr Rielly was given ample opportunity to comply with the visitor entry requirements, was directed to comply with those requirements "but steadfastly refused to do so" and further that "even if he had been given the opportunity to orally undertake the visitor entry requirements, he would have been unlikely to have agreed. Requests and requirements given to him were treated with disdain and ignored": *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FedCFamC2G 101 (**LJ**) at [27]. The primary judge further found that Mr Rielly manifested an intent "to be obstructionist and non-compliant from the outset": LJ [28].

9 As to Mr Rielly's conduct upon entering the worksite, the primary judge relevantly found at PJ [35] that:

> [T]he only likely way that Mr Rielly would have been effectively discouraged from entering upon the site, or otherwise going where he wanted to when he had entered upon the site, would have been for him to have been physically restrained. Employees in the position of those present on the day shouldn't be put in that position of possible physical harm to themselves when they have already given reasonable instructions relating to visitor entry requirements, and had made other requests, for Mr Rielly to leave the site once he had entered upon it.

10 The primary judge was satisfied that Mr Rielly would not have been unduly delayed or frustrated in exercising his right of entry by compliance with the requests made of him: PJ [37].

11 None of those findings was disturbed on appeal.

12 Overall, the respondent submits that a right of entry to private premises is a serious encroachment upon private rights (*Darlaston v Parker* [2010] FCA 771; 189 FCR 1 at [44] (Flick J)) and compliance with legislative requirements which permit entry is an important consideration in the assessment of a penalty that is appropriately deterrent in effect.

13 Mr Rielly ceased to be a permit holder pursuant to s 512 on 2 September 2022, when his application for a new permit was refused by the Fair Work Commission. Mr Rielly ceased employment with the CFMMEU on 6 September 2022 and thereafter commenced employment with the Construction, Forestry, Mining and Energy Industrial Union of Employees Queensland, which is a registered organisation pursuant to the *Industrial Relations Act 2016* (Qld). It is not registered pursuant to the FW Act. Mr Rielly has been ordered to pay pecuniary penalties in two other cases by the FCFCOA as well as one case by this Court, but in each case the penalties were not imposed until after the events in this proceeding: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Pacific Highway Upgrade Case) (No 4)* [2022] FedCFamC2G 608; *Australian Building And Construction Commissioner v Rielly (No 3)* [2022] FedCFamC2G 1 and *Fair Work Ombudsman v Rielly* [2023] FCA 1144.

14 As to the CFMEU, the respondent draws attention to its well-documented history of non-compliance with industrial laws and has provided a comprehensive list of agreed or determined penalties imposed upon it, or its representatives, for conduct between January 1999 and May 2022, by reference to individual cases, by jurisdiction and with a summary of the nature of the conduct and the penalties ultimately imposed either by admission or finding. In all, within that period there were 207 reported penalty cases involving the CFMEU.

15 The appellants make a number of submissions, commencing with the proposition that the need for general and specific deterrence is "diminished" because Mr Rielly no longer holds an entry permit, he is no longer employed by the CFMEU and Mr Brian Lacy AO was engaged by the CFMEU in September 2022 to provide training to its officials relating to the exercise of rights of entry to workplaces. That task was completed by delivery of a report on 15 September 2022. In broad terms, the appellants submit that the contravening conduct was not coercive and nor did it display disregard for safety obligations at the worksite or endanger other persons. Mr Rielly's conduct is categorised as "limited and relatively benign", was not rude, threatening, or aggressive and that we should find that his conduct was no more than an "over-enthusiastic approach to the exercise of his right of entry on the relevant day". They submit that there is no evidence of loss or damage having been caused to the worksite occupier, senior management of the CFMEU were not involved in the contraventions, Mr Rielly's conduct was not deliberate, there is evidence of contrition being the engagement

of Mr Lacy (which is also submitted as amounting to the taking of corrective action by the CFMEU) and that, despite that the appellants did not cooperate in the investigation and legal proceeding, there is no need for specific deterrence in this case.

16 There are two threshold issues that arise.

17 The first concerns the relevance of the penalties imposed by the primary judge. The appellants submit that, although those penalties are "strictly irrelevant" to the exercise of the discretion of this Court, the respondent did not by a notice of cross-appeal contend that the primary judge's discretion miscarried, which then caused him to impose inadequate penalties. In that circumstance the appellants contend that it would be unjust to impose greater penalties. The point was not further developed. Had the appellants received timely notice that the respondent intended to submit that this Court should impose greater pecuniary penalties in the event of partial success on the appeal, it is possible that the appeal may have been differently prosecuted. On one view the imposition of greater penalties upon a partially successful appellant when the discretion falls to be re-exercised might be thought to be an unfair outcome. On another, the inherent risk of only partial success on the appeal with the consequential imposition of greater penalties by this Court was a foreseeable outcome.

18 Be that as it may, s 546 of the FW Act requires this Court to impose penalties that are appropriate when satisfied that a person has contravened a civil remedy provision. It is not open to ameliorate any unfairness of which the appellants complain by failing to comply with the statutory requirement. The question is now what this Court determines is the appropriate penalty for the contravening conduct of Mr Rielly.

19 The other concerns Mr Rielly's course of conduct. Initially, the parties' penalty submissions did not distinguish between Mr Rielly's conduct before he entered the worksite and what he did after doing so. Implicitly each assumed that there was one course of conduct. We invited the parties to provide supplementary submissions on this question and drew attention to *The Broadway on Ann Case*. The respondent submits that in the proceeding before the primary judge and in its penalty submission to the Court it proceeded on the basis that there is only one course of conduct that Mr Rielly engaged in and as a matter of fairness to the appellants it does not now depart from that position.

20 The appellants submit that, in a case of multiple contraventions, the course of conduct principle, together with the totality principle, should each be deployed as an analytical tool to ensure that the overall penalty is not "greater than necessary to achieve the object of deterrence": *Construction, Forestry, Maritime, Mining and Energy Union v Richard Crookes Constructions Pty Ltd* [2022] FCA 992 at [165] (Wigney J).

21 The concern of the course of conduct principle, as explained by Bromwich J in *The Broadway on Ann Case*, is to "ensure that the contravener is not penalised twice for what is essentially the same wrongdoing": [145]. His Honour dissented in the result on this question, but not as a matter of principle. Although in this case the contraventions occurred on the same day, by the same person and at the same worksite, the issue is whether there is a qualitative difference between Mr Rielly's disregard of the visitor entry requirements, before he set foot on the worksite, and the visitor conduct requirements which applied thereafter. This requires close attention to the facts.

22 At approximately 2.30 pm on 1 July 2021, Mr Rielly spoke with representatives of the site occupier and produced his written notice of entry and entry permit. That documentation was in order. He was then requested to "please head over to the Lot 1 compound" so that he could be signed in as a visitor and undertake the visitor induction process. Mr Rielly refused, responding: "I don't need to do that, I want to go on to site". Further requests were made of him to complete the visitor entry requirements. Once again, Mr Rielly ignored the requests and walked around the individuals and towards the gate at the main entrance of the worksite. A traffic controller at the gate remonstrated with Mr Rielly that as a visitor he was required to report to the site office. A representative of the occupier distinctly told him not to enter the site. Mr Rielly simply proceeded through the gate and commenced walking around the worksite.

23 Having entered the worksite in breach of the visitor entry requirements, Mr Rielly walked up a set of scaffold stairs and onto a tower crane pad. He did so despite being told not to proceed to that location, to "come back down, you're not authorised to go up there". Mr Rielly did not respond. There were further requests that he should leave the tower crane pad, each of which was ignored.

24 Eventually Mr Rielly left the tower crane pad, at a time of his choosing, and then walked towards a restricted area at the southern end of the site, designated for excavation works. For

good reason that area was restricted for access because heavy plant and equipment was being used, a self-evident risk to individuals. The restricted area was clearly delineated by separate fencing and signage. Once again, Mr Rielly ignored relevant questions put to him about his lawful authority to enter the restricted area pursuant to his s 117 notice. On at least three occasions whilst in the restricted area, a clear instruction was given to Mr Rielly that he must leave. Undeterred, Mr Rielly considered it appropriate to wander about the restricted area including walking into the swinging radius of an excavator (albeit not in operation at the time). For an individual ostensibly concerned with occupational health and safety at the worksite, that conduct was extraordinary and ultimately unexplained by Mr Rielly in that he chose not to give evidence in the proceeding.

25 At approximately 3.10 pm, having been spoken to by the site safety lead, Mr Rielly left the restricted area and then the worksite. In all, Mr Rielly ignored the visitor entry and visitor conduct requirements for approximately 40 minutes.

26 The appellants further submit that we should conclude that there was a single course of conduct by Mr Rielly commencing with entry to the worksite and concluding with his voluntary exit approximately 40 minutes later. It is emphasised that:

> [T]he found contraventions did not crystallise until Mr Rielly *entered* the worksite having not complied with the visitor entry requirements. A characterisation of his actions as involving two courses of conduct, *viz*, a pre-entry course of conduct and a post-entry course of conduct, is therefore submitted to be an inapposite dichotomy. That is because, in light of the found contraventions and the circumstances of this case, there was no pre-entry conduct that resulted in a contravention.
>
> (Original emphasis.)

27 There is force in that submission, despite the fact that the visitor entry and visitor conduct requirements serve different purposes, and in this case imposed separate obligations upon Mr Rielly in the exercise of his rights as a permit holder to obey any reasonable request by the occupier to comply with an occupational health and safety requirements applicable to the worksite.

28 A question of procedure also arises. The respondent did not frame a case before the primary judge as one of multiple contraventions of s 499 and does not depart from that position in this Court.

29 Accordingly, we have determined that pecuniary penalties should be imposed upon Mr Rielly for a single course of conduct as appropriate to achieve the twin deterrence objectives.

30 We deal next with the respondent's submission that Mr Rielly's conduct was objectively serious and deliberate.

31 The appellants' re-characterisation of Mr Rielly's conduct as anodyne is inconsistent with the findings made by the primary judge which must now be taken as our findings to the extent that the appeal grounds failed: see generally the discussion in *Bankstown Football Club Ltd v CIC Insurance Ltd* (1998) 10 ANZ Insurance Cases 61-406 at 74,458-74,459 (Giles J). His conduct (summarised above and addressed in our primary reasons at [21]-[23], [41]-[44] and [46]-[52]) was deliberate and defiant. The contravening course of conduct commenced the moment he presented himself to employees of the occupier at the boundary of the worksite. A permit holder must be taken to be aware, and Mr Rielly must have been aware, that a building worksite poses dangers to employees and contractors of the occupier, that various workplace health and safety laws apply and that it is the primary responsibility of the occupier to implement practices, procedures and requirements designed to ensure that the workplace is safe. The visitor entry and visitor conduct requirements were uncomplicated, easily complied with and clearly communicated to him. Objectively, Mr Rielly's behaviour leads us to conclude that he did not consider that he was bound to comply with those requirements for undisclosed reasons at best or, at worst, was fully cognisant of the requirement to comply and chose to ignore them in an act of open defiance.

32 In the result of the appeal, the appellants enjoyed partial success in establishing that the respondent had failed to make good the contention that, having entered the worksite, Mr Rielly had not been accompanied by one or more employees of the occupier. On that score, the appellants submit that the contravention findings are now "objectively less serious". We do not agree. As correctly submitted for the respondent, the overall seriousness of the contraventions, once Mr Rielly had entered the worksite, is not materially reduced by the appellants' success on this point. At best, it has a minor impact in considering Mr Rielly's course of conduct within the worksite. It does not detract from his intransigence and open defiance of the reasonable requirements that were made of him.

33 That Mr Rielly is no longer employed by the CFMEU and is not a permit holder is relevant to specific deterrence, however, as correctly submitted by the respondent, balanced against

those factors is the likelihood that Mr Rielly may once again become a permit holder and indeed at some time may be re-employed by the CFMEU. As an employee of the Queensland registered organisation, he is still involved in industrial relations. No evidence has been adduced as to whether his current employment requires him to perform duties that differ from his previous employment with the CFMEU. There is still a need for specific deterrence to discourage Mr Rielly from engaging in the same, or similar, conduct in the future.

34 For permit holders generally, it is obvious that an appropriate pecuniary penalty must be imposed to deter others from engaging in conduct in defiance of reasonable Occupational Health & Safety requirements that apply to worksites.

35 Taking into account the entirety of the conduct of Mr Rielly as set out in our primary reasons, that one aspect of the contraventions was not upheld on appeal, and considered together with the matters above, we consider that the appropriate pecuniary penalty that must be imposed upon Mr Rielly for his contravening conduct is $6,300 being an amount that is no more than reasonably necessary to deter the prospect of future conduct of a similar character by him and to deter others in like circumstances.

36 Next considering the CFMEU, there is little that can be said in its favour. The imposition of many pecuniary penalties since January 1999 has clearly not had the desired effect of deterring it from engaging in conduct in contravention of various provisions of the FW Act. The CFMEU has an extensive record of failing to comply with various provisions of the FW Act which, in some cases and under different provisions, has attracted very severe civil penalties. Justice Tracey in the *Broadway on Ann Case* chronicled several of his judgments (at [17]-[22]) delivered between 2015 and 2017 where he recounted the recidivist conduct of the CFMEU and his concern about "ongoing misconduct" despite the imposition of civil penalties, particularly by the holders of entry permits. At [23], his Honour observed, in terms we respectfully endorse, that:

> The contravening conduct has continued unabated to a point where there is an irresistible inference that the CFMEU has determined that its officials will not comply with the requirements of the FW Act with which it disagrees. If this results in civil penalties being imposed they will be paid and treated as a cost of the union pursuing its industrial ends. The union simply regards itself as free to disobey the law.

37 In this case, as we have noted, some evidence was adduced before the primary judge of educative steps taken by the CFMEU, after the events in this case, to provide training to officials who were permit holders about the right to enter workplaces, the limitations thereon and what is improper conduct contrary to s 500. There was in evidence an affidavit made by Mr Lacy in April 2023 of his engagement by the CFMMEU in September 2022 to provide training to CFMMEU Queensland and Northern Territory Branch officials and then to prepare and deliver a report. Each task was completed by mid-September 2022. In the executive summary to the report, Mr Lacy notes that the officials who attended participated "positively in the training" and responded well to instructions "albeit with some reservation about a perceived lack of balance in the statutory regulation of the conduct and activity of the industrial parties on construction sites". In situational exercises, the attendees correctly identified potential contraventions. Mr Lacy expressed the opinion that the attendees "know and understand their rights as permit holders under s 118 when exercising a s 117 right of entry to investigate suspected contraventions and their obligation to not act in an improper manner."

38 No evidence was adduced as to whether this training was in fact subsequently effective. No explanation was given as to why this training was undertaken in September 2022 for Queensland permit holders when it is a necessary condition for the issue of an entry permit that the Fair Work Commission must be satisfied that the official is a fit and proper person by taking into account, inter alia, whether the official has received "appropriate training about the rights and responsibilities of a permit holder": s 513(1)(a).

39 The clear inference which is open, and which we draw, is that the CFMEU defiantly considers that pecuniary penalties are simply a cost of undertaking its industrial activities. The evidence that since the events in this case educative steps have been taken to appraise Queensland officials who are entry permit holders of their rights and responsibilities, balanced against the long history of contraventions by officials of the CFMEU, is not a significant ameliorating factor. The primary consideration in our view is that the CFMEU has an extensive history of failures to comply with the requirements of the FW Act, did not cooperate in the investigation of this matter, did not at an early stage accept that the conduct of Mr Rielly was contrary to the FW Act and is vicariously liable for his steadfast refusals, as

found by the primary judge, to comply with his legal obligations as a permit holder in the exercise of his right of entry to the worksite.

40 In our view the appropriate penalty to impose upon the CFMEU is $60,000.

41 We order as follows:

1. Pursuant to s 546 of the *Fair Work Act 2009*:

   (a) The Construction, Forestry and Maritime Employees Union must pay a pecuniary penalty in the amount of $60,000 to the Commonwealth of Australia;

   (b) Mr Dean Lesley Rielly must pay a pecuniary penalty in the amount of $6,300 to the Commonwealth of Australia.

2. Each pecuniary penalty must be paid within 14 days of the making of these orders.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Halley, Goodman and McElwaine.

Associate:

Dated: 9 May 2024

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (BBQ Case) [2023] FedCFamC2G 668

File number(s):	BRG 167 of 2022
Judgment of:	**JUDGE VASTA**
Date of judgment:	27 July 2023
Catchwords:	**INDUSTRIAL LAW** – penalty hearing – agreed penalties ordered – personal payment order
Legislation:	*Fair Work Act 2009* (Cth): ss 484, 487, 500, 550, 793
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 *CFMMEU v ABCC (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate and Ors* [2015] HCA 46 *Mason v Harrington Corporation Proprietary Limited t/as Pangaea Restaurant & Bar* [2007] FMCA 7
Division:	Division 2 General Federal Law
Number of paragraphs:	68
Date of last submission/s:	14 July 2023
Date of hearing:	In Chambers
Place:	Brisbane
Counsel for the Applicant:	Mr Felman of King's Counsel with Mr Denton
Solicitor for the Applicant:	Ashurst Australia
Counsel for the Respondents:	Ms Doust
Solicitor for the Respondents:	Hall Payne Lawyers

ORDERS

BRG 167 of 2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**FAIR WORK OMBUDSMAN** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	MICHAEL RAVBAR Second Respondent
	ANDREW ROBERT BLAKELEY Third Respondent

ORDER MADE BY: **JUDGE VASTA**

DATE OF ORDER: **27 JULY 2023**

PENAL NOTICE TO THE RESPONDENTS:

- **CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION;**
- **MICHAEL RAVBAR; AND**
- **ANDREW ROBERT BLAKELEY.**

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

THE COURT DECLARES THAT:

1. On 19 August 2021, the second respondent (**Mr Ravbar**) contravened s. 500 of the *Fair Work Act 2009* (Cth) (**FW Act**) when he acted in an improper manner while exercising, or seeking to exercise, rights in accordance with Part 3-4 of the FW Act at the Gabba Site of the Cross River Rail Project (**Project**), located between Main Street and Leopard Street, Woollongabba, by:

   (a) failing to comply with the notice requirement of s. 487 of the FW Act;

   (b) failing to comply with the Project's requirements to complete a visitor induction;

   (c) hosting, or alternatively, participating in, an unauthorised BBQ for the 19 August Workers during ordinary work hours; and

   (d) addressing the 19 August Workers during ordinary work hours without authorisation from the Occupier.

2. On 19 August 2021, the third respondent (**Mr Blakeley**) contravened s. 500 of the FW Act when he acted in an improper manner while exercising, or seeking to exercise, rights in accordance with Part 3-4 of the FW Act at the Gabba Site of the Project, located between Main Street and Leopard Street, Woollongabba, by:

   (a) failing to comply with the notice requirement of s. 487 of the FW Act;

   (b) failing to comply with the Project's requirements to complete a visitor induction;

   (c) directing an unauthorised vehicle and trailer (the BUSSQ vehicle) to enter into a private premises in direct defiance of the wishes of the Occupier;

   (d) making physical contact with a representative of the Occupier who was standing in the path of the BUSSQ vehicle;

   (e) hosting, or alternatively, participating in, an unauthorised BBQ for the 19 August Workers during ordinary work hours;

   (f) addressing the 19 August Workers during ordinary work hours without authorisation from the Occupier; and

   (g) refusing and failing to leave the Project when requested to do so by the Occupier.

3. On 24 August 2021, Mr Ravbar contravened s. 500 of the FW Act when he acted in an improper manner while exercising, or seeking to exercise, rights in accordance with Part 3-4 of the FW Act at the Roma Site of the Project, located at Roma Street, Brisbane City, by:

   (a) failing to comply with the notice requirement of s. 487 of the FW Act;

   (b) failing to comply with the Project's requirements to complete a visitor induction;

   (c) hosting, or alternatively, participating in, an unauthorised BBQ for the 24 August Workers during ordinary work hours;

   (d) addressing the 24 August Workers during ordinary work hours without authorisation from the Occupier; and

   (e) failing to leave the Roma Street Site in the circumstances where he was told by Ms Lauren Mead (on more than one occasion) that he was unauthorised to be on site and to leave.

4. On 24 August 2021, Mr Blakeley contravened s. 500 of the FW Act when he acted in an improper manner while exercising, or seeking to exercise, rights in accordance with Part 3-4 of the FW Act at the Roma Site of the Project, located at Roma Street, Brisbane City, by:

   (a) failing to comply with the notice requirement of s. 487 of the FW Act;

   (b) denying that he was on site pursuant to his right of entry as a permit holder in circumstances where he was so exercising his right of entry;

   (c) failing to comply with the Project's requirements to complete a visitor induction;

   (d) hosting, or alternatively, participating in, an unauthorised BBQ for the 24 August Workers during ordinary work hours;

   (e) addressing the 24 August Workers with a speech during ordinary work hours as opposed to them performing the building work that they were engaged to perform; and

   (f) failing to leave the Roma Street Site in the circumstances where he was told by Mead (on more than one occasion) and told by Mr Gary Lappin that he was unauthorised to be on site and to leave.

5. The first respondent (**CFMMEU**) contravened:

   (a) section 500 of the FW Act on 19 August 2021 by reason of the conduct of Mr Ravbar referred to in declaration 1;

   (b) section 500 of the FW Act on 19 August 2021 by reason of the conduct of Mr Blakeley referred to in declaration 2;

   (c) section 500 of the FW Act on 24 August 2021 by reason of the conduct of Mr Ravbar referred to in declaration 3;

   (d) section 500 of the FW Act on 24 August 2021 by reason of the conduct of Mr Blakeley referred to in declaration 4.

THE COURT ORDERS THAT:

1. The first respondent pay the following pecuniary penalties:

   (a) $51,000 in respect of its contraventions referred to in declaration 5(a);

   (b) $51,000 in respect of its contraventions referred to in declaration 5(b);

   (c) $51,000 in respect of its contravention referred to in declaration 5(c);

   (d) $51,000 in respect of its contravention referred to in declaration 5(d).

2. The second respondent pay the following pecuniary penalties:

   (a) $4,660 in respect of his contravention referred to in declaration 1;

   (b) $4,660 in respect of his contravention referred to in declaration 3.

3. The third respondent pay the following pecuniary penalties:

   (a) $6,000 in respect of his contraventions referred to in declarations 2;

   (b) $6,000 in respect of his contravention referred to in declaration 4.

4. The second respondent pay the penalties required by Order 2 personally in that he not, whether before or after the payment of those penalties:

   (a) seek to have or encourage the first respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part; and

   (b) accept or receive from the first respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part.

5. The pecuniary penalties referred to in Orders 1, 2, and 3 be paid to the Commonwealth of Australia within 90 days.

6. There be no order as to costs.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE VASTA

Introduction

1 On 19 April 2022, the Australian Building and Construction Commissioner ("ABCC") filed an originating application in this Court seeking declarations that the first respondent, Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU"), the second respondent, Michael Ravbar, and the third respondent, Andrew Robert Blakely, had contravened s. 500 of the *Fair Work Act 2009* (Cth) ("FW Act"). The applicant, ABCC, also sought pecuniary penalties against each of the respondents.

2 The matter was the subject of many case management orders made, by consent, in Chambers and has never resulted in an actual court appearance. The Court ordered that the parties file their material and then participate in a court ordered mediation. That mediation did not resolve the matter.

3 On 21 October 2022, I ordered that a trial upon liability alone be set for four days duration commencing on 2 May 2023.

4 On 25 January 2023, I ordered that the name of the applicant be changed to the Fair Work Ombudsman ("FWO") after legislation abolished the office of the ABCC.

5 On 27 April 2023, I made consent orders in Chambers vacating the hearing, allowing for amended pleadings to be filed and for outlines of submissions on the question of penalty to also be filed. I ordered that the penalty hearing was to occur not before 11 AM on 7 August 2023.

6 On 16 June 2023, I made consent orders in Chambers, for the penalty hearing to be vacated and for the FWO to file a further amended statement of claim by 23 June 2023. I also ordered that the parties file an agreed statement of facts as well as submissions going to the topics of agreed penalties and to a specific claim of the FWO. The parties asked for the matter to be determined "on the papers".

7 I reserved judgement on 17 July 2023 in accordance with those orders.

The factual matrix

8 In late 2019, major construction works commenced on the Cross River Rail Project, which is an infrastructure project centred in Brisbane. The project will construct about 10 km of new rail line with approximately 6 km through new tunnels. Relevantly, a new railway station is to be constructed at Woolloongabba as well as a major upgrade to the current Roma Street railway station.

9 A number of companies under the banner of the CIMIC Group were the contractor for the project and, as such, were "the Occupier" of the worksites for the project, which included the worksites for the railway stations previously mentioned.

10 As at August 2021, those worksites were known as "the Gabba worksite" and "the Roma Street worksite". The hours of work at those worksites, at that particular time, varied, however it is common ground that work would have commenced at both sites by 6:30 AM on work days.

11 Workers at those sites included members of the first respondent as well as persons who are eligible to be members of the first respondent.

12 As is usual for such worksites, any visitors to those worksites were required to complete the visitors' safety induction and to sign in to the site.

19 August 2021 - Gabba worksite

13 At about 5:45 AM on 19 August 2021, a vehicle with a trailer from the Building Unions Superannuation Scheme Queensland ("BUSSQ") arrived at the gate of the Gabba worksite. A traffic controller at the worksite approached the vehicle and an occupant of the vehicle told the traffic controller that they were at the worksite for a barbecue ("BBQ").

14 The site supervisor then came to the gate at about the same time that the second respondent and the third respondent arrived. The third respondent directed the BUSSQ vehicle to come onto the site but the supervisor placed himself between the vehicle and the boom gates in an attempt to block the vehicle from entering the site.

15 The third respondent then made physical contact with the supervisor during which the supervisor moved out of the path of the BUSSQ vehicle. The third respondent then continued directing the vehicle through the boom gates and down the site haul road whilst the second respondent followed the vehicle on foot.

16 Neither the second respondent, nor the third respondent, provided any notice to the Occupier that they would be attending the Gabba worksite; and neither the second respondent, nor the third respondent, completed the visitors' induction nor did they sign in.

17 At about 6 AM, the second respondent and the third respondent supervised the persons who had entered the site in the BUSSQ vehicle as they began to set up a BBQ on the site.

18 At this time, the industrial relations manager for the Occupier approached the third respondent and said words to the effect that "your access is unauthorised and you need to leave". The third respondent did not respond.

19 The Occupier's safety lead then approached the third respondent and told him that he was not authorised to be on site and that he had not signed in as a visitor. The manager again approached the third respondent and said "this is an unauthorised access to site and you need to pack up and leave site".

20 Suffice it to say that the Occupier had not organised, or authorised, a BBQ to take place that morning and did not have any advance knowledge that anyone would attempt to organise a BBQ that day.

21 At about 6:20 AM, there were 50 workers, who had attended the worksite to perform building work that day, who had gathered around the BBQ. At about 6:35 AM, the second respondent addressed the workers for about 10 minutes speaking about the following topics:-

- Covid-19
- how work had stopped at another worksite on the project because there weren't sufficient wash facilities or amenities
- that he, personally, had met with the State's Chief Health Officer
- that the position of the first respondent was that vaccines should not be mandatory for construction sites
- that the occupier had to repay millions in wrongly claimed JobKeeper payments

22 Following this speech, the BUSSQ representatives addressed the workers. After this the third respondent addressed the workers about safety on site and work conditions.

23 At 7:05 AM, the workers posed for a photo with the Eureka flag as well as a BLF and a CFMEU flag. The workers then began to eat the food cooked at the BBQ.

24 At about 7:30 AM, the second respondent and the third respondent left the project. About five minutes later, the workers who had attended the BBQ walked back to the crib rooms on site and then started work for the day.

Consequences

25 The conduct of the second respondent and the third respondent meant that work was delayed from the 6:30 AM pre-start by at least one hour. This delayed all other work on the worksite for at least one hour and it meant that the work that was scheduled to be completed in the morning was not able to be completed as planned.

26 Both the second respondent and the third respondent entered the Gabba worksite for the purpose of holding discussions with workers who wished to participate in those discussions as per s. 484 of the FW Act. Both the second respondent and the third respondent were exercising rights in accordance with Part 3-4 of the FW Act.

27 The second respondent acted in an improper manner, on that day, in that he:-

- failed to comply with the notice requirement in s. 487 of the FW Act
- failed to comply with the Gabba worksite's requirements to complete a visitor induction
- hosted or participated in an unauthorised BBQ for the workers during ordinary work hours
- addressed the workers during ordinary work hours without authorisation from the Occupier

28 The third respondent acted in an improper manner, on that day, in that he:-

- failed to comply with the notice requirement in s. 487 of the FW act
- failed to comply with the Gabba worksites requirements to complete a visitor induction
- directed an unauthorised vehicle and trailer to enter into a private premises in direct defiance of the wishes of the occupier
- made physical contact with the representative of the Occupier who was standing in the path of the BUSSQ vehicle

- hosted or participated in an unauthorised BBQ for the workers during ordinary work hours
- addressed the workers during ordinary work hours without authorisation from the Occupier
- refused to leave the Gabba worksite when requested to do so by the Occupier

29 The actions of the second respondent amount to a contravention of s. 500 of the FW Act. The actions of the third respondent amount to a contravention of s. 500 of the FW Act.

24 August 2021 - Roma Street worksite

30 At about 6 AM on 24 August 2021, the same BUSSQ vehicle and trailer entered the Roma Street worksite without authorisation from the Occupier. At some time before 6:20 AM, both the second respondent and the third respondent entered the Roma Street worksite.

31 Neither the second respondent, nor the third respondent, had provided any notice to the Occupier that they would be attending the Roma Street site that day. Neither the second respondent, nor the third respondent, completed the visitors' induction nor did they sign in to the site.

32 At about 6:17 AM, the third respondent spoke to various workers next to a BBQ that had been set up by occupants of the BUSSQ vehicle. About this time, the industrial relations manager for the occupier approached the third respondent and asked whether he was at the worksite "on a permit". The third respondent answered "no, I'm just here for the BBQ".

33 The manager again asked "so you're not here on a right of entry?" to which the third respondent answered "no".

34 The Occupier had not organised, or authorised, a BBQ to take place at the Roma Street worksite on this day.

35 The manager told the second respondent and the third respondent, on more than one occasion, that they were unauthorised to be on site and that they should leave the site. Neither the second respondent, nor the third respondent, did so.

36 Another official of the occupier also told the third respondent that he was unauthorised to be on site and asked him, more than once, to leave the site. The third respondent answered that

he would leave the site by 6:30 AM as he "just wanted to talk "super" with the boys". That official replied "I can live with that".

37 At about 6:44 AM, about 25 workers were crowded around the BBQ area. The second respondent addressed the workers about Covid-19 and how the occupier didn't care about safety or doing the right thing by workers. The third respondent then addressed the workers. The BUSSQ representatives then addressed the workers.

38 The workers then began eating from the BBQ at about 7:15 AM. This continued until 7:30 AM. The second respondent and the third respondent then left the Roma Street worksite, and the workers then began work for the day.

Consequences

39 The conduct of the second respondent and the third respondent delayed work on the Roma Street worksite by at least one hour and did not allow for work to be completed in the morning as planned.

40 Both the second respondent and third respondent were exercising rights in accordance with Part 3-4 of the FW Act.

41 The second respondent contravened s. 500 of the FW Act in that he:-

- failed to comply with the notice requirement in s. 487 of the FW Act
- failed to comply with the Roma Street worksite's requirements to complete a visitor induction
- hosted or participated in an unauthorised BBQ for the workers during ordinary work hours
- addressed the workers during ordinary work hours without authorisation from the Occupier
- failed to leave the Roma Street worksite when asked to do so

42 The third respondent contravened s. 500 of the FW Act in that he:-

- failed to comply with the notice requirement of s. 487 of the FW Act
- denied that he was on-site pursuant to his right of entry as a permit holder in circumstances where he was exercising his right of entry
- fail to comply with the worksite's requirement to complete a visitor induction

- hosted or participated in an unauthorised BBQ for the workers during ordinary work hours
- addressed the workers with a speech during ordinary work hours as opposed to them performing the building work that they were engaged to perform
- failed to leave the Roma Street worksite when asked to do so

Liability of the first respondent

43 Both the second respondent and the third respondent are officers of the first respondent. Pursuant to s. 793 of the FW Act the actions and conduct of both the second respondent and the third respondent were also the actions and conduct of the first respondent. It also means that the first respondent possessed the same state of mind as the second respondent and the third respondent in relation to their actions and conduct.

44 Pursuant to s. 550 of the FW Act, the first respondent was knowingly concerned in the conduct of the second respondent and the third respondent. Therefore, the first respondent was "involved in" the contraventions of the FW Act committed by the second respondent and the third respondent.

45 This means that the first respondent contravened s. 500 of the FW Act on four occasions by reason of the actions of the second respondent and the third respondent on 19 August 2021 and the actions of the second respondent and the third respondent on 24 August 2021.

Pecuniary penalties

46 The law in relation to assessment of pecuniary penalties has really been laid down quite comprehensively. The High Court, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3, said, at paragraph 116 of that judgment:

> As has been observed, the principal object of an order that a person pay a pecuniary penalty under s 546 is deterrence: specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners. According to orthodox sentencing conceptions as they apply to the imposition of civil pecuniary penalties, specific deterrence inheres in the sting or burden which the penalty imposes on the contravener. Other things being equal, it is assumed that the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or burden that a penalty imposes on a contravener, the less likely it will be that

> the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

47 The High Court reaffirmed that principle very recently in the matter of *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13. The High Court said, at paragraph 46:

> [46] It is important to recall that an "appropriate" penalty is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case. …
>
> [47] The penalty that is appropriate to protect the public interest by deterring future contraventions of the Act may also be moderated by taking into account other factors … where those responsible for a contravention of the Act express genuine remorse for the contravention, it might be considered appropriate to impose only a moderate penalty because no more would be necessary to incentivise the contravenors to remain mindful of their remorse and their public expressions of that remorse to the court. Similarly, where the occasion in which a contravention occurred is unlikely to arise in the future because of changes in the membership of an industrial organisation, a modest penalty may be appropriate having regard to the reduced risk of future contraventions.
>
> [48] It is not necessary to multiply examples further. It is sufficient to say that a court empowered by section 546 to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.

48 In *Mason v Harrington Corporation Proprietary Limited t/as Pangaea Restaurant & Bar* [2007] FMCA 7, which is known as the *Pangaea case*, the Court went through, in effect, a number of factors the Court should be mindful of when imposing pecuniary penalties. One must be careful, though, in looking at the *Pangaea case* (Supra), that one does not simply look at those matters as some form of checklist to see whether or not the facts of the case with the particular factors either aggravate or mitigate the penalty. As such, the list compiled in *Pangaea* (Supra) is extremely useful, but it should not be a formula used by the Court to slavishly come up with some sort of almost mathematical guide for the imposition of penalties.

49 Notwithstanding what has been said in Pattinson, the principles in *Pangea* are still apposite when looking at the circumstances of the contravention as well as the circumstances of the contavenor.

Agreed penalties

50 My task, in assessing pecuniary penalties, has been made very easy because the parties have come to an agreement as to what the penalties should be. In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate and Ors* [2015] HCA 46 (*The Agreed Penalties Case)*, the High Court said at paragraph 57:-

> More generally, it is entirely consistent with the nature of civil proceedings for a court to make orders by consent and to approve a compromise of proceedings on terms proposed by the parties, provided the court is persuaded that what is proposed is appropriate.

51 At paragraph 58, the High Court said:-

> Possibly, there are exceptions to the general rule. There is, however, no reason in principle or practice why civil penalty proceedings should be treated as an exception. Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and, for the reasons identified in *Allied Mills*, highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty. To do so is no different in principle or practice from approving an infant's compromise, a custody or property compromise, a group proceeding settlement or a scheme of arrangement.

52 It seems to me that, unless I am of the view that there is something unacceptable about the penalties arrived at by the parties, I should accept that the penalties are appropriate.

53 The maximum penalty for a contravention of s. 500 of the FW act is $13,320 for an individual and $66,600 for a body corporate. This means that the maximum penalty that the second respondent is facing is $26,640 and the maximum penalty that the third respondent is facing is also $26,640. The maximum penalty that the first respondent is facing is one of $266,400.

54 The parties have agreed that the first respondent should pay a penalty of $51,000 for each contravention which is a total of $204,000. The parties agree that the second respondent should pay a penalty of $4,660 for each contravention which is a total of $9,320. The parties agree that the third respondent should pay a penalty of $6,000 for each contravention which is a total of $12,000.

55 These totals are different to the totals that I may have imposed but I cannot say that the penalties are inappropriate or unacceptable.

56 I note that there has been a great deal of cooperation between the three respondents and the FWO. The conduct of the matter has proceeded by way of consent orders from the beginning. There has not been any wastage of court resources in managing the matter through to conclusion. The first time that the matter will be mentioned in court is when I deliver these orders.

57 I also note that the second respondent and the third respondent no longer have entry permits.

58 But most impressively, I note that the first respondent enlisted the services of Mr Brian Lacy AO to conduct training for permit holding officials of the first respondent on, specifically, s. 500 of the FW Act. Such training occurred on 13 September 2022. It is actions such as these, from the first respondent, that are concrete demonstrations of remorse and contrition.

59 Having noted those matters, I am of the view that the agreed penalties are acceptable and appropriate.

Personal payment order

60 The FWO has asked that I impose a personal payment order upon the second respondent. The second respondent resists such an order.

61 The second respondent does have prior contraventions of s. 500 of the FW Act. The second respondent is the secretary of the Queensland and Northern Territory Divisional Branch of the Construction and General Division of the first respondent. He is the public voice of the first respondent in Queensland.

62 However, the second respondent no longer has an entry permit. Objectively, his behaviour was not as serious as that of the third respondent. It may be that the FWO is not seeking a personal payment order against the third respondent, but that has little relevance. The principles in criminal cases where offenders may have "a justifiable sense of grievance" at lower, or different, penalties given to co-offenders, does not apply to a civil penalty regime where, as the High Court has made clear, the only objective is that of deterrence.

63 There is no doubt that a personal payment order will hit the second respondent in a much harder way than if such an order is not made. The question really is whether such an order is necessary as a deterrent, both specifically to the second respondent (given his position in the ranks of the first respondent) and more generally to the senior officials of the first respondent or any other industrial body who blatantly contravenes the FW Act.

64 In *CFMMEU v ABCC (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97 at paragraph 40, the Court said:-

> The Union acts through its officials, of whom Mr Myles was, and is, one. The penalty against the individual must be a burden or have a sting to be a deterrent. The history of contravening by the Union, all undertaken through its officials, reflects a willingness to contravene the Act and to pay the penalties as a cost of its approach to industrial relations. Mr Myles has a history of significant contravention. A personal payment order of the kind to which we will come will bring home to him, and others in his position, that he, and they, cannot act in contravention of the Act knowing that Union funds will always bale him, or them, out.

65 In my view, the position of the second respondent is one where he should have been setting an example of adherence and compliance with the law. The actions of the second respondent were bad enough on 19 August 2021 and, there is little doubt that, he would have known that he had just contravened s. 500 of the FW Act.

66 To then blatantly contravene in the exact same manner some five days later, illustrates why the deterrent aspect of the imposition of the pecuniary penalty must contain the necessary sting or else it will not be an effective deterrent at all.

67 For those reasons, I will impose a personal payment order upon the second respondent.

68 I will make all other orders that have been agreed to by the parties.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Vasta.

Associate:

Dated: 27 July 2023

FEDERAL COURT OF AUSTRALIA

CPB Contractors Pty Ltd v Construction, Forestry and Maritime Employees Union [2024] FCA 459

File number:	QUD 189 of 2024
Judgment of:	**RANGIAH J**
Date of judgment:	19 April 2024
Date of publication of reasons:	2 May 2024
Catchwords:	**INDUSTRIAL LAW** – application for interlocutory injunctions – where applicant alleges interference with protected action ballots – whether prima facie case demonstrated – meaning of hinder or obstruct – whether balance of convenience favours granting interlocutory injunctions – where text message could not be regarded as a direction to employees – application dismissed **EVIDENCE –** whether evidence admissible under s 75 of the *Evidence Act 1995* (Cth) – where applicant's affidavits contain hearsay statements of unnamed persons in an identified group – whether sufficient evidence of sources adduced – where relevant factor is the breadth of the identified group – where evidence was prejudicial to respondents – evidence ruled inadmissible
Legislation:	*Evidence Act 1995* (Cth) ss 59(1), 75 and 135 *Fair Work Act 2009* (Cth) ss 444(1A), 459(1), 462 and 462(1) *Rules of the Supreme Court* O 41 r 3
Cases cited:	*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 *BGC POS Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2019) 285 IR 43; [2019] FCA 74 *Communications, Electrical, Electronic, Energy, Information, Postal Plumbing and Allied Services Union Of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333; [2009] FCA 726 *Darlaston v Parker* (2010) 189 FCR 1 *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2

	Qd R 158 *Di Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* (2011) 200 FCR 253 *DP World Melbourne Limited v Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU)* [2019] FCA 1209 *DP World Melbourne Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2019] FCA 1331 *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521 *Levis v McDonald* (1997) 75 FCR 36 *Liu v Age Co Ltd* [2010] NSWSC 1176 *New South Wales Crime Commission v Vu* [2009] NSWCA 349 *Prior v Wood* [2017] FCA 193 *Proctor Gamble Australia Pty Ltd v Medical Research Pty Ltd* [2001] NSWSC 183 *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* (1995) 58 FCR 125; (1995) 137 ALR 404 *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 *Wily v Terra Cresta Business Solutions Pty Ltd* [2006] NSWSC 949
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	75
Date of interlocutory hearing:	19 April 2024
Counsel for the Applicant:	Mr CJ Murdoch KC with Mr J Moxon
Solicitor for the Applicant:	Mills Oakley Lawyers
Counsel for the First, Third to Sixth Respondents:	Mr WL Friend KC with Mr C Massy
Solicitor for the First, Third to Sixth Respondents:	Hall Payne Lawyers
Counsel for the Second	The Second Respondent did not appear

Respondent:

ORDERS

QUD 189 of 2024

BETWEEN:	**CPB CONTRACTORS PTY LTD** Applicant
AND:	**CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION** First Respondent
	DEMOCRATIC OUTCOMES PTY LTD T/A CIVS Second Respondent
	DEAN MATTHUS (and others named in the Schedule) Third Respondent

ORDER MADE BY: **RANGIAH J**

DATE OF ORDER: **19 APRIL 2024**

THE COURT ORDERS THAT:

1. The applicant's application for the interlocutory orders set out in paragraphs 6 and 7 or the Originating Application filed on 12 April 2024 be dismissed.
2. Order 1 of the orders made by Justice Collier on 12 April 2024 has ceased to have effect.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH J:

1 The applicant (**CPB**) is the principal contractor for the Cross River Rail Project in Brisbane. The first respondent (the **Union**) and CPB are currently engaged in negotiations for new enterprise agreements.

2 On 27 March and 3 April 2024, the Fair Work Commission (the **Commission**) made "protected action ballot orders" authorising the Union to hold ballots of CPB's employees who are members of the Union about whether to take industrial action, and in what form.

3 On 12 April 2024, CPB commenced proceedings in this Court alleging that Union delegates and organisers contravened s 462 of the *Fair Work Act 2009* (Cth) (**FWA**) by engaging in intimidatory conduct, hindering or obstructing the ballots, and compromising their secrecy. The relief sought by CPB includes an injunction restraining the respondents from taking further steps in, or completing, the protected action ballots or organising any industrial action in reliance upon those ballots.

4 Also on 12 April 2024, the Court granted an urgent interim injunction until the hearing of CPB's application for interlocutory injunctions.

5 On 19 April 2024, I heard the application for interlocutory injunctions and declined to grant that relief. I indicated that my reasons would be provided in due course. These are my reasons.

Background

6 There are two enterprise agreements covering CPB's employees working on the Cross River Rail Project, both of which have nominally expired. There are ongoing negotiations between CPB and the Union for new enterprise agreements.

7 Following the making of protected action ballot orders by the Commission under s 443(1) of the FWA, voting by CPB's employees who were members of the Union took place. The voting period ended on 12 April 2024.

8 On 12 April 2024, CPB commenced its proceeding in this Court. The second respondent is a "protected action ballot agent" appointed by the Commission under s 444(1A) of the FWA.

The third to sixth respondents are Union organisers or delegates. I will refer to the respondents other than the second respondent as "the **Union Parties**".

9 The basis of CPB's proceeding is an allegation that the Union Parties contravened s 462 of the FWA, which provides, relevantly:

> **462 Interferences etc. with protected action ballot**
>
> *General*
>
> (1) A person (the ***first person***) must not do any of the following in relation to a protected action ballot:
>
> (a) hinder or obstruct the holding of the ballot;
>
> (b) use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person;
>
> …
>
> (o) request, require or induce another person:
>
> (i) to show a ballot paper to the first person; or
>
> …
>
> while the vote is being made, or after the vote has been made, on the ballot paper;
>
> …

10 CPB also sought urgent interim injunctions, and, on 12 April 2024, Collier J made orders that, until the hearing of the applications for interlocutory injunctions, the Union Parties be restrained from:

> …taking further steps in or completing the protection action ballots in protected action ballot orders PR772775 and PR772781 made respectively by the Fair Work Commission in matters B2024/260 and B2024/261 (**PABO Orders**), or organising any industrial action in reliance on those ballots.

11 The matter was made returnable on 19 April 2024, when CPB sought interlocutory injunctions in similar terms until the final hearing of the proceedings.

The evidence

12 In support of its application for interlocutory injunctions, CPB relied upon affidavits of Malcolm Davis (a solicitor) and Jessica Allam and Alicia Wood (employees of a company associated with CPB). The Union Parties objected to certain passages in and annexures to those affidavits. I upheld the objections and ruled that those passages and annexures were inadmissible. These are my reasons for so ruling.

13 In respect of Mr Davis' affidavit, the Union Parties objected to paras [43] and [44] and annexures "MD-5" and "MD-6". Mr Davis deposed that two of CPB's employees who are members of the Union had provided statements concerning the conduct of Union delegates and organisers but had asked that their identities not be revealed. At paras [43] and [44], Mr Davis summarised the contents of the employees' statements and, at annexures "MD-5" and "MD-6", annexed the statements. The names of the employees and any other identifying information were redacted from the statements. The statement at annexure "MD-5" asserted that two Union delegates had engaged in conduct which the employee found intimidating and made them uncomfortable, including attempting to look over the employee's shoulder to see which way they were voting and asking if they were going to be smart about their choices. The statement at annexure "MD-6" asserted that Union organisers and delegates told the employees to get their phones out and tick all the boxes together (to vote yes), and intimidated and coerced employees and tried to influence how they voted.

14 In respect of Ms Allam's affidavit, the Union Parties objected to paras [5] and [11] and annexures "JA1" and "JA2". At para [5], Ms Allam deposed that a site superintendent told her he had been approached by two employees who said they had been subjected to harassment in relation to casting their votes. At para [11], Ms Allam annexed the employees' statements, which she said had been, "redacted to protect their identity at this time". The statement at annexure "JA1" indicated that during a meeting, a Union organiser had asked the employees to get their phones out and vote "yes", and that the maker of the statement felt pressured into voting "yes". The statement at annexure "JA2" also asserted that a Union organiser or delegate asked the employees to pull their phones out so they could vote "yes".

15 Ms Wood provided two affidavits. The Union Parties objected to paras [8](b), [9], [16], and annexures "AW1", "AW2" and "AW3" of Ms Wood's first affidavit. At para [8](b), Ms Wood deposed that a site manager told her he understood that the reason for the Union delegates arranging a meeting was to ensure that all the voters voted together. Ms Wood deposed at para [9] that the site manager later said that some of the voters had told him they felt bullied about the conduct of the vote and wanted to make a statement. Three employees subsequently provided statements. At para [16], Ms Wood deposed that she had typed up the statements because the employees did not, "wish their statement to be provided in evidence in its original form for fear that their handwriting may be recognised".

16 In the statement at annexure "AW1", an employee asserted that they were instructed by Union delegates to "do the ballot together" (as the delegates stood around watching) and the employee felt under pressure to do so and was made to feel uncomfortable by the delegates' conduct. The employee also asserted that the Union delegates said that the ballots would mean nothing and that they would be doing a "hands up vote" at the Union office. In the statement at annexure "AW2", an employee said that they were "coerced into another room" and instructed that they should all vote "yes", and that the employee felt uncomfortable about being coerced to vote in that way. In the statement at annexure "AW3", an employee asserted they felt pressured into voting "yes", and was told that they should have voted with the Union and was questioned about their vote.

17 The Union objected to paras [3], [8], [9] and [10] and annexure "AW4" of the second affidavit of Ms Wood. Ms Wood deposed at para [3] that the third of the employees referred to in her previous affidavit said they were only happy for their statement to be used if their name and personal details were redacted; and she understood that the employee was afraid that their name and personal details would be disclosed to the Union. At para [4], she said that the employee was willing to provide the statement based on her assurance that the details would be kept confidential. Ms Wood deposed at para [8] that the second and third employees told her that they were afraid that Union delegates would be able to find out which employees had provided the statements. She said at para [9] that the third employee said that the Union delegates had told a number of employees that they would find out who submitted the redacted statements that had been filed in the Federal Court. Ms Wood deposed at [10], that the third employee said he was afraid that the Union would get a copy of the handwritten statements and post them on their Facebook page and was concerned that they would be harassed and intimidated if they were identified.

18 Ms Wood also annexed at "AW4" a, "work health and safety Psychosocial Hazard Risk Assessment", prepared by a CPB employee. That document was based upon the statements of the unnamed employees of being intimidated and threatened and made to feel uncomfortable.

19 Section 59(1) of the *Evidence Act 1995* (Cth) (the **Evidence Act**) provides:

> **59 The hearsay rule—exclusion of hearsay evidence**
>
> (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

20 CPB accepted that the evidence of Mr Davis, Ms Allam and Ms Wood objected to by the Union Parties was hearsay and inadmissible under s 59(1) of the Evidence Act. However, it sought to rely on s 75 of the Evidence Act, which provides:

> In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

21 CPB argued that it was apparent from the affidavits that the sources of the information were persons who were employees of CPB and members of the Union who worked on the Cross River Rail Project, and that this was adequate to satisfy the requirement of s 75 of the Evidence Act to adduce evidence of the sources.

22 CPB relied upon the judgment of McCallum J (as her Honour was then) in *Liu v Age Co Ltd* [2010] NSWSC 1176 (***Liu***) at [45]. It is convenient to also set out the passages at [44] and [46], as they give context to [45]:

> 44 The failure to adduce evidence of the source of the hearsay evidence was not due to any exigencies of time in the present case. It was deliberate, for the perfectly acceptable reason that to identify the source would defeat any resistance to Ms Liu's application. Nonetheless, I think the simple result is that the evidence is inadmissible.
>
> 45 I note that it would have been open to the defendants to seek to adduce the evidence in admissible form by tendering the relevant correspondence with the sources, masking the names of the sources and any other identifying information. I do not mean to rule pre-emptively that the evidence would be admissible in that form, but it is a course that could have been pursued.
>
> 46 In any event, I am satisfied that the evidence of Mr Bartlett objected to by Mr McClintock does not fall within the exception under s 75 and, accordingly, that the evidence must be rejected.

23 CPB submitted that McCallum J at [45] contemplated that a source might be identified for the purpose of s 75 without their name being given, and that such redaction is apt in this case in circumstances where the employees fear repercussions from the Union.

24 CPB argued that the evidence of Mr Davis, Ms Allam and Ms Wood is specific about dates, the Union delegates involved and what conduct occurred. It submitted that since the Court would not be asked to make findings on contested evidence, but only that a prima facie case existed, the Union ought to be able to respond satisfactorily to that evidence. It submitted that no prejudice is likely to result from redaction of the employees' names.

25 The Union Parties submitted that second-hand accounts from anonymous sources do not satisfy the requirements of s 75 of the Evidence Act. They submitted that *Liu* is not authority for the proposition that attaching correspondence with the names of the relevant persons redacted would have been sufficient. They also observed that her Honour indicated that at [47] that even if the evidence were admissible, it would have been excluded pursuant to the discretion under s 135 on the basis that its probative value was extremely low and outweighed by the danger that it might be unfairly prejudicial.

26 The Union Parties pointed to a number of cases in support of the proposition that the source of the information must be identified, or be identifiable, for the operation of s 75 of the Evidence Act.

27 The Union Parties submitted that even if the evidence they objected to were ruled to be admissible under s 75 of the Evidence Act, such evidence should be excluded under s 135 of that Act.

28 The purpose of s 75 of the Evidence Act was explained by Palmer J in *Wily v Terra Cresta Business Solutions Pty Ltd* [2006] NSWSC 949 (***Wily v Terra***), as follows at [11]:

> The purpose of s 75 of the Evidence Act is to facilitate the conduct of interlocutory proceedings in circumstances where it is often difficult, at short notice, to adduce evidence in direct and admissible form. For that reason, evidence on information and belief is accepted. However, the requirement of the section that the source of the information be revealed goes some way to assisting the Court in assessing the reliability of that evidence. Without any indication of the source of the evidence proffered on information and belief, the Court is unable to assess its weight nor can the opponent test the evidence or make any sensible submissions as to its weight.
>
> (Cited with approval in *New South Wales Crime Commission v Vu* [2009] NSWCA 349 at [45].)

29 In *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158 (***Ahern***), the Full Court of the Queensland Supreme Court was concerned with O 41 r 3 of the *Rules of the Supreme Court*, which provided that in an interlocutory application, "statements as to the belief of the deponent, giving the sources of his information and the grounds of his belief, may be admitted". In that case, Thomas J (Ryan and de Jersey JJ agreeing) explained at 163:

> The object of the disclosure is to provide some specified source which can, if necessary, be followed up by the adversary or the court.

30 Section 75 of the Evidence Act requires that the party adducing the evidence also adduce, "evidence of its source". While CPB submits it is sufficient to describe the sources as persons who are employees of CPB and Union members who are eligible to vote in respect of the

protected action ballot orders, the Union Parties submit that there is a strong line of authority in this Court that what is required is identification, ordinarily by naming, of the source.

31 In *Registrar of Aboriginal Corporations v Murnkurni Women's Aboriginal Corporation* (1995) 137 ALR 404, R D Nicholson J held at 414:

> The absence of a particular identification of a person acting on behalf of the Australian Federal Police and giving the knowledge means the source of the knowledge has not been identified: the source has only been identified institutionally and that is an inadequate identification of source.
>
> (The report of this case at (1995) 58 FCR 125 omits this passage.)

32 In *Levis v McDonald* (1997) 75 FCR 36 (***Levis***), Lindgren J held at 44 that in the absence of identification of the informant, there was no evidence of the source of the representation, and the terms of s 75 were not satisfied. In that case, it was conceded that one paragraph of an affidavit was not admissible because there was no evidence as to the identity of the maker of the statement, but his Honour also ruled that paragraphs where the deponent had merely described the sources as his "customers" without naming the customers were inadmissible.

33 In *Di Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* (2011) 200 FCR 253, certain statements contained in a transcript of an examination before a court were objected to as inadmissible hearsay, such as a statement by an unidentified person from the Shareholders' Association. Justice Stone held that such evidence was inadmissible, holding at [40]:

> Section 75 provides that there be evidence of the source of the otherwise hearsay evidence. This requires that the person who made the representation be identified.

34 In *Prior v Wood* [2017] FCA 193, Dowsett J also held at [77] that s 75 was not engaged where the source had not been identified.

35 In other jurisdictions, rules allowing the admission of hearsay statements in interlocutory applications where the deponent discloses their sources of their information and their grounds of belief have been considered in a number of cases.

36 In *Proctor Gamble Australia Pty Ltd v Medical Research Pty Ltd* [2001] NSWSC 183, a lawyer's affidavit made a number of assertions (such as, that no relevant documents in certain categories had been located despite extensive searches having been conducted), based on information provided by seven named employees. The lawyer did not distinguish between what information had been obtained from which employee. Justice Hunter held at [55]:

> I think the requirements of s 75 have been satisfied, notwithstanding the failure of

> [the lawyer], in respect of each of the hearsay statements in paragraph 4 of his January affidavit, to particularise who, among the persons referred in paragraph 3 of that affidavit, was the source of his instructions. I think it is sufficient compliance with the section to identify the source of the hearsay statements in the compendious way [the lawyer] has expressed himself in paragraph 3 and paragraph 4 of his affidavit.

37 In *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521, Walsh J stated at 558–559:

> I am of opinion that a further submission that a great deal of the hearsay evidence upon which the respondent relied was not admissible in accordance with O.39, r.3, of the Rules of this Court or at all should not be accepted. Some of this evidence would have had greater weight if the "sources and grounds" of the deponent's information and belief had been stated more specifically but, in my opinion, the defects in the form of the evidence did not render it inadmissible.

38 In *Ahern*, Thomas J observed at 162 that Walsh J's expression, "more specifically", suggested that some degree of disclosure of the source existed, but that greater specificity would have been desirable. His Honour continued:

> This introduces a question of degree, and it is impossible to lay down any rule which will determine what is a sufficient disclosure of sources and grounds to overcome the hurdle of admissibility and enter the area where weight is assessed. However, I find nothing in Walsh J.'s remarks which gives a general discretion to a court to admit evidence which would be otherwise inadmissible.

39 His Honour continued at 164:

> If an affidavit does not comply with the rule, it is not right to say that a further power exists in the court to excuse the non-compliance and to admit evidence which it would not on any direct application of the law be permitted to receive. I do not think that non-compliance with the enabling rule (O.41 r.3) creates a power to widen the ambit of the exception.

40 Justice Thomas observed at 163 that there were two requirements of O 41 r 3: first, that the source material itself must be admissible; and, second, that the source be identified.

41 Justice Thomas concluded at 167:

> In circumstances of great urgency a court may accept a general statement of sources as sufficient compliance with the rule, although this will more readily happen in the case of an interim rather than an interlocutory injunction. The question as to what is a sufficient disclosure of sources must be decided according to the exigencies of each particular case, and the court's discretion is not to be fettered. In the present case there were no apparent circumstances of urgency justifying the absence of disclosure of sources, and the bulk of the material may fairly be described as oppressive and embarrassing.

42 In this passage, Thomas J's reference to, "the court's discretion", was to evaluation of whether the disclosure of the source is sufficient to make the evidence admissible. The passage does not suggest there is any general discretion to admit evidence where there is no disclosure or insufficient disclosure of the source, his Honour having specifically ruled at 164 against such a proposition.

43 In *New South Wales Crime Commission v Vu* [2009] NSWCA 349 (***Vu***), Spiegelman CJ (Allsop P and Hodgson JA agreeing) observed at [47]:

> There is authority for the proposition that, where hearsay evidence is admissible, it is not necessary to name an informant with respect to every source of information. (See *Hardie Rubber Co Pty Ltd v General Tyre & Rubber Co* (1971) 129 CLR 521 at 536; *Proctor Gamble Australia Pty Ltd v Medical Research Pty Ltd* [2001] NSWSC 183 at [54]-[56].)

44 The Chief Justice at [48] then quoted the passage set out above from the judgment of Thomas J in *Ahern* at 167 with approval.

45 In *DP World Melbourne Ltd v Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU)* [2019] FCA 1209, in a case involving an application for interim relief, Snaden J held at [27], that the description of the source as being an employee of the applicant was sufficient for the purposes of s 75 of the Evidence Act in the circumstances of urgency involved in that case. In the present case, the Union Parties submitted that his Honour's view was erroneous. However, Snaden J's approach was consistent the view expressed by Thomas J in *Ahern* at 167 that in circumstances of urgency, a court may accept a general statement of the source of information as sufficient compliance. His Honour granted interim orders restraining the respondent from organising industrial action.

46 In *DP World Melbourne Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2019] FCA 1331, when the matter returned for consideration of whether the interim injunction should be discharged, Snaden J again ruled that the evidence was admissible under s 75 of the Evidence Act. His Honour held at [25]:

> Evidence that attributes a prior representation to an unnamed member of an identified group is, in my view, sufficient to qualify as evidence of the source of that representation.

47 CPB relied upon this passage to submit that it was sufficient that the affidavits revealed the unnamed employees to be members of an identified group. However, the opinion expressed in such absolute terms by Snaden J as to what amounts to sufficient evidence of the source for s 75 of the Evidence Act does not, with respect, seem to be supported by earlier decisions

of intermediate appellate courts. As was held in *Ahern* (approved in *Vu*), the sufficiency of the disclosure depends on the exigencies of each particular case and is a matter for a court's discretion. Where the source of the information is attributed to an unnamed member of an identified group, a relevant factor must be the breadth of the identified group, bearing in mind that an object of disclosure is to allow the opposing party to test the evidence and make sensible submissions as to its weight. It could not be thought, for example, that it would be sufficient to describe an unnamed source as a member of a group identified as consisting of residents of Queensland. However, it can be accepted that s 75 does not require that the person who is the source of the information be named in every case, and that a description of an unnamed person as a member of an identified group *may* suffice depending on the exigencies of the case.

48 CPB contended that it had sufficiently identified the sources as its employees who were also members of the Union and eligible to vote in respect of the protected action ballot orders. CPB also argued that it had provided further information by naming the Union delegates and organisers who allegedly engaged in the relevant conduct and identifying the meetings at which the conduct occurred.

49 There were 212 CPB employees who were eligible to vote in respect of the protected action ballot orders. Accordingly, the unnamed employees who are said to have given statements were seven from a group of up to 212. Plainly, CPB's refusal to name the persons who provided the statements limits the Union Parties' ability to investigate the allegations made against them and respond to those allegations. A matter that underlies the requirement for the party relying on evidence that would otherwise be inadmissible hearsay to adduce evidence of its source is the need for the opposing party to be provided with procedural fairness. CPB's refusal to name the employees who provided statements would mean that the Union Parties would have to address a case that a prima facie case of contravention of s 462 of the FWA had been demonstrated without knowing who was making the allegations against them. While it is true that the organisers and delegates denied the conduct alleged against them, the Union Parties were unable to investigate whether, for example, the makers of the statements were in fact in attendance at the meetings, or whether they might have some motivation to make up the allegations. That created prejudice to the Union Parties in defending the application for interlocutory injunctions.

50 I did not regard the asserted fears expressed by the sources as providing a basis for concluding that CPB has adduced sufficient evidence of the sources of the hearsay statements it sought to rely upon. CPB's argument first involved accepting the truth of the assertions by the unnamed persons that they did not want their identities disclosed because of their fears, and then using that asserted fear of disclosure as a basis for accepting the statements of the unnamed persons as evidence of the truth of what they asserted. That seemed to be a "bootstraps" argument which would prevent the Union Parties from fully investigating and addressing not only the substantive allegations, but the assertions that the unnamed persons feared revelation of their identities.

51 While it is well documented in cases in this Court that officials of the Union have engaged in thuggish behaviour on occasions, CPB made no suggestion that it was notorious that workers who give evidence against the Union's interests would be targeted or fear being targeted. If it is assumed that the employees in fact held the fears claimed, there appeared to be no realistic prospect that they would change their minds about disclosure of their identities at trial. It would be incongruous and unfair to admit evidence of unnamed persons in support of the application for interlocutory injunctions, and potentially grant the interlocutory injunctions, based on that evidence, when there is no realistic prospect of that evidence being converted into admissible form at trial. Allowing the use of evidence of unnamed sources whose identities are known but deliberately withheld in such circumstances would be inconsistent with the purpose of s 75 of the Evidence Act explained in *Wily v Terra* as being to facilitate the conduct of interlocutory proceedings in circumstances where it is often difficult "at short notice" to adduce evidence in direct and admissible form.

52 It may be noted that CPB did not contend that it was unable to produce evidence of the sources of the statements. Rather, it declined to do so on the basis of the sources' asserted fears of repercussions if their identities were revealed to the Union. CPB has not pointed to any case where evidence has been admitted under s 75 or an equivalent provision in circumstances where the identity of the source has been deliberately withheld. In *Levis*, it was conceded that hearsay evidence was inadmissible in circumstances where the deponent had agreed to keep the source's identity confidential, and Lindgren J seemed to have regarded the concession as properly made. In *Liu*, where failure to adduce evidence of the source of the hearsay evidence was deliberate, McCallum J held that "the simple result" was that the evidence was inadmissible.

53 It must be acknowledged that CPB was in a difficult position, but one that might not necessarily have been incapable of being overcome. In support of the proposition that the evidence of the presently unnamed employees who provided statements might be willing to have their identities disclosed at trial, CPB submitted that an application could be made for an order that their identities be made known to the Union Parties' legal representatives and a further order that the legal representatives not disclose such identities to their clients, which might then induce the employees to give direct evidence. If it is assumed that such an application might feasibly be made in respect of the final hearing, there seems to be no reason why such an application could not have been made when seeking interlocutory relief.

54 I considered that the exigencies of the case did not support a conclusion that CPB had adduced sufficient evidence of the relevant sources. I ruled that the parts of the affidavits objected to by the Union Parties were not admissible under s 75 of the Evidence Act.

55 In any event, I would have accepted the Union Parties' alternative submission that the evidence of statements attributed to the seven employees of CPB should be excluded under s 135 of the Evidence Act. That section provides:

> **135 General discretion to exclude evidence**
>
> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing; or
>
> (c) cause or result in undue waste of time.

56 The hearsay statements were unfairly prejudicial to the Union Parties, and their probative value was also diminished, in the absence of the employees being named. I would have been satisfied that the probative value of that evidence was so substantially outweighed by the danger that the evidence might be unfairly prejudicial to the Union Parties that it ought to be excluded.

Consideration of the application for interlocutory injunctions

57 CPB's proceeding alleges that the Union Parties contravened s 462 of the FWA. That section provides, relevantly:

> **462 Interferences etc. with protected action ballot**
>
> *General*

> (1) A person (the ***first person***) must not do any of the following in relation to a protected action ballot:
>
> (a) hinder or obstruct the holding of the ballot;
>
> (b) use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person;
>
> …
>
> (o) request, require or induce another person:
>
> (i) to show a ballot paper to the first person; or
>
> …
>
> while the vote is being made, or after the vote has been made, on the ballot paper;
>
> …

58 To obtain an interlocutory injunction, it is necessary for the applicant to demonstrate a prima facie case and that the balance of convenience favours granting the interlocutory inunction: see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [19] and [65]–[72]; *Communications, Electrical, Electronic, Energy, Information, Postal Plumbing and Allied Services Union Of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333; [2009] FCA 726 at [21]. Whether there is a prima facie case is to be considered together with the balance of convenience: *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 at [67].

59 The only admissible evidence relied upon by CPB to demonstrate a prima facie case of contravention of s 462 of the FWA was the following text message sent by the Union to its members who were CPB employees:

> ATTN: CPB MEMBERS – Voting will be conducted at a meeting with your delegate. Pls DO NOT vote separately. UNITED WE STAND!

60 CPB submitted that the text message was a direction by the Union to the employees that they were not to vote at a time of their own choosing and not to vote by themselves, but were only to vote at meeting with a Union delegate, together with other Union members, and in the same way as other Union members. CPB argued that the direction hindered or obstructed the holding of the ballot within s 462(1)(a) of the FWA.

61 As to the meaning of "hinder or obstruct", the CPB relied upon the judgment of Flick J in *Darlaston v Parker* (2010) 189 FCR 1 at [52] where Flick J considered that, in the context of s 767(1) of the FWA, the phrase refers to, "any act or conduct that actually makes it more

difficult for the person who is 'hindered or obstructed' to discharge his functions, other than an act or conduct which is accidental".

62 CPB also referred to *BGC POS Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2019) 285 IR 43; [2019] FCA 74 where, in respect of s 502 of the FWA, Colvin J observed at [26]:

> The ordinary meanings of the words hinder and obstruct overlap. To hinder is to delay, interrupt or cause difficulty to do something or for something to happen. To obstruct is to block or get in the way of something, but may refer to preventing or interfering with a physical action or the movement of something. The term hinder is usually applied to describe the actions of persons whereas the term obstruct may be applied to persons as well as inanimate objects. A person may hinder or obstruct without specifically intending to achieve that result. The terms are not confined to deliberate actions. So, a person may accidently hinder or obstruct.

63 CPB's arguments seemed to be, in substance, that the Union gave a *direction* which obstructed the democratic conduct of the ballot by depriving the employees of the freedom to choose how and when they voted.

64 The appropriate construction of the text message has to be considered in the industrial context, including that the sender and CPB's employees can be assumed to have been aware of the ongoing negotiations for new enterprise agreements, the application for a protected action ballot and the requirement of s 459(1) of the FWA for at least of 50% of the eligible voters to vote and for at least 50% of those voting to vote in favour of taking industrial action.

65 In my opinion, the text message from the Union, when considered as a whole, could not be regarded as a direction to the employees. The first sentence is ambiguous. It could mean, as CPB contended, that Union members were instructed to vote at a meeting with their Union delegate. It could also simply be understood as informing Union members of the fact that it was proposed that voting take place at the meeting. The second sentence commences with "Pls" (short for "please"), and is inconsistent with the first sentence having the meaning contended for by CPB. The message as a whole is consistent with providing information and advice and making a request, not a direction.

66 In my opinion, the text message conveyed that a meeting or meetings would be held between Union delegates and CPB employees who were Union members; that the Union delegates would attempt to persuade the employees to vote in favour of taking protected industrial action; that the employees were requested not to vote before the delegates had that

opportunity; that it was proposed that employees would vote together at the meeting after the delegates had spoken to them; and that there was a benefit to all the employees in voting in a unified way, namely by voting in favour of taking protected industrial action.

67 I did not consider it open to construe the text message in the more sinister way suggested by CPB as providing a direction to the employees. Even if it could be construed as such a direction, there was no obligation on the part of the employees to comply with it, and the text message did not suggest that any consequence would ensue if the employees chose to vote other than at a meeting.

68 I did not understand CPB to ultimately submit that the Union merely seeking to persuade employees to vote in a particular way or to vote at the same time at the meeting would amount to hindering or obstructing the holding of the ballot. I would not, in any event, have accepted that submission.

69 I was not satisfied that the text message demonstrated a prima facie case that any of the Union Parties contravened s 462(1) of the FWA.

70 In any event, I was not satisfied that the balance of convenience would have favoured granting the interlocutory injunctions.

71 The injunctions sought by CPB would prevent, first, the counting of the ballots; and, second, organising any industrial action in reliance on those ballots.

72 It was not demonstrated that there would be any substantial detriment to CPB if the ballot were counted. In fact, a count might have been beneficial to CPB because it would reveal whether or not the threshold under s 459(1) of the FWA had been reached. If not, then the threat of any protected industrial action relying on the ballot would dissipate. It is not until and unless the votes are determined to exceed the threshold, that any realistic possibility of protected industrial action could arise.

73 In these circumstances, any interlocutory injunction restraining the Union from organising protected industrial action before the votes were counted and the results published would be premature. The balance of convenience would not have favoured granting an interlocutory injunction.

Conclusion

74 For these reasons, I considered that CPB had not demonstrated a prima facie case of contravention of s 462 of the FWA. Further, the balance of convenience would not have favoured granting the interlocutory injunctions sought by CPB.

75 Accordingly, I dismissed the application for interlocutory injunctions.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 2 May 2024

SCHEDULE OF PARTIES

QUD 189 of 2024

Respondents

Fourth Respondent:	DEAN RILEY
Fifth Respondent:	MARK MCKEAN
Sixth Respondent:	JOSEPH PRIOR

FEDERAL COURT OF AUSTRALIA

CPB Contractors Pty Ltd v Construction, Forestry and Maritime Employees Union (No 2) [2024] FCA 460

File number:	QUD 189 of 2024
Judgment of:	**RANGIAH J**
Date of judgment:	20 April 2024
Catchwords:	**INDUSTRIAL LAW** – where applicant's application in this Court for interlocutory injunctions was dismissed – where applicant then commenced proceeding in the Fair Work Commission for substantially the same relief – where respondents then sought interlocutory injunction preventing Commission from hearing and determining the application – whether the proceeding in the Commission is an abuse of process – whether interests of justice require staying or restraining the proceeding – where issues not identical and evidence that was not admissible in Court potentially admissible in Commission – application dismissed
Legislation:	*Evidence Act 1995* (Cth) s 75 *Fair Work Act 2009* (Cth) ss 418(1), 420(1), 420(2), 443(1), 444(1A), 462 and 591
Cases cited:	*Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158 *McMahon v Gould* (1982) 7 ACLR 202 *National Tertiary Education Union v Monash University* [2022] FCA 1368 *Pegasus Leasing Ltd v Cadoroll Pty Ltd* (1996) 59 FCR 152 *Qantas Airways Ltd and Australian Licensed Aircraft Engineers Association* (2020) 295 IR 373; [2020] FCA 682 *Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd* (1992) 34 FCR 287 *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCA 1033 *UBS AG v Tyne* (2018) 265 CLR 77
Division:	Fair Work Division
Registry:	Queensland

National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	33
Date of interlocutory hearing:	20 April 2024
Counsel for the Applicant:	Mr JE Murdoch
Solicitor for the Applicant:	Mills Oakley Lawyers
Counsel for the First, Third to Sixth Respondents:	Mr WL Friend KC
Solicitor for the First, Third to Sixth Respondents:	Hall Payne Lawyers
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

QUD 189 of 2024

BETWEEN:	**CPB CONTRACTORS PTY LTD** Applicant
AND:	**CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION** First Respondent
	DEMOCRATIC OUTCOMES PTY LTD T/A CIVS Second Respondent
	DEAN MATTHUS (and others named in the Schedule) Third Respondent

ORDER MADE BY: **RANGIAH J**

DATE OF ORDER: **20 APRIL 2024**

THE COURT ORDERS THAT:

1. The interlocutory application dated 20 April 2024 be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(DELIVERED EX TEMPORE AND REVISED FROM TRANSCRIPT)

RANGIAH J:

1 The respondents other than the second respondent (the **Union Parties**) seek an urgent interim injunction restraining the Fair Work Commission (the **Commission**) from hearing and deciding proceedings (C2024/2471), commenced by the applicant, CPB Contractors Pty Ltd (**CPB**), in the Commission.

2 The Commission has listed the matter for an urgent hearing tomorrow, Sunday, 21 April 2024, at 10 am. In that proceeding, CPB applies for orders stopping any industrial action deriving from, and setting aside the result of any ballot under, protected action ballot orders made by the Commission on 27 March and 3 April 2024.

3 CPB's application to the Commission is made under s 418(1) of the *Fair Work Act 2009* (Cth) (**FWA**), which provides:

> (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
>
> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the ***stop period***) specified in the order.

4 The Union Parties seek an injunction restraining the Commission from proceeding with the hearing of the application scheduled for tomorrow and from determining CPB's application.

5 The proceeding commenced by CPB in the Commission has a relationship with the present proceeding commenced by CPB in this Court. It is necessary to explain the history of the respective proceedings in order to give context to the Union Parties' application.

6 CPB is the principal contractor for the Cross River Rail Project in Brisbane. There are two enterprise agreements covering CPB's employees, both of which have nominally expired. CPB and the first respondent (the **Union**), are engaged in negotiations for new enterprise agreements.

7 The Union applied to the Commission for protected action ballot orders pursuant to s 443(1) of the FWA, and such orders were made on 27 March and 3 April 2024. Voting under the orders about whether protected action should be taken and the form of any such action was completed on 12 April 2024.

8 On 12 April 2024, CPB commenced proceedings in this Court seeking relief including orders restraining the respondents from taking any steps in, or completing, the protected action ballots, or organising any industrial action under those ballots.

9 The second respondent is a "protected action ballot agent" appointed by the Commission under s 444(1A) of the FWA. The third to sixth respondents are Union organisers or delegates.

10 The basis of the proceedings in this Court is an allegation that the Union Parties contravened s 462 of the FWA, which provides, relevantly:

> **462 Interferences etc. with protected action ballot**
>
> *General*
>
> (1) A person (the ***first person***) must not do any of the following in relation to a protected action ballot:
>
> (a) hinder or obstruct the holding of the ballot;
>
> (b) use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person;
>
> …
>
> (o) request, require or induce another person:
>
> (i) to show a ballot paper to the first person; or
>
> …
>
> while the vote is being made, or after the vote has been made, on the ballot paper;
>
> …

11 CPB also sought urgent interim injunctions, and, on 12 April 2024, Collier J made orders that, until the hearing of the applications for interlocutory injunctions, the Union Parties be restrained from:

> …taking further steps in or completing the protection action ballots in protected action ballot orders PR772775 and PR772781 made respectively by the Fair Work Commission in matters B2024/260 and B2024/261 (**PABO Orders**), or organising any industrial action in reliance on those ballots.

12 The hearing of CPB's application for interlocutory injunctions was listed before me yesterday, on 19 April 2024. In support of that application, CPB relied upon affidavits of Malcolm Davis, Alicia Wood and Jessica Allam. Those affidavits annexed statements said to have been provided by employees alleging that organisers and delegates of the Union had engaged in conduct amounting to intimidation and breaches of the secrecy of the ballot. The employees who provided that information were not identified and CPB asserted that the employees did not wish to be identified for fear of being intimidated or harassed.

13 The Union Parties objected to the admission into evidence of the paragraphs of the affidavits containing statements made by the employees on the basis that the evidence was hearsay. CPB contended that the evidence was admissible in the interlocutory application under s 75 of the *Evidence Act 1995* (Cth) (the **Evidence Act**). I ruled that the evidence was inadmissible.

14 The only remaining evidence relied upon by CPB was a text message from the Union to its members who were employed by CPB stating:

> Voting will be conducted at a meeting with your delegate. Pls DO NOT vote separately. UNITED WE STAND!

15 After hearing the parties' arguments, I ruled that the application for interlocutory injunctions should be dismissed. I indicated that I was not satisfied that a prima facie case had been established, nor that the balance of convenience favoured granting the injunctions, and that I would provide my reasons in due course.

16 The hearing of the application for interlocutory injunctions concluded at about 3.45 pm on 19 April 2024. At about 4.15 pm, CPB commenced its proceedings in the Commission.

17 As I have indicated, the hearing before the Commission is set to commence at 10 am tomorrow, Sunday, 21 April 2024. The hearing has been set down urgently before the Commission because s 420(1) of the FWA provides, "As far as practicable, the FWC must determine an application for an order under section 418 or 419 within 2 days after the application is made".

18 It may be noted that under s 420(2), "If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order that the industrial action to which the application relates stop, not occur or not be organised (as the case may be)".

19 The Union Parties contend that the proceeding in the Commission is an abuse of process, and that the Commission should be restrained from hearing and determining the application. They submit, in the alternative, that in circumstances where there are competing proceedings in the Commission and the Court, it is in the interests of justice to grant the injunction sought.

20 The Union Parties submit that the proceeding in the Commission seeks the same relief on the same evidence as the application heard in this Court yesterday. They submit that as the Court dismissed the application for interlocutory injunctions, the application to the Commission is vexatious. They rely upon *UBS AG v Tyne* (2018) 265 CLR 77 at [45] and [46], and seem to assert that the proceedings are an abuse of process as a manipulation of the process of the Court and Commission, or on the basis that they pursue substantially the same claim by serial proceedings in different jurisdictions.

21 In both proceedings, it is alleged that the Union Parties engaged in conduct that contravened s 462 of the FWA inconsistently with the statutory requirements for the democratic conduct of the protected action ballot. The proceeding brought in the Commission involves much the same allegations of fact and seek substantially similar relief, but is not identical to the proceedings brought in the Court.

22 There are two significant differences between the respective proceedings. The Commission will have to determine, under s 418(1), whether the alleged conduct of the Union Parties contravened s 462; and whether, in consequence, any proposed industrial action would not be "protected industrial action". This Court will have to determine the first of those issues, but not the second. The relief sought by CPB in this Court does not require determination of whether any industrial action taken in consequence of a ballot compromised by contravention of s 462 would mean that any action taken as a result of the ballot was not "protected industrial action".

23 The second difference is that the Commission has a discretion to decide whether to admit hearsay evidence in the form of statements of the unidentified CPB employees, whereas the Court had no general discretion to allow the admission of that evidence under s 75 of the Evidence Act: see *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158 at [162]. Under s 591 of the FWA, the Commission is not bound by the rules of evidence. Accordingly, the application before the Commission is proposed to be supported by evidence that was not before the Court in the application for interlocutory injunctions.

24 The proceeding before the Commission is sufficiently different to that in the Court that it cannot be said that they are substantially the same. Nor is CPB's attempt to put before the Commission evidence that was inadmissible before the Court an illegitimate "manipulation" of the process of the Court or the Commission. In my opinion, the proceeding before the Commission is not an abuse of process.

25 The Union Parties rely upon several cases in which this Court restrained the continuation of proceedings in the Commission in circumstances where there were competing, concurrent proceedings: namely, *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCA 1033; *Qantas Airways Ltd and Australian Licensed Aircraft Engineers Association* (2020) 295 IR 373; [2020] FCA 682; and *National Tertiary Education Union v Monash University* [2022] FCA 1368 (***NTEU v Monash University***).

26 In circumstances where there are proceedings covering the same subject matter commenced in different courts or tribunals and it is alleged that the continuation of one is oppressive, the question is whether the interests of justice require that one of the proceedings be stayed or otherwise restrained: *Pegasus Leasing Ltd v Cadoroll Pty Ltd* (1996) 59 FCR 152 at 156.

27 The starting point must be that CPB has regularly engaged the jurisdiction of the Commission: *McMahon v Gould* (1982) 7 ACLR 202 at 206; *Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd* (1992) 34 FCR 287 (***Sterling Pharmaceuticals***) at 291. Certainly, no submission has been made to the contrary. Accordingly, CPB has a prima facie entitlement to have its application heard and determined by the Commission.

28 Each of the cases relied upon by the Union Parties concerned the proper interpretation of an industrial instrument and the issue before the Court and the Commission was the same. In those cases, there was no contentious issue of any evidence potentially admissible in the Commission but not in the Court. In this case, there exist the two significant differences that I have identified.

29 It is relevant that if the injunction sought were granted, CPB would be deprived of a legal entitlement before the Commission, namely, to seek the exercise of the Commission's discretion to adduce evidence that was inadmissible in this Court. CPB should not be lightly deprived of such an entitlement: see *NTEU v Monash University* at [7], and the cases cited therein.

30 While the Union Parties submit that there is a risk of conflicting decisions as to whether industrial action subject to s 462 of the FWA is protected industrial action, I do not think that there is any such risk based upon the present form of the two proceedings.

31 I have had regard to the considerations set out in *Sterling Pharmaceuticals* at 290–291. I accept that several of those considerations, including that the proceeding in this Court was commenced first and the law should strive against permitting a multiplicity of proceedings concerning the same (or similar) issues, provide some support for the Union Parties' case.

32 However, I am not ultimately persuaded that it is in the interests of justice that the injunction sought should be granted.

33 Accordingly, the Union Parties' application will be dismissed.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 20 April 2024

SCHEDULE OF PARTIES

QUD 189 of 2024

Respondents

Fourth Respondent:	DEAN RILEY
Fifth Respondent:	MARK MCKEAN
Sixth Respondent:	JOSEPH PRIOR

FEDERAL COURT OF AUSTRALIA

CPB Contractors Pty Ltd v Construction, Forestry and Maritime Employees Union (No 3) [2024] FCA 797

File number(s):	QUD 189 of 2024
Judgment of:	**COLLIER J**
Date of judgment:	18 July 2024
Catchwords:	**INDUSTRIAL LAW** – application for urgent interlocutory injunction – whether serious question to be tried – whether damages inadequate remedy – form of orders sought – balance of convenience
Legislation:	*Fair Work Act 2009* (Cth) ss 19(1), 340 (1)(a), 342(1) Item 7(a), 343, 346(b), 347, 348, 363, 408, 414
Cases cited:	*Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; 80 ALJR 1672 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd* [2017] FWC 5380 *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 *Newton v Australian Postal Corporation (No 2)* [2019] FCA 2192 *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, 218 FCR 172
Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	67
Date of hearing:	18 July 2024
Counsel for the Applicant:	Ms S Moody

Solicitor for the Applicant:	Ferrous Advisory
Counsel for the Respondent:	Mr C Massy
Solicitor for the Respondent:	Hall Payne Lawyers

ORDERS

QUD 189 of 2024

BETWEEN:	**CPB CONTRACTORS PTY LTD** Applicant
AND:	**CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION** Respondent

ORDER MADE BY: **COLLIER J**

DATE OF ORDER: **18 JULY 2024**

PENAL NOTICE

TO: THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

NOTING THE PROVISION OF THE USUAL UNDERTAKINGS AS TO DAMAGES BY THE APPLICANT, THE COURT ORDERS THAT:

1. In this Order:

CRR Project means the Cross River Rail Project.

CRR Construction Site means the construction sites established for the CRR Project at the date of this order, being those at the following addresses in Brisbane:

(a) the project site known as the Albert Street Precinct (Lot 1, Lot 2, Lot 3), bound by Mary, Edward, Elizabeth and George Street, Brisbane City;

(b) the project site known as the Roma Street Precinct, bound by Roma Street, Countess Street and Parkland Boulevard and the Queensland Rail Corridor, Brisbane City;

(c) the project site known as the Woolloongabba Precinct, bound by Stanley, Main, Leopard and Vulture Streets, Woolloongabba;

(d) the project site known as the Boggo Road Precinct, bound by Boggo Road, Peter Doherty Street and Boggo Road Busway/ Queensland Rail Corridor in Dutton Park;

(e) the project site known as the Southern Area work area, bound by Cornwall Street, Kent Street and Queensland Rail Corridor;

(f) the project site known as the Northern Portal, bound by the Queensland Rail Corridor, Bowen Bridge Road, Gregory Terrace and Kalinga Avenue;

(g) Hamilton Yard at 222 MacArthur Avenue, Hamilton;

(h) BlueWater Yard at 2-6 Bishop Drive, Port of Brisbane;

(i) 271 Gilchrist Avenue, Herston;

(j) 33 Lanham Street, Bowen Hills;

(k) 48 O'Connell Terrace, Bowen Hills;

(l) 58 Chale Street, Yeerongpilly;

(m) Corner of Nobel Street and Annerley Road, Dutton Park;

(n) Corner of Brooke Street and Pegg Road, Rocklea;

(o) Corner of Wilkie Street and Green Street, Yeerongpilly; and

(p) 19 Orient Avenue, Pinkenba.

Point of Entry means any point of entry to (or exit from) a CRR Construction Site, and includes without limitation any gate, turnstile, entrance way, driveway or door.

2. Until further order, the First Respondent (whether by its officers, delegates, employees, or other representatives) be restrained from:

(a) photographing, recording by any means, or creating or maintaining a record of the identity of, any person or vehicle entering or leaving a CRR Construction Site;

(b) coming within 15 meters of a Point of Entry, or going or remaining within 15 meters of a Point of Entry, excluding:

(i) transit to and from a school; or

(ii) to catch public transport; or

(iii) travel in a moving vehicle on a public roadway; or

(iv) persons seeking to enter the site for the purpose of performing work in accordance with their contract of employment, or a person with a valid right of entry exercising that right of entry in accordance with applicable legislation or as otherwise permitted by law; or

(v) legal and other professional third-party representatives.

3. The First Respondent take all reasonable steps **forthwith**, but no later than **9.00am on 19 July 2024**, to:

(a) bring the existence and content of this order to the attention of its officers, delegates, members, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch; and

(b) direct its officers, delegates, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch to comply with paragraphs 2(a) and (b) above; and

(c) direct its officers, delegates, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch to comply with the Order of the Court made on 1 May 2024.

4. The First Respondent is to notify the Applicant and the Court by 12:00PM on 25 July 2024 as to whether it intends to seek the discharge of these orders.

5. In the event that the First Respondent notifies the Applicant and the Court in accordance with paragraph 4 above, the matter be listed before a Duty Judge for case management and the hearing of any application for the discharge of these orders.

6. Costs be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

BACKGROUND

1 Late on 17 July 2024 CPB Contractors Pty Ltd filed an interlocutory application seeking urgent relief against the respondent union, the Construction, Forestry, Maritime Employees Union (**CFMEU**). The relief sought was as follows:

> 1. In this Order:
>
> **CRR Project** means the Cross River Rail Project.
>
> **CRR Construction Site** means the construction sites established for the CRR Project at the date of this order, being those at the following addresses in Brisbane:
>
> (a) the project site known as the Albert Street Precinct (Lot 1, Lot 2, Lot 3), bound by Mary, Edward, Elizabeth and George Street, Brisbane City;
>
> (b) the project site known as the Roma Street Precinct, bound by Roma Street, Countess Street and Parkland Boulevard and the Queensland Rail Corridor, Brisbane City;
>
> (c) the project site known as the Woolloongabba Precinct, bound by Stanley, Main, Leopard and Vulture Streets, Woolloongabba;
>
> (d) the project site known as the Boggo Road Precinct, bound by Boggo Road, Peter Doherty Street and Boggo Road Busway/ Queensland Rail Corridor in Dutton Park;
>
> (e) the project site known as the Southern Area work area, bound by Cornwall Street, Kent Street and Queensland Rail Corridor;
>
> (f) the project site known as the Northern Portal, bound by the Queensland Rail Corridor, Bowen Bridge Road, Gregory Terrace and Kalinga Avenue;
>
> (g) Hamilton Yard at 222 MacArthur Avenue, Hamilton;
>
> (h) BlueWater Yard at 2-6 Bishop Drive, Port of Brisbane;
>
> (i) 271 Gilchrist Avenue, Herston;
>
> (j) 33 Lanham Street, Bowen Hills;
>
> (k) 48 O'Connell Terrace, Bowen Hills;
>
> (l) 58 Chale Street, Yeerongpilly;
>
> (m) Corner of Nobel Street and Annerley Road, Dutton Park;
>
> (n) Corner of Brooke Street and Pegg Road, Rocklea;
>
> (o) Corner of Wilkie Street and Green Street, Yeerongpilly; and

(p) 19 Orient Avenue, Pinkenba

Point of Entry means any point of entry to (or exit from) a CRR Construction Site, and includes without limitation any gate, turnstile, entrance way, driveway or door.

2. Until further order, the First Respondent (whether by its officers, members, delegates or employees, or howsoever otherwise) be restrained from:

(a) photographing, recording by any means, or creating or maintaining a record of the identity of, any person or vehicle entering or leaving a CRR Construction Site or coming within 20 metres of a Point of Entry; and

(b) going or remaining within 20 metres of a Point of Entry, other than a person seeking to enter the site for the purpose of performing work in accordance with their contract of employment, or a person with a valid right of entry exercising that right of entry in accordance with applicable legislation.

3. The First Respondent take all reasonable steps by no later than **midnight on 17 July 2024** to:

(a) bring the existence and content of this order to its officers, delegates and employees; and

(b) direct its officers, members, delegates and employees not to:

(i) photograph, record by any means, or create or maintain a record of the identity of, any person or vehicle entering or leaving a CRR Construction Site or coming within 20 metres of a Point of Entry; and

(ii) go or remain within 20 metres of a Point of Entry, other than a person seeking to enter the site for the purpose of performing work in accordance with their contract of employment, or a person with a valid right of entry exercising that right of entry in accordance with applicable legislation.

(c) Direct its officers, members, delegates and employees to comply with the Order of the Court made on 1 May 2024.

4. The matter be listed for case management on _____ and the hearing of any application for the discharge of these orders.

5. The First Respondents is to notify the court by 12:00PM on 24 July 2024 as to whether it intends to seek the discharge of these orders.

2 Despite the late filing, the applicant sought the interlocutory application to be heard and determined by midnight on 17 July. However the email accompanying the interlocutory application indicated that the lawyers for the first respondent had received notice of the interlocutory application only at the same time as the Court, and it was questionable whether they would be in a position to answer the interlocutory application if it were listed as requested by the applicant.

3 Accordingly, my Associate informed the parties that the matter would be listed for 9.00am the following morning.

4 I note that this is not the first time that this matter has been before the Court. On 12 April 2024 the applicant filed an originating application in which it sought the following relief against the CFMEU and other respondents (including CFMEU officials):

> **Details of claim**
>
> On the grounds stated in the accompanying affidavit, or any statement of claim or other document prescribed by the Rules to be filed, the Applicant claims:
>
> 1. Orders pursuant to *Fair Work Act 2009* s.539 imposing penalties on the First, Third, Fourth, Fifth and Sixth Respondents for breaches of s.462 of that Act.
>
> 2. Orders pursuant to *Fair Work Act 2009* s.562 and *Federal Court of Australia Act 1976* s.23 permanently staying or setting aside the protected action ballot orders PR772775 and PR772781 made respectively by the Fair Work Commission in matters B2024/260 and B2024/261 (**PABO Orders**) for the conduct of protected action ballots.
>
> 3. Further or in the alternative to item 2 above, orders pursuant to *Federal Court of Australia Act 1976* s.23 or Judiciary Act 1903 s.39B, issuing writs in the nature of certiorari quashing the PABO Orders.
>
> 4. Orders pursuant to *Federal Court of Australia Act 1976* s.23 permanently restraining the Respondents from taking further steps in or completing the protected action ballots ordered in the PABO Orders or organising any industrial action in reliance upon those ballots.
>
> 5. Such other orders as the Court deems suitable in the circumstances.
>
> **Claim for interlocutory or interim relief**
>
> The Applicant also claims the following relief.
>
> 6. Orders pursuant to *Federal Court of Australia Act 1976* s.23 restraining the Respondents until further order from taking further steps in or completing the protected action ballots ordered in the PABO Orders or organising any industrial action in reliance upon those ballots.
>
> 7. Orders pursuant to *Fair Work Act 2009* s.562 and *Federal Court of Australia Act 1976* s.23 staying until further order the PABO Orders.
>
> 8. Orders pursuant to *Federal Court Rules 2011* r.1.39 shortening the time for service of the Application.
>
> 9. Orders pursuant to *Federal Court Rules 2011* r.10.24 allowing:
>
> a. substituted service of the application on the First and Second Respondents by email; and
>
> b. substituted service of the application on the Third to Sixth Respondents by service upon the First Defendant;
>
> 10. Directions towards the final hearing of the claim.

5 On 1 May 2024 Rangiah J granted interlocutory orders. On that date, in respect of the same construction sites established for the Cross River Rail Project as identified in the interlocutory application currently before me, Rangiah J relevantly ordered:

> 2. The First Respondent (whether by its delegates, office holders, employees, or other representatives) and the Third and Fourth Respondents are prohibited from:
>
> (a) physically obstructing or physically impeding the free movement of goods or people to and from a Point of Entry;
>
> (b) abusing, threatening, harassing or intimidating any person entering or leaving a CRR Construction Site;
>
> (c) aiding, abetting, counselling, procuring or inducing any person to engage in the conduct referred to in orders 2(a) or 2(b) above.
>
> 3. Orders 1 and 2 do not apply to the organising or taking by any person of protected industrial action in accordance with section 408 of the *Fair Work Act 2009* (Cth) or activity which is not industrial action because of the operation of s 19(2) of the *Fair Work Act 2009* (Cth).
>
> 4. The matter be listed for case management on Friday 10 May 2024 and the hearing of any application for the discharge of these orders.
>
> 5. The First, Third and Fourth Respondents are to notify the Court by 12.00 pm on 8 May 2024 as to whether they intend to seek the discharge of these orders.

6 On 18 July the parties appeared before me for a hearing which concluded that afternoon. During that time, Ms Moody for the applicant offered the usual undertaking as to damages in support of the applicant's application, and further sought that any interlocutory orders made by the Court be accompanied by a penal notice.

7 Mr Massy for the CFMEU informed the Court that his client would not oppose an order restraining photography or filming of persons entering the applicant's sites. However, (*inter alia*), Mr Massy opposed orders relating to any direction by the CFMEU of activities of its members, and in particular opposed orders restraining activities by the CFMEU proximate to all points of entry to the applicant's sites.

8 Following oral submissions by both parties, late in the afternoon (but before Court adjourned) the applicant filed an amended interlocutory application in the following terms:

> 1. In this Order:
>
> **CRR Project** means the Cross River Rail Project.
>
> **CRR Construction Site** means the construction sites established for the CRR Project at the date of this order, being those at the following addresses in Brisbane:

(a) the project site known as the Albert Street Precinct (Lot 1, Lot 2, Lot 3), bound by Mary, Edward, Elizabeth and George Street, Brisbane City;

(b) the project site known as the Roma Street Precinct, bound by Roma Street, Countess Street and Parkland Boulevard and the Queensland Rail Corridor, Brisbane City;

(c) the project site known as the Woolloongabba Precinct, bound by Stanley, Main, Leopard and Vulture Streets, Woolloongabba;

(d) the project site known as the Boggo Road Precinct, bound by Boggo Road, Peter Doherty Street and Boggo Road Busway/ Queensland Rail Corridor in Dutton Park;

(e) the project site known as the Southern Area work area, bound by Cornwall Street, Kent Street and Queensland Rail Corridor;

(f) the project site known as the Northern Portal, bound by the Queensland Rail Corridor, Bowen Bridge Road, Gregory Terrace and Kalinga Avenue;

(g) Hamilton Yard at 222 MacArthur Avenue, Hamilton;

(h) BlueWater Yard at 2-6 Bishop Drive, Port of Brisbane;

(i) 271 Gilchrist Avenue, Herston;

(j) 33 Lanham Street, Bowen Hills;

(k) 48 O'Connell Terrace, Bowen Hills;

(l) 58 Chale Street, Yeerongpilly;

(m) Corner of Nobel Street and Annerley Road, Dutton Park;

(n) Corner of Brooke Street and Pegg Road, Rocklea;

(o) Corner of Wilkie Street and Green Street, Yeerongpilly; and

(p) 19 Orient Avenue, Pinkenba

Point of Entry means any point of entry to (or exit from) a CRR Construction Site, and includes without limitation any gate, turnstile, entrance way, driveway or door.

2. Until further order, the First Respondent (whether by its officers, delegates, employees, or other representatives) be restrained from:

(a) photographing, recording by any means, or creating or maintaining a record of the identity of, any person or vehicle entering or leaving a CRR Construction Site;

(b) coming within 15 meters of a Point of Entry, or going or remaining within 15 meters of a Point of Entry, excluding:

(i) transit to and from a school; or

(ii) to catch public transport; or

(iii) travel in a moving vehicle on a public roadway; or

(iv) persons seeking to enter the site for the purpose of performing work in accordance with their contract of employment, or a person with a valid right of entry exercising that right of entry in accordance with applicable legislation or as otherwise permitted by law; or

(v) legal and other professional third-party representatives.

3. The First Respondent take all reasonable steps forthwith, but no later than 1 hour after the date this Order is issued, to:

(a) bring the existence and content of this order to the attention of its officers, delegates, members, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch; and

(b) direct its officers, delegates, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch to comply with paragraphs 2(a) and (b) above; and

(c) direct its officers, delegates, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch to comply with the Order of the Court made on 1 May 2024.

4. The matter be listed for case management on and the hearing of any application for the discharge of these orders.

5. The First Respondents is to notify the court by 12:00PM on 24 July 2024 as to whether it intends to seek the discharge of these orders.

9 I made Orders late in the evening of 18 July 2024. These are the reasons for those Orders.

EVIDENCE OF THE APPLICANT

10 The interlocutory application before me was supported by an affidavit of Mr Terence Prior, the Industrial Relations Manager of the applicant, dated 17 July 2024. The applicant also relied on earlier affidavits of Mr Malcolm Davis filed on 12 April 2024 and 1 May 2024. Ms Moody specifically submitted that her reliance on the evidence of Mr Davis for the purposes of the interlocutory application was referable to contracts annexed to that affidavit. The CFMEU offered no dispute or objection in respect of that material.

Terence Prior affidavit

11 In his affidavit Mr Prior deposed, in summary, as follows.

12 On 10 July 2024 the applicant received two notices from the CFMEU purporting to give notice under s 414 of the *Fair Work Act 2009* (Cth) of the intention of its members to take protected industrial action commencing from 16 July 2024.

13 The CRR Project is currently behind schedule but there are a number of critical elements to the project that are very time sensitive, which if delayed have a compound impact on the critical path for completion. One of those critical elements is the programming of the testing of the first train to travel within the newly constructed tunnels under Brisbane. The first train is scheduled to be run through the tunnel on 27 and 28 July 2024.

14 In the coming days it is critical that the necessary preparations to receive that first train are completed. The works that are currently underway must be completed to ensure that the first train can be received into the tunnels and be tested on those days.

15 The number of CPB employees who could legitimately be engaged in protected industrial action is relatively small (of the order of 170 workers) compared to the very significant contractor workforce, which the project relies on day to day, which is typically in the range of 1500 - 2000 each day.

16 The intimidation and threats made against the subcontractor workforce plays a fundamental role in denying the project the workforce it needs to continue its operations and meet its critical path objectives for the project.

17 In particular the Exhibition Station is currently being refurbished in preparation for the Royal Queensland Show (**the EKKA**). As a result of conduct in which the CFMEU has engaged this past week, two days and nights of critical construction activity on the station has been lost. If the critical works are not completed by the end of July all persons attending the EKKA will need to be transported by bus.

18 The applicant is the head contractor with control over 16 construction sites including the project site known as the Albert Street Precinct (Lot 1, Lot 2, Lot 3), bound by Mary, Edward, Elizabeth and George Streets, Brisbane City (**Albert Street Precinct**).

19 Mr Prior was informed by Ms Alicia Wood, Senior Industrial Relations Advisor of the applicant, and believed that the following events took place at Lot 1 of the Albert Street Precinct on 16 July 2024:

> (a) At approximately 4.40am supplies were dropped off at the Lot 1 entrance to the Albert Street Precinct site. These supplies included BBQs, shade covers and eskys. From this time on she started receiving reports that electrical workers from the site were being turned away by CFMEU officials by site entries, with the workers being told "Site is closed' and "Do not cross the picket line."

(b) Two people from the picket counted steps from the front entry of the site to another area at a nearby Cafe, with the assumption that this was so that shade covering could be placed in this area.

(c) Dylan Howard was observed outside the site gates. Mr Howard is known to be employed by the CFMEU in the position of 'Civil Coordinator', having previously been a union organiser.

(d) At approximately 5.20am supervisory and safety workers sought to enter the site. Persons from the picket started filming these workers on their phones, and members of the picket line directed chants and comments to these workers to the following effect:

i. "We are doing this for our children"

ii. "Never cross a picket line"

(e) These same workers were called "grubs" and "scum" by members of the picket line for seeking to enter site.

(f) Some supervision staff, including and in particular an Electrical Supervisor did not enter site, as they felt intimidated. The delegates or officials of the CFMEU in the picket were not known to the supervisory staff and were not workers on the Albert Street Precinct site.

(g) That Electrical Supervisor commenced work from the St Mary's offices. That Electrical Supervisor was unwilling to provide a statement but stated words to the following effect:

i. "I'm concerned for my safety."

ii. "I won't get another job - I'll be blackmailed if I crossed the picket line and entered site."

iii. “I won’t risk my safety by crossing the picket line”

(h) Site workers commenced arriving at the site entry gates from approximately 5.30am, but did not enter site.

(i) By 6.00am, 1 site worker from the Applicant had entered site for the performance of work. No other workers entered site for the prestart. No workers from subcontractors engaged on the site that day entered site or attended prestart. They remained outside the site entrances.

(j) At 6.15am the service trade subcontractors left the site. This included Cooke & Dorsett (plumbers), and KME (electrical subcontractors).

(k) At 6.30am a silver car arrived and parked outside the site entrance. 2 people with CFMEU branded clothing exited the car, and began unloading flags and signs for the members of the picket. Those signs contained various CFMEU and union slogans, and included one that said "CPB grubs".

(l) By 7.00am the direct hire and subcontractor workers outside the site entries disbursed and left the area.

(m) By 7.15am the majority of the crowd by the picket had left, and approximately 6-8 CFMEU delegates or officials remained in the picket, where they remained for the day.

20 Mr Prior was informed by Mr Daniel Lewis, supervisor of the applicant, and believed that the following events took place at Lot 1 of the Albert Street Precinct on 16 July 2024:

(a) At approximately 4.55am a picket line of approximately 7-8 people associated with the CFMEU formed near one of the site entrances. The people in the picket line had set up a shade covering and BBQ.

(b) At approximately 5.15am as Mr Lewis was returning from a nearby office to the site entry, he and persons in his company (Murray Harris, Mat Anforth, and Elliot Ham) were confronted by a number persons in the CFMEU picket. He did not recognise those persons, and they were not workers on the Albert Street Precinct. One member of the CFMEU picket filmed Mr Lewis and his group using their Iphone as they entered site. Members of the picket line shouted words to the effect of “You are not going to cross the picket line", “Stand with your brothers and sisters for better conditions and better rates".

21 Mr Prior was informed by Mr Murray Harris, Shift Boss of the applicant, and believed that the following events took place at Lot 1 of the Albert Street Precinct on 16 July 2024:

(a) As he was entering the site in the morning (with Mr Lewis), he encountered a CFMEU picket.

(b) A number of comments were directed at him from CFMEU delegates and persons in the picket, including:

i. "Don't cross the picket line."

ii. "Are you going to stand with your brothers and sisters and fight for better

(c) He observed that one of the CFMEU delegates was filming him, using an Iphone.

22 Mr Prior was informed by Mr James Maher, Superintendent of the applicant, and believed that the following events took place at Lot 1 of the Albert Street Precinct on 16 July 2024:

(a) At approximately 5.10am he received reports site supervisors that a CFMEU picket had formed at the entry to the Albert Street Precinct entry points, and members of that picket were filming and otherwise intimidating workers who were seeking to enter the site.

(b) Mr Maher followed the supervisors to site. He encountered a number of persons while walking to site who were wearing CFMEU-branded clothing, and in particular black hoodies emblazoned with the words 'CFMEU'.

(c) A picket had formed outside the entry gate to the precinct. Persons wearing CFMEU branded clothing and members of the picket called out to him encouraging him to join the picket and not enter site.

(d) Before entering site he paused to speak to a supervisor who was standing near the picket. That supervisor said to him words to the effect of "They have asked me not to cross the picket line ... they are filming ... I have to work in the industry [the construction industry]."

(e) Mr Maher then sought to enter the site. He unsuccessfully swiped is security

access card on the entry gate 3 times, and while doing so, heard directed at him from persons in the picket lines the following comments:

i. "Stand with your brothers, don't cross the picket line"

ii. "This will benefit you too"

iii. "Think of your family"

iv. "This is for your kids too"

(f) Mr Maher was able to enter the site, and as the door was closing behind him someone from the picket called him a "grub".

(g) Mr Maher observed that Phil Robinson (General Superintendent) was also seeking to enter site behind him. Similar comments were directed to Mr Robinson as he sought to enter the site.

(h) As a result of the picket and actions of the CFMEU personnel in the picket, only 1 worker (in addition to the supervisors) entered site and attended the site pre-start meeting.

23 Mr Prior was informed by Mr Phil Robinson and believed that the following events took place at Lot 1 of the Albert Street Precinct on 16 July 2024:

(a) He sought to enter the site at approximately 5.20am. He encountered a picket of approximately 6 people. He did not recognise the people in the picket but observed that they appeared to be associated with the CFMEU.

(b) While he was entering his security number in the entry gate, the following comments were directed towards him:

i. "We don't cross picket lines mate."

ii. "This company is unsafe mate and kills people."

iii. "Think of your wife and kinds. They will appreciate you for not cross the picket line."

iv. "You're a fucking grub anyway."

24 Mr Prior deposed that there were also pickets on each of the other sites of the applicant.

25 Mr Prior deposed that he was informed of a statement by a person in the picket addressing employees re-entering the Roma Street site on 17 July 2024 to the effect that "We will put your photo on Whatsapp".

26 Mr Prior deposed that he was informed that a subcontractor had been told by a CFMEU official that if concrete was pumped by the subcontractor on that date, the subcontractor would be blackballed in Queensland. Mr Prior deposed that the subcontractor's workers ceased work at the site, which caused additional costs.

27 Mr Prior annexed to his affidavit CCTV video footage which he deposed had been taken outside one of the entry gates to the Albert Street precinct at approximately 5.11am on the morning of 16 July 2024 and emailed to him by Ms Wood. The video footage appeared to show persons wearing shirts marked with the letters CFMEU using mobile phones to take photographs of persons entering the site.

28 Annexed to Mr Prior's affidavit were two letters from the CFMEU to the applicant dated 10 July 2024, being notifications of intention to take protected industrial action, by all members of the CFMEU employed by the applicant. Both letters notified of work stoppages on 16 July 2024, 17 July 2024, 18 July 2024, 19 July 2024, 22 July 2024, in addition to overtime bans commencing 16 July 2024, bans on paperwork commencing 16 July 2024, and bans on the use of technology commencing 16 July 2024.

29 Mr Prior further annexed video footage of what he described as union activity including picket lines blocking access to sites at Albert Street, Kent Street, and Vulture Street.

30 At the hearing Mr Massy objected to various aspects of Mr Prior's evidence. In particular, Mr Massy objected to paragraph 16 of Mr Prior's affidavit which stated:

> In relation to the matter referred to in 14(b) I am informed by a site Project Manager and verily believe that the relevant subcontractor received a phone call from a CFMEU official who said to him words to the effect of "*If you pump concrete* [on the CRR Project that day], *you will be black balled in Queensland"*. Shortly thereafter the concrete truck workers ceased work, and the concrete trucks exited the site and no further concrete was poured on that day by that subcontractor. This has caused additional cost expense and delay to the project. Delays of this kind will have an impact on the critical path objectives of the project and are likely to cause substantial damages and other losses to be incurred by CPS and its joint venturers in the performance of contracted works on the CRR Project.

Video evidence

31 At the hearing the applicant asked that various videos be played and admitted as evidence.

32 One video was Annexure TP-2 to Mr Prior's affidavit, which was described as CCTV footage taken outside one of the entry gates to the Albert Street site at approximately 5.11 am on 16 July 2024.

33 The remaining videos, cumulatively found in Annexure TP-3 to Mr Prior's affidavit, were described as "CRR TSD – Union activity", and constituted CCTV footage of scenes at the Albert Street site, the Southern Area worksite (Kent Street), and the Wooloongabba site (Vulture Street) on 16 and 17 July 2024. The "Activity Observed" was commentary adjacent

to each dropbox link which sought to summarise the contents of each video, referable to contended CFMEU activity at the relevant sites.

34 I shall return to these videos later in this judgment.

EVIDENCE OF THE CFMEU

35 The CFMEU relied on one affidavit, namely the affidavit of its instructing solicitor Ms Alexandra Jarrett affirmed 18 July 2024. Ms Jarrett deposed:

> **Employment**
>
> 1. I am a solicitor employed by Hall Payne Lawyers, the solicitors for the respondents. I am assisting Mr Luke Tiley, a Principal of Hall Payne Lawyers, with this proceeding on behalf of the respondents. I am authorised to make this affidavit on behalf of the respondents.
>
> **Affidavit of Terence Paul Prior dated 17 July 2024**
>
> 2. On 18 July 2024, I met with Mr Jackson Whipps, Construction Manager - Queensland of De Martin & Garparnini in respect of paragraph [16] of the Affidavit of Terence Paul Prior dated 17 July 2024 (the **Prior Affidavit**)
>
> 3. I showed Mr Whipps, and read out to him, paragraph [16] of the Prior Affidavit and Mr Whipps told me words to the effect to: "that is incorrect, no conversation like that happened. "
>
> 4. Mr Whipps then provided to me a written statement in which outlines the detail of his denial of paragraph [16] of the Prior Affidavit. Mr Whipps told me, and I believe, that his statement is true and correct. Annexed hereto and marked as "**ARJ-1**" is a copy of the signed statement of Mr Whipps, witnessed by me.

36 Annexure ARJ-1 to Ms Jarrett's affidavit was in the following terms:

> Statement of Jackson Whipps
>
> 18 July 2024
>
> 1. My name is Jackson Whipps and I am the Construction Manager, Queensland DMG.
>
> 2. At no time have I spoken to anyone from CPB Contractors in relation to the pumping and supply of concrete for the Cross River Rail Project.
>
> 3. At no time has any person approached me and warned that DMG would be "blacklisted" (or words to that effect) from the industry if it was to supply, pump or place concrete in relation to the Cross River Rail Project.
>
> Jackson Whipps

CONSIDERATION

37 Principles guiding the Court in considering whether to make interlocutory injunctive orders were explained by the High Court of Australia in *Australian Broadcasting Corporation v*

O'Neill [2006] HCA 46; 80 ALJR 1672. In that case Gleeson CJ and Crennan J relevantly said:

> 19. The principles were discussed, for example, in *Chappell v TCN Channel Nine Pty Ltd* (a decision referred to by Crawford J in a passage quoted above), *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd*, and *Jakudo Pty Ltd v South Australian Telecasters Ltd*. As Doyle CJ said in the last-mentioned case, in all applications for an interlocutory injunction, ***a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction.*** These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. We agree with the explanation of these organising principles in the reasons of Gummow and Hayne JJ, and their reiteration that the doctrine of the Court established in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* should be followed…
>
> (footnotes omitted)
>
> (emphasis added)

38 Materially, Gummow and Hayne JJ in that case said:

> 65. The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*. This court… said that on such applications the court addresses itself to two main inquiries, and continued:
>
> > The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief… The second inquiry is… whether the inconvenience of injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.
>
> By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial…
>
> (footnotes omitted)

39 In the present case, the applicant submitted that interlocutory relief was sought in aid of the following causes of action:

- Breach of s 340 (1)(a)(i),(ii),(iii) of the Fair Work Act, being a prohibition on a person taking adverse action against another person because the other person had a workplace right; or had, or had not, exercised a workplace right; or proposed or

proposed not to, or had at any time proposed or proposed not to, exercise a workplace right.

- Breach of s 343 of the Fair Work Act, being a prohibition on a person organising or taking, or threatening to organise or take, any action against another person with intent to coerce the other person, or a third person, to exercise or not exercise, or propose to exercise or not exercise, a workplace right; or exercise, or propose to exercise, a workplace right in a particular way.
- Breach of s 346(b) of the Fair Work Act, being a prohibition on a person taking adverse action against another person because the other person engaged, or had at any time engaged or proposed to engage, in industrial activity as defined by paras 347 (a) or (b).
- Breach of s 348 of the Fair Work Act, being a prohibition on a person organising or taking, or threatening to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.
- Section 363 of the Fair Work Act, which defines "actions of industrial associations".
- A claim for tortious interference with contractual relations.

Is there a serious question to be tried?

40 In respect of s 343 of the Fair Work Act, the Full Court in such cases as *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, 218 FCR 172 at [7] and *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191 at [155] found that the conception of coercion requires the pressure applied to be unlawful, unconscionable or illegitimate. A similar requirement exists in respect of allegations of coercion under s 348 : *Newton v Australian Postal Corporation (No 2)* [2019] FCA 2192 at [27]–[29].

41 For the purposes of s 340 and s 346(b) of the Fair Work Act, the applicant contended that the CFMEU took "adverse action" against it, namely the CFMEU as an industrial association (or officers or members) organised or took industrial action against the person. The workplace right on which the applicant relied was its ability to make an enterprise agreement with its employees.

42 In respect of the applicant's contention that there had been tortious interference with contractual relations, the applicant submitted that, if the conduct of the CFMEU meant that

the applicant was unable to give access to any of its sites to subcontractors, the applicant would be in breach of its contracts with those subcontractors.

43 The applicant contended that the evidence supported a finding that there was a serious question to be tried in respect of each cause of action, because of relevant conduct (to which Mr Prior deposed and which the applicant submitted was substantiated by video evidence before the Court) involving:

- workers being turned away from the site;
- verbal abuse of workers including "scum" and "grubs" both orally and by signs;
- filming of workers who entered the site;
- staff choosing not to attend work due to intimidation, including being filmed;
- both employees and subcontractors arriving at site gates but not entering (raising the inference that they have not done so due to the abuse and intimidation).
- At the Roma Street site, CPB employees were threatened to have their photograph put on "Whatsapp";
- In relation to the Southern Area Worksite, the Queensland General Manager from the CPB's subcontractor, DMG Concrete Pumping, received a phone call from a CFMEU official who said to him words to the effect of "If you pump concrete [on the CRR Project that day], you will be black balled in Queensland". Shortly thereafter, the concrete truck workers ceased work, the cement mixer trucks exited the site, and no further concrete was poured on that day by that subcontractor.
- A picket line including seated persons who wore clothing bearing the letters "CFMEU" and who blocked vehicle access at the Woolloongabba site.

(the **Action**)

44 The applicant further submitted that the Action was not authorised by a protected action ballot order, and that the Court could infer that the Action was organised by the CFMEU because:

- The Action was taken on the same days as the protected industrial action.
- There was no dispute that the CFMEU had organised the protected industrial action, being the protected work stoppages.

- The Action was being undertaken by, *inter alia*, CFMEU delegates and officials including Mr Dylan Howard, a CFMEU Civil Coordinator (and previously a CFMEU organiser).
- The effect of the Action was to cause not only CPB employees, but also subcontractors, not to perform work on the applicant's sites.
- The number of CPB employees who could legitimately be engaged in protected industrial action was relatively small (of the order of 170 workers) compared to the very significant contractor workforce, which the project relied on day to day, and which was typically in the range of 1500 - 2000 each day.
- Assuming the work stoppages promoted or were intended by the CFMEU to promote its aims in enterprise bargaining, the Action significantly advanced those aims.
- The Action was inherently highly unlikely to have been organised by anyone other than the CFMEU.

45 The respondent resisted the inferences the applicant asked the Court to make, for reasons including that:

- The presence of persons wearing what appeared to be CFMEU branded clothing, and the existence of CFMEU flags, at the relevant sites, did not mean that the Action was attributable to, authorised by, or organised by the CFMEU. It is not in dispute that the CFMEU sells branded merchandise, including clothing, to members of the public. It followed, for example, that the presence of persons at the respective sites engaging in various conduct was not necessarily at the instigation of the CFMEU, or that such persons were CFMEU delegates or officials for whose conduct the CFMEU was liable.
- The video evidence on which the applicant relied was inconclusive. For example, videos in Exhibits 2(A), 3(A), 4(A) and 5(A) relating to arrival and departure of cement mixer trucks from the Southern Area worksite simply showed that the trucks entered the site despite what appeared to be a marquee and CFMEU flags. The video showed no conduct which could be described as coercive to the truck drivers, and indeed the departure of the three cement mixers with their cement apparently unpoured could be attributed to an inability to pump the concrete because of a staff shortage at the site caused by strike action.

- Although Exhibit 1(A) showed apparent filming or photography of workers arriving at the Albert Street site, and although one of the persons involved in the filming or photography appeared to be wearing CFMEU branded clothing, there was no evidence to suggest that the CFMEU itself had organised or authorised that conduct. Rather, it was open to the Court to find that the conduct was that of a person on the picket line, becoming "carried away" and acting of their own accord.
- The video evidence on which the applicant relied concerned only 3 sites of the 16 sites controlled by the applicant on which there had been industrial action on the relevant dates. Further, the types of conduct occurring at each of the 3 sites was different. If the CFMEU had authorised or organised the relevant conduct, it would have occurred more consistently across all of the 16 sites.
- The Action alleged by the applicant was not unlawful, illegitimate or unconscionable for the purposes of the Fair Work Act provisions relating to coercion. Taking a photograph of a person in a public place or calling someone names is not, *per se*, unlawful. Picketing is also not of itself unlawful, even if not a protected action. No legal standard of illegitimacy had been identified by the applicant. Further, unconscionability involves taking advantage of a person who suffered a special disadvantage, which was not the case here.
- Organising activities, which was the applicant's primary complaint against the CFMEU, was not a feature of the tort of interference with contractual relations.
- In respect of the applicant's contentions concerning s 340 of the Fair Work Act, namely that the CFMEU had engaged in adverse action against the applicant by organising "industrial action" by the stoppage of other employees who work for subcontractors – such a claim was not competent because industrial action can only be taken by *employees* against their *employer* : *Auimatagi*. Further, in the present case the stoppage of work by employees of the *applicant* was protected action under s 408 of the Fair Work Act.
- The claim by the applicant that a subcontractor had been contacted by the CFMEU and threatened with "blackballing" if it pumped concrete at the applicant's sites was implausible when considered against the evidence of Mr Jackson Whipps of De Martin & Garparnini, who stated that the alleged threat by the CFMEU to his firm never occurred.

46 Considering the applicant's claim of breach of the tort of interference in contractual relations, I am not satisfied that applicant at this stage has made out a serious question to be tried. In particular, I am not satisfied that the applicant has adequately answered the respondent's submission that the tort does not contemplate organisational conduct of the kind alleged against the CFMEU.

47 Turning now to the applicant's claim of a *prima facie* case of adverse action by the CFMEU against the applicant within the meaning of s 340 and s 342(1) Item 7(a) of the Fair Work Act, the parties characterise the alleged adverse action differently. The applicant submitted that the "adverse action" interfered with the applicant's workplace right to make an enterprise agreement with its employees, or alternatively interfered with the workplace right of employees of the applicant to work. The CFMEU relied on the decision of the Full Court in *Auimatagi* as negating the prospect of a claim by the applicant against the respondent for adverse action referable to Item 7(a) of s 342 (1) of the Fair Work Act because it characterised the workplace right by reference to the alleged inability of subcontractors or their employees to work on the applicant's sites.

48 "Industrial action" is defined by s 19(1) of the Fair Work Act as including:

> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
>
> (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
>
> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
>
> …

49 In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Abigroup Contractors Pty Ltd* [2013] FCAFC 148 the Full Court considered issues including whether a union had engaged in industrial action at a construction site in circumstances where pickets had been established and there was evidence that workers were fearful of crossing those pickets in light of alleged communications from the union. The Full Court found in that case, *inter alia*, that the union had been denied procedural fairness in respect of the conduct of the case and whether the union had actually either engaged in or organised the relevant industrial action.

50 I do not consider it controversial, however, that organisation of a picket by a union, which either prevents access to the workplace by employees or which constitutes a threat to employees who choose to cross the picket such as to dissuade them from doing so, constitutes "industrial action" within the meaning of s 19(1)(a), (b) or (c) of the Fair Work Act.

51 I consider that it is likely that the picket lines, which are not disputed, at various sites, at random hours of the day and night, on days which were notified by the CFMEU as work stoppage days, were organised by the CFMEU. I further consider it likely that persons participating in those picket lines, and in conduct including filming, photography, blocking of entry to work sites and name calling, were either delegates or officials of the CFMEU, or were organised in that conduct by the CFMEU. The evidence of Mr Prior that he was informed by Ms Wood of the presence of Mr Dylan Howard at the Albert Street site on 16 July 2024, and the delivery at early hours of the day of supplies including barbeques, shade covers, and eskys, is suggestive of co-ordination and logistical support by an organisation with the resources of the CFMEU, rather than *ad hoc* activities by individuals sympathetic to the CFMEU's cause.

52 Accordingly, I am satisfied at this interlocutory stage that there is a serious question to be tried that the CFMEU has engaged in adverse action against the applicant.

53 Further, I am satisfied that there is a serious question to be tried in respect of claimed breaches of s 343 and s 348 of the Fair Work Act, referable to the coercive nature of the Action.

54 First, as I earlier explained, I am satisfied that the CFMEU organised the relevant pickets, in conjunction with claims of name calling and filming/photography. I reject the submission of the CFMEU that filming or photography of workers in an environment where a picket has been established is not of itself unconscionable conduct. As Murphy J observed in *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 at 388:

> I infer, also, that the first-named defendant has deliberately organized the picket and the activities of those who participate in it, and that it has done so deliberately to interfere with the plaintiff's contractual business activities. Members of the picket and some of the defendants have been seen photographing various drivers from time to time, and their trucks, when they are making delivery to the plaintiff's premises. I infer that this activity is designed to frighten such drivers or their employers into believing that retribution of one sort or another may be wreaked on them if they deliver their goods to the plaintiff, or should they ever return to its premises in order to do so.

55 More recently I note the decision of the Fair Work Commission in *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd* [2017] FWC 5380 where Asbury DP at [201] noted that the use of a mobile telephone to film or photograph vehicles leaving a mine was said to be designed to intimidate the occupants of the vehicles.

56 The prospect that images of persons entering the relevant sites could be posted on social media sites would, in my view, invariably be intimidatory to those persons. Again, I consider it likely that conduct involving filming or photography of persons entering the sites was pursuant to a strategy of the CFMEU rather than lone individuals.

57 Second, while I consider that the explanation advanced by the CFMEU for the departure of loaded cement mixers from the Southern Area worksite – namely, the striking of workers on that day – is plausible, that explanation must be weighed against the evidence of Mr Prior concerning alleged threats made by the CFMEU to subcontractors. While Mr Whipps has apparently indicated that his company was not threatened, the applicant presses evidence that an unidentified subcontractor was so threatened. I find it implausible that the applicant would have allowed delivery of fully loaded cement mixers at that site unless it had anticipated the ability to have poured the concrete on that day. The suggestion by the CFMEU that the cement mixers departed without pumping the concrete because of an absence of staff at the relevant site on 16 July 2024 is not persuasive.

58 Third, the fact that the applicant adduced video evidence of conduct at only three of its sites does not support an inference that the CFMEU was not involved. The evidence of Mr Prior was that there was intimidatory conduct occurring at multiple sites of the applicant. I accept that evidence at this interlocutory stage.

Is damages an inadequate remedy?

59 There is no contest that the Cross River Rail Project is an infrastructure project of significant proportions in Queensland. Mr Prior has given evidence of the criticality of events referable to the Cross River Rail project over the course of the next week. He has also given evidence concerning the need for construction activity to take place uninterrupted and imminently at the Exhibition Station in light of the upcoming Royal Queensland Show.

60 While there is no evidence before the Court as to the quantum of losses the applicant will face if there continues to be disruption to its activities at its 16 sites, I am satisfied that the damage suffered by the applicant would be extensive, both financially and reputationally, and

that any damages the Court could realistically order against the CFMEU would be an inadequate remedy.

Balance of convenience

61 The form of orders sought by the applicant is a relevant factor in determining where the balance of convenience lies.

62 First, I note that, at the hearing, Mr Massy for the respondent submitted that his client did not oppose an order in terms of paragraph 2(a) of the amended interlocutory application, relating to the photographing, recording by any means, or creating or maintaining a record of the identity of, any person or vehicle entering or leaving a construction site of the applicant. For reasons I have already expressed, an order in such terms is plainly appropriate.

63 Second, paragraph 2(b) of the amended interlocutory application restrains the officers, delegates, employees, or other representatives of the CFMEU from coming within 15 metres of a point of entry of relevant sites, subject to the exceptions listed. In my view the balance of convenience favours this order. I note the submissions of the parties at the hearing that points of entry may move depending on the progress of construction, and that (depending on the site) members of the public may access the sites. Limiting a restraint to the "main" point of entry to a site is fraught with uncertainty in such circumstances, and may practically result in the order being ineffective.

64 Third, noting the lateness of the hour at which I made the orders on 18 July 2024, 1 hour's notice by the CFMEU to its officers, delegates, members, employees and other representatives within its Construction and General Division Queensland and Northern Territory Branch, as sought by paragraph 3 of the amended interlocutory application, was plainly inadequate. I also note Mr Massy's submission that the administrative staff of the CFMEU, who would be responsible for the dissemination of the terms of the order, generally work business hours. In my view the appropriate order is that the relevant order require the CFMEU to take all reasonable steps forthwith, but no later than 9.00am on 19 July 2024, to bring the existence and content of this order to relevant parties. I am satisfied that the CFMEU would be in a position to take steps prior to that time and date to notify its officers, delegates, members, employees and other representatives, particularly noting that the parties were on notice earlier on 18 July 2024 that judgment could be delivered later that evening.

65 I also consider that it is reasonable for the CFMEU to bring the order to the attention of not only its officers, delegates, employees and other representatives within its Construction and General Division Queensland and Northern Territory Branch, but also its ***members***, as sought by paragraph 3(a) of the amended interlocutory application. Contrary to the concerns expressed by Counsel for the CFMEU at the hearing, the union bringing the Orders of the Court to the attention of the its members does not constitute "direction" by the CFMEU of those members.

66 Finally, in the circumstances of this case, I consider it reasonable for the CFMEU to direct its officers, delegates, employees and other representatives within the First Respondent's Construction and General Division Queensland and Northern Territory Branch to comply with not only these orders, but also the orders of Justice Rangiah of 1 May 2024.

CONCLUSION

67 The applicant has sought an order that the CFMEU notify the Court by midday on 24 July 2024 as to whether it intends to seek the discharge of these orders. Given that Orders were made late on 18 July 2024, it is reasonable that the CFMEU have until midday on 25 July 2024 to make that decision. In the event that the CFMEU seeks to do so, the matter can then be listed forthwith for case management before a duty judge and for the hearing of any application for discharge.

I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier.

Associate:

Dated: 19 July 2024

REASONS FOR DECISION

Fair Work Act 2009
s.418—Industrial action

CPB Contractors Pty Limited T/A CPB Contractors
v
Construction, Forestry and Maritime Employees Union
(C2024/6824)

DEPUTY PRESIDENT LAKE BRISBANE, 30 SEPTEMBER 2024

Application for stop order for unprotected industrial action – mass meeting – stop work – order issued,

[1] On 27 September 2024, CPB Contractors Pty Ltd (**CPB**) made an application to the Fair Work Commission (the **Commission**) seeking to stop industrial action by the Construction, Forestry and Maritime Employees Union (**CFMEU**) under s.418 of the *Fair Work Act 2009* (the **Act**).

[2] CPB were represented by Mr James Ford of Counsel and Mr Elliot Dalgleish appeared for the CFMEU. The CFMEU objected to CPB being represented. However, given the nature of industrial action in this matter is sufficiently complex, representation in this instance would allow the matter to run more efficiently. I granted permission for the Applicant to be represented at Hearing under s.596 of the Act.

[3] The matter was allocated to me on 27 September 2024. Section 420(1) of the Act requires that as far as practicable, an application under s.418 be determined within 2 days after it is made. I listed the matter for hearing on 27 September 2024 as the Applicant alleged that industrial action "is happening, is threatened, impending or probable or is being organised."

[4] Upon the conclusion of the hearing, I made an Order to stop industrial action as it was not protected industrial action, and I provide my reasons below.

Is the proposed action undertaken by the CFMEU constitute industrial action?

[5] Section 19 of the Act provides as follows:

> **19 Meaning of industrial action**
>
> (1) Industrial action means action of any of the following kinds:
>
> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an

> employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
>
> (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
>
> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
>
> (d) the lockout of employees from their employment by the employer of the employees.

[6] The relevant Explanatory Memorandum which accompanied the Fair Work Bill 2008 (Cth) stated at para 90 that:

> "The legislative note at the end of subclause 19(1) alerts the reader to the decision of the AIRC in Automotive Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Ltd [2004] AIRC 1254. The note is included to clarify that the definition of industrial action is only intended to cover actions that have *an industrial character and occur within the area of disputation and bargaining*."

[7] The decision of French J in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Laing* (1998) 89 FCR 17, affirmed in *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257 at [46]-[60] discusses the term "industrial action". The term "industrial action" is widely defined:

> "*So communication can be industrial action. And industrial action, verbal or non-verbal, can be communication in a wider sense. The withdrawal of labour because of an industrial dispute may be seen as a signal from employee to employer of a grievance or as underlining, from the employee's perspective, the seriousness of a grievance which has been communicated verbally. To say that industrial action sends a signal to the employer or communicates in this sense is not to take it out of the class of conduct to which s 127 applies.*
>
> *Industrial action may be caught by the section notwithstanding that it is intended to send a signal or communicate some message other than about a dispute with the employer. It is not necessary for the application of s 127 that it relate to an industrial dispute if it relates to work regulated by an award or a certified agreement. Thus, employees might stop work without the authority of their employer and in breach of their contract of employment in order to attend a rally at Parliament House or some other form of demonstration or public meeting to express views about some issue not arising out of their relationship to their employer. In such a case where their work is regulated by an award or a certified agreement, s 127 is capable of application*."

[8] On 26 September 2024, a right of entry notice was provided by Mr Dean Mattas from the CFMEU that he would enter the Gabba site at 12:00pm on 27 September 2024. A CFMEU delegate communicated with the workers, stating that there was a meeting at 12:30pm to 46 workers, of whom 9 were direct employees of CPB.

[9] Mr Ritchie Atuluola, who is a CFMEU delegate at the Gabba site, told the workers on site that there were a couple of CFMEU officials coming to site to "address everyone on the vote at 12:00pm or 12:30pm".

[10] There were no scheduled mealtimes or breaks around this time for the direct employees, or the subcontractors. The employees and workers at the Gabba tunnels have their breaks scheduled at 9:30am and 1:00pm. Sub-contractors have different breaks.

[11] CCTV footage was provided of workers from the CFMEU gathering before 1:00pm in what appears to be a "stop work". Upon the evidence before me, I am satisfied that there were employees in attendance at this meeting who were not on their scheduled lunch or smoko break.

[12] Given that there were communications sent by the CFMEU delegates about a grievance of the proposed Enterprise Agreement during working hours, this constituted industrial action under s.19(1)(a) of the Act, given that action was "industrial" in character, and that there was an adoption of a practice in relation to work by these workers in a delay of the performance of work.

Has the proper notice of the industrial action been given?

[13] Section 414 of the Act provides as follows:

> **414 Notice requirements for industrial action**
>
> Notice requirements--employee claim action
>
> (1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.
>
> (2) The period of notice must be at least:
>
> (a) subject to paragraph (b):
>
> (i) if subparagraph (ii) of this paragraph does not apply--3 working days; or
>
> (ii) if the proposed enterprise agreement is a multi - enterprise agreement--120 hours; or
>
> (b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph--that period of notice.

[14] There are no minimum notice requirements in the protected ballot action order and therefore it was expected that the CFMEU give at least 3 working days' notice regarding their stop work/industrial action to CPB. Notice of these meetings were not given to CPB and therefore did not meet the proper notice requirements under s.414 of the Act.

Order

[15] As I am satisfied that the actions undertaken by the CFMEU are not protected industrial action, and the action is happening, and is being organised, it is appropriate to make an Order to stop the industrial action under s.418 of the Act. I am satisfied that given the events that occurred at the Gabba site, it is probable that similar industrial action is being planned to occur at the Albert Street site.

> "**418 FWC must order that industrial action by employees or employers stop etc.**
>
> (1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
>
> (a) is happening; or
>
> (b) is threatened, impending or probable; or
>
> (c) is being organised;
>
> the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.
>
> Note: For interim orders, see section 420.
>
> (2) The FWC may make the order:
>
> (a) on its own initiative; or
>
> (b) on application by either of the following:
>
> (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
>
> (ii) an organisation of which a person referred to in subparagraph (i) is a member.
>
> (3) In making the order, the FWC does not have to specify the particular industrial action.
>
> (4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:
>
> (a) some or all of which has not been taken before the beginning of the stop period specified in the order; or
>
> (b) which has not ended before the beginning of that stop period; or
>
> (c) beyond that stop period;

the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot."

[16] In *United Voice v Foster's Australia Limited*,[1] the Full Bench noted that there must be a "rational connection between the period of the order and the purpose for which it was required to be made". With this consideration, I have made an order that the CFMEU stop industrial action in the form of "stop work" and that the workers cannot engage in this action until after 2 October 2024, when the Agreement access period is completed.

[17] An Order has been issued to this effect on 27 September 2024.



DEPUTY PRESIDENT

Appearances:

J. Ford as Counsel for the Applicant
E. Dalgleish appearing for the Respondent

Hearing details:
27 September 2024
Brisbane
Hearing via Microsoft Teams

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[1] *United Voice v Foster's Australia Limited* [2014] FWCFB 4104.

Fair Work Ombudsman

FWO alleges CFMEU officials unlawfully entered and remained on site exclusion zone

10 February 2026

The Fair Work Ombudsman has commenced legal action against the Construction, Forestry and Maritime Employees Union (CFMEU) and two of its officials for alleged unlawful conduct in Brisbane.

The legal action has been commenced in the Federal Circuit and Family Court against the CFMEU, as well as Cody Budgeon and Dylan Howard, who both hold the position within the union of 'organiser'.

The legal action relates to conduct that allegedly occurred on 15 November 2024 at the construction site of a new underground railway station at Woolloongabba, which is part of the Cross River Rail project.

The Fair Work Ombudsman alleges that Mr Budgeon and Mr Howard, and through them the CFMEU, breached sections 499 and 500 of the *Fair Work Act* by failing to comply with occupational health and safety requirements, and by acting in an improper manner while exercising their right-of-entry permits on the site.

Most significantly, it is alleged the conduct included Mr Budgeon and Mr Howard entering, without authorisation, the exclusion zone and refusing requests to leave the zone for about one hour, delaying work on the site.

An exclusion zone is set up on a construction site to ensure that work can be carried out safely with only authorised people present. The site had an exclusion zone that day due to a crane being used to lift a canopy onto the roof of the railway station.

Fair Work Ombudsman Anna Booth said the filing of legal proceedings reflected the seriousness of the alleged conduct.

"The alleged conduct of the two CFMEU officials on this Brisbane construction site was unacceptable and unsafe," Ms Booth said.

"Union officials are provided rights under industrial laws, which can include rights to enter work sites, but they come with legal obligations to behave in a proper manner and meet health and safety requirements," Ms Booth said.

"We expect all workplace participants, including unions and their officials, to follow the law at all times.

"Improving compliance across the building and construction sector is a priority for the Fair Work Ombudsman, and we will investigate reports of non-compliance and continue to hold to account those who act outside the law."

The FWO is seeking penalties in court in relation to multiple alleged breaches of the Fair Work Act. Mr Budgeon and Mr Howard each face penalties of up to $19,800 per contravention and the CFMEU faces penalties of up to $99,000 per contravention.

A directions hearing is listed in the Federal Circuit and Family Court in Brisbane for 25 May 2026.

The litigation is the third active court case the FWO has filed against the CFMEU and its current or former officials. The FWO's litigation against the CFMEU and former Victorian secretary John Setka, and separate litigation against the CFMEU and officials Joel Shackleton and Gerald 'Gerry' McCrudden, each filed in 2025, remain before the courts.

The Fair Work Ombudsman has also secured total penalties of more than $3.8 million in court cases that have been finalised since they were transferred to the FWO from the Australian Building and Construction Commission (ABCC) in December 2022.

All building and construction industry (www.fairwork.gov.au/find-help-for/building-and-construction-sector) employers, employees and other participants can seek specific workplace information, advice and assistance from the Fair Work Ombudsman.

Employers and employees can also visit www.fairwork.gov.au or call the Fair Work Infoline on **13 13 94** for free advice and assistance. An interpreter service is available on **13 14 50**.

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Media inquiries:

Matthew, 0466 470 507, media@fwo.gov.au (mailto:media@fwo.gov.au)

The Fair Work Ombudsman acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters, skies and communities. We pay our respects to them, their Cultures, and Elders past and present.

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The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2) [2023] FedCFamC2G 564

File number(s):	BRG 81 of 2022
Judgment of:	**JUDGE EGAN**
Date of judgment:	29 June 2023
Catchwords:	**INDUSTRIAL LAW** – Imposition of pecuniary penalties – where union official was no longer the holder of a right of entry permit – where union had taken steps to educate its officials as to how to appropriately exercise entry rights – relevant principles – orders accordingly.
Legislation:	*Fair Work Act 2009* (Cth) ss 499, 500, 546, 550, 793. *Work Health and Safety Act 2011* (Cth) ss. 117 and 118.
Cases cited:	*Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman* [2023] FCA 72 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Titan Cranes Case)* [2022] FCA 774 *Kelly v Fitzpatrick* [2007] FCA 1080 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 *Fair Work Ombudsman v AJR Nominees Pty Ltd (No. 2)* [2014] FCA 128
Division:	Division 2 General Federal Law
Number of paragraphs:	24
Date of last submission/s:	2 June 2023
Date of hearing:	2 June 2023
Place:	Brisbane
Counsel for the Applicants:	Mr M McKechnie
Solicitor for the Applicants:	K&L Gates

Counsel for the Respondent:	Mr H Clift
Solicitor for the Respondent:	Hall Payne

ORDERS

BRG 81 of 2022

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**FAIR WORK OMBUDSMAN** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	DEAN LESLEY RIELLY Second Respondent

ORDER MADE BY: **JUDGE EGAN**

DATE OF ORDER: **29 JUNE 2023**

THE COURT ORDERS THAT:

1. Pursuant to the provisions of sections 546(1) and (3) of the *Fair Work Act 2009* (Cth) (FW Act):

   (a) The First Respondent pay a pecuniary penalty in the amount of $37,500.00 to the Commonwealth of Australia Consolidated Revenue Fund on or before 4:00pm on 27 July 2023 by reason of its contravention, pursuant to sections 793 and 550(2)(c) of the FW Act, of sections 499 and 500 of the FW Act.

   (b) The Second Respondent pay a pecuniary penalty in the amount of $5,500.00 to the Commonwealth of Australia Consolidated Revenue Fund on or before 4.00pm on 27 July 2023 by reason of his contravention of the provisions of sections 499 and 500 of the FW Act.

2. The Applicant have liberty to apply on the giving of two (2) days' notice by it to the Respondents in the event of any failure on the part of either the First Respondent or the Second Respondent to comply with the orders of the Court as set out in paragraph 1 hereof.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE EGAN

Introduction

1 On 21 February 2023, this Court made the following declarations and orders:

IT IS DECLARED THAT:

A. In contravention of section 499 of the *Fair Work Act 2009* (Cth) (the FWA), on 1 July 2021 at Lot 3, 142 Albert Street, Brisbane (the Site), Mr Rielly failed to comply with reasonable requests made by representatives of the CBGU JV, the occupier of the Site, to comply with occupational health and safety requirements that applied to the Site, while exercising a State or Territory OHS right, namely to:

(a) sign the Visitor Register;

(b) complete a visitor induction;

(c) not enter the tower crane pad;

(d) leave the tower crane pad;

(e) not enter a restricted area; and

(f) having entered a restricted area, refusing to leave it when requested to do so.

B. In contravention of section 500 of the FWA, on 1 July 2021 at the Site, Mr Rielly acted in an improper manner while exercising or seeking to exercise a right of entry, by:

(a) failing to comply with the Visitor Entry Requirements other than the requirement to make a Covid-19 Mandatory Health Declaration, namely by:

(i) failing to sign the Visitor Register;

(ii) failing to complete a Visitor induction.

(b) failing to comply with the Visitor Conduct Requirements, namely by:

(i) failing to be accompanied by an escort from CBGU JV;

(ii) failing to read and obey all safety signs on the Site; and

(iii) not entering any areas on Site to which access was restricted.

C. By reason of the operation of sections 793 and 550(2)(c) of the FWA, the CFMMEU was directly or indirectly, knowingly concerned in or party to the contraventions set out at

paragraphs A and B above and, as a result, the CFMMEU contravened sections 499 and 500 of the FWA.

AND IT IS ORDERED THAT:

3. Pecuniary penalties be imposed upon Mr Rielly pursuant to the provisions of s. 546(1) of the FWA as a result of his contraventions of the provisions of s. 499 and s. 500 of the FWA as set out in paragraphs A and B of the declaratory orders made herein.

4. Pecuniary penalties be imposed upon the CFMMEU pursuant to the provisions of s. 546(1) of the FWA as a result of its contraventions of the provisions of s. 499 and s. 500 of the FWA as set out in paragraphs A and B of the declaratory orders made herein.

5. The date for the hearing of any application for the imposition of pecuniary penalties be adjourned to a date to be fixed.

2 The conduct giving rise to the making of orders by the Court was undertaken by the second respondent, namely Dean Lesley Rielly (Rielly). It is not without significance that the Court found that requests and requirements made of Rielly *' ... were treated with disdain and ignored.'* [1]

3 Relevant past conduct on the part of Rielly which needed to be taken into account when assessing pecuniary penalties was as set out in Annexure B to the applicant's written submissions filed on 4 April 2023, as summarised at [18] of those submissions, as follows:

> [18] That timeline can be summarised as follows:
>
> (a) in January to March 2019, Mr Rielly coerced CPB Contractors to take adverse action against Telum Precast (Qld) Pty Ltd at the Coffs Harbour Hospital Project (**Coffs Harbour Conduct**);
>
> (b) in August 2019, Mr Rielly obstructed a concrete pour on the Woolgoolga to Ballina Pacific Highway upgrade construction project that resulted in the loss of 1.5 working days (**W2B Conduct**);
>
> (c) in March 2020, proceedings were filed against Mr Rielly in relation to the Coffs Harbour Conduct;
>
> (d) in November 2020, proceedings were filed against Mr Rielly in relation to the W2B Conduct;
>
> (e) in February 2021, the Court found that Mr Rielly was liable for the Coffs Harbour Conduct;
>
> (f) in July 2021, Mr Rielly engaged in the conduct the subject of this proceeding;

[1] See [27] of Judgement of the Court handed down on 21 February 2023.

(g) in January 2022, the Court imposed a penalty on Mr Rielly for the Coffs Harbour Conduct;

(h) in February 2022, this proceeding was filed against Mr Rielly and the CFMMEU in relation to his conduct on the Cross River Rail Project;

(i) in May 2022, the Court found that Mr Rielly was liable for the W2B Conduct;

(j) in August 2022, the Court imposed a penalty on Mr Rielly for the W2B Conduct (noting that the appeal of that decision was dismissed in March 2023); and

(k) in February 2023, the liability decision was made by the Court in this proceeding.

4 No doubt with a view to minimise the quantum of any pecuniary penalty imposed upon either the union or Rielly, an affidavit sworn by one Leanne Butkus was filed on behalf of the respondents on 2 May 2023. Ms Butkus deposed such affidavit in her capacity as office manager of the Queensland and Northern Territory Branch of the Construction and General Division of the Construction, Forestry, Maritime, Mining and Energy Union. Paragraphs [4] – [7] of such affidavit relevantly provided information to the effect that Rielly had ceased to hold a right of entry permit under the *Fair Work Act 2009* on September 2022, and that he had ceased his employment with the union on 6 September 2022. Those paragraphs were as follows:

[4] I have searched the records of the Union and the CFMEUQ in relation to the employment of the second respondent.

[5] Mr Dean Rielly, the second respondent, ceased to hold a right of entry permit under the Fair Work Act 2009 (Cth) on 2 September 2022 when the application for a new permit was refused by the Fair Work Commission. The permit was then returned by the Union to the Commission.

[6] Mr Rielly ceased his employment with the Union on 6th September 2022.

[7] Mr Rielly is currently employed by the CFMEUQ as an Organiser.

5 In *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman* [2023] FCA 72 at [55] (CFMMEU v FWO), Rangiah J said as follows:

[55] It was an agreed fact before the primary judge that Mr Ravbar no longer held an entry permit under Pt 3-4 of the Act. In *Pattinson (HC)*, the plurality observed at [47] that a penalty may be moderated by changes in the membership of an industrial organisation which reduce the risk of similar contraventions arising in the future. That Mr Ravbar no longer had an entry permit and could no longer contravene s 500 of the Act was a matter that could bear upon the need for specific deterrence and, consequently, the appropriate penalty. …

6 Further, the respondents filed an affidavit which had been affirmed by one Brian Lacy who relevantly was a practicing barrister experienced in industrial relations law who had been engaged by the union to provide training to officials of the union who were permit holders. That training was focussed upon:

(a) The principles around the prohibition on acting in an improper manner under s. 500 of the *Fair Work Act 2009* ('FWA');

(b) The rights of permit holders under s. 118 of the *Work Health and Safety Act 2011* (Cth) ('WHS Act') when exercising a s. 117 right of entry to investigate suspected contraventions, including in relation to ceasing work where the officials have concerns about whether the employees are exposed to unsafe conditions; and

(c) Alternative options available to permit holders when faced with difficult circumstances on site.

7 Paragraphs [6] – [12] of the affidavit of Mr Lacy relevantly provided as follows:

> [6] I was instructed that, by conducting the training, the CFMMEU was seeking to ensure that the Officials had access to a formal and structured learning setting to provide them with sufficient knowledge to facilitate their compliance with the law in the future.
>
> [7] The training was conducted in person with the Officials at the CFMMEU offices in Brisbane on Tuesday 13 September 2022. Some of the Officials participated by video.
>
> [8] On 15 September 2022, I provided my report to the CFMMEU on the training and instruction that I gave to the Officials **(Report).**
>
> [9] Annexed and marked **BL-1** is a copy of my Report with attachments.
>
> [10] I made an affidavit in Federal Court proceedings QUD231 of 2021 on 16 September 2022, which was then tendered by the Union in the penalty hearing of that matter.
>
> [11] In preparing the Report I read the Harmonised Expert Witness Code of Conduct and I agree to be bound by it.
>
> [12] I have made all necessary inquiries which I believe desirable and appropriate (save for any matters explicitly identified in the Report) and no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.

8 In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Titan Cranes Case)* [2022] FCA 774 at [43] – [47] inclusive,

Logan J recognised that the Union understood that there was a behavioural problem on the part of some of its officials which required corrective action. His Honour held as follows:

> [43] The acknowledgements of contravention were not made at the earliest possible opportunity. The evolution of the pleadings is eloquent proof of that. But they were made. And they were made before it was necessary for affidavit or other evidence to be prepared and filed. Moreover, I am persuaded that the acknowledgements do carry with them, in the overall circumstances, an element of understanding on the part of the CFMMEU and the individual respondents that their conduct was not just unlawful, for that it certainly was, but completely unacceptable in a society governed by the rule of law.
>
> [44] The reason why I hold that view is apparent in an affidavit made by Mr Brian Lacy AO, which was read on behalf of the CFMMEU. Mr Lacy is a distinguished Australian. He held particular responsible positions, in his youth, in Defence Signals, in which necessarily he must have been invested with a high degree of trust and confidence in respect of our nation's most sensitive national security classified material. He was admitted to the Bar in later life, with a particular expertise in industrial law. His postnominal AO bespeaks a high recognition in our national honour system. He served a term as a senior deputy president of the Industrial Commission's predecessor, the Australian Industrial Relations Commission. Moreover, he held, at what must have been a difficult time, the highly responsible position of Administrator of the Christmas Island and Cocos and Keeling Islands territories of the Commonwealth
>
> [45] Mr Lacy was commissioned by the CFMMEU, via its industrial officer, to give very particular training indeed to each of the individual respondents about their industrial law responsibilities. There was some controversy as between the parties about what was or was not relevant or admissible in Mr Lacy's affidavit. As to that, though, I hold exactly the same view as did Snaden J, who was also the beneficiary of like evidence from Mr Lacy, in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Monash Freeway Widening Case) (*No 2) [2021] FCA 1101 (the Monash Freeway Widening Case). His Honour observed, at [49] – [59], as follows:
>
> > [49] The respondents led evidence in the form of an affidavit affirmed on 7 April 2021 by Mr Brian Lacy AO. Parts of that affidavit were objected to in ways to which I shall shortly come; but, in summary, it attested to some training that the Union engaged Mr Lacy AO to provide to its officials, including Simpson, concerning the nature and limits of the rights of entry conferred by part 3-4 of the FW Act. That training, it was said, reflects some effort on the part of the respondents (and in particular the Union) to understand the limits of those statutory powers and to ensure that they are not breached in the future.
> >
> > [50] Mr Lacy AO is a barrister and a former presidential member of what is now the Fair Work Commission. He is well known to and well respected by those who have practiced in the field of industrial law over recent decades. His expertise undoubtedly extends to the nature and limits of the rights of entry conferred by part 3-4 of the FW Act. The Commissioner did not contend otherwise.

[51] By a report that he provided to the Union after conducting his training session with Simpson, Mr Lacy AO recorded that:

(1) he met with Simpson on 18 January 2021 for the purposes of administering that training;

(2) that meeting lasted for approximately 65 minutes;

(3) during their session, he explained to Simpson why his conduct at the Eumemmering Creek Site on 29 and offended ss 499 and 500 of the FW 30 April 2017 Act;

(4) further, he explained to Simpson why his conduct at the Gate 3 Site on 9 May 2017 contravened s 500 of the FW Act;

(5) during and/or as a result of the training he undertook, Simpson:

(a) agreed that "...it is important that he [Simpson] has a good knowledge and understanding of his responsibilities and obligations under industrial and work health and safety laws";

(b) stated that he appreciated the opportunity to undertake training in order that he might "...better understand those responsibilities and obligations";

(c) appeared, to Mr Lacy's AO observations and from comments that he (Simpson) made during their discussions (but upon which Mr Lacy AO did not elaborate), to understand "...why his conduct contravened sections 499 and 500 of the FW Act";

(d) struck Mr Lacy AO as "...contrite about the events of April/May 2017 and genuinely committed to compliance in future"; and

(e) appeared to understand "...the steps he needs to take to ensure he does not contravene right of entry provisions in future".

[52] Before preparing his report, Mr Lacy AO "...read, understood and complied with[,] and agree[d] to be bound by the [Federal Court of Australia] Expert Evidence Practice Note (GPN-EXPT)".

[53] Attached to Mr Lacy's AO expert report was correspondence that the Union sent to him on 22 December 2020, by which it requested that he provide training to Simpson. Amongst other things, that correspondence recorded that:

(1) the Union wished to retain Mr Lacy AO to provide to Simpson training "...about his responsibilities and obligations under workplace laws";

(2) the purpose of that training was "...to ensure Mr Simpson understands and has a good knowledge of his responsibilities and obligations under applicable industrial and work health and safety laws, to assist him to comply with these laws in future";

(3) the Union wished "...to ensure that Mr Simpson has sufficient knowledge to facilitate his compliance with the law in the future";

(4) Mr Lacy AO was asked, in particular, to focus upon the circumstances of this case and:

(a) why Simpson's conduct on 29 and 30 April 2017 was found to have contravened ss 499 and 500 of the FW Act;

(b) why Simpson's conduct on 9 May 2017 was found to have contravened s 500 of the FW Act; and

(c) what steps Simpson needs to take in future "...to ensure that contraventions of ss 499 and 500 do not occur";

(5) Mr Lacy AO was requested to prepare a report in respect of the training provided to Simpson; and

(6) any report so prepared would be provided to the court in connection with the penalty hearing that took place on 28 April 2021.

[54] The Commissioner objected to the passages of Mr Lacy's report that purported to record Simpson's state of mind or the matters that he appeared, to Mr Lacy, to "understand". He submitted that those observations were expressions of opinion that did not fall within Mr Lacy's AO field of expertise and that the court should take no account of them. Broadly, those objections were fairly advanced. To the extent that Mr Lacy AO purported to state in his report what he thought Simpson understood or believed, he trespassed beyond his acknowledged expertise and, respectfully, little if anything can be made of his opinions. To the extent that his observations were products of what Simpson told him, they are admissible under s 66A of the Evidence Act 1995 (Cth) as exceptions to the rule against hearsay. It is difficult to ascertain into which category some of Mr Lacy's AO observations fall. They are of limited, if any, assistance presently.

[55] It doesn't much matter. Respectfully, the Commissioner's objections are largely a distraction. The state of Simpson's knowledge or understanding after having completed his training is one thing; his apparent willingness to undertake it speaks also to the deterrent effect that the setting of penalties in the present case must strive to achieve. Likewise, it is clear from the brief given to Mr Lacy AO that the Union, having orchestrated the training, should be understood to have exhibited a desire to ensure that Simpson and its other organisers conduct themselves lawfully in the future.

[56] The Commissioner urged the court to approach the training provided by Mr Lacy AO with some caution. It was, he said, comprised of a single, hour-long training session and was, on the documentation available, designed and intended to assist the Union in proceedings such as this one. He described it as an exercise in self-interest.

[57] With respect, that is undoubtedly so; but so to observe is not to acknowledge any relevant want of sincerity on the respondents' part. The respondents were entitled to take steps to educate themselves with a view to ensuring, first, that they in future avoid the predicament in which they currently find themselves; and, second, that they (and the Union, in particular) can demonstrate why penalties to be imposed upon them in the present circumstances needn't be as high as they might otherwise need to be (for example, in the Union's case, because the attitude of belligerence that its history of statutory non-compliance demonstrates is ameliorated, at least to some extent, by a contemporary willingness to ensure that its officials adhere to the requirements of the law).

[58] It may be that history vindicates the Commissioner's scepticism that the union's poor record of compliance with the right of entry provisions of part 3-4 of the Fair Work Act continues unabated, and that the training provided by Mr Lacy is exposed over time as something of a stunt designed to dupe the court into imposing lower penalties than might otherwise have been thought appropriate. If that occurs, it might well serve as a circumstance of which future courts take account in assessing the level of penalty necessary to deter repetition of statutory misconduct.

[59] For now, however, I do not share the Commissioner's cynicism. The training that Mr Lacy AO has administered can only be seen as a welcome development, and as one that reflects well on the union for organising it and on Mr Simpson for agreeing to take it. It reflects an acknowledgment, on the respondents' part, of wrongdoing – of a problem requiring corrective action. It weighs against other considerations, most obviously, the union's poor history of statutory contravention, which, in the balance, inform the deterrent effect that the court must strive to achieve through the imposition of penalties in this case.

[46] Making due substitution for the reference by Snaden J, in the passage quoted to Mr Simpson, to the individual respondents in this case, and due amendment of relevant dates, I respectfully agree with everything that his Honour has stated in relation to the evidence of Mr Lacy and regard it as exactly applicable in the present case.

[47] Once again, in the present case, the training which Mr Lacy has administered to each of Mr Seiffert, Mr Murdoch and Mr Rapata can only be seen as a welcome development, or perhaps more aptly, a further welcome development. It is a development that reflects well on the CFMMEU for organising it, and it reflects well on Mr Seiffert, Murdoch and Rapata for agreeing to undertake it. I accept it reflects an acknowledgement on the part of both the individual respondents, as well as the CFMMEU of a problem requiring corrective action. As in the case before Snaden J, it weighs against other considerations, once again, and most obviously, the CFMMEU's shameful history, as I once observed in *Broadway on Ann*, of statutory contravention.

Consideration of Submissions as to Penalty

9 In *Kelly v Fitzpatrick* [2007] FCA 1080 at [28], Tracey J said as follows:

> [28] The respondents have expressed contrition and have put in place mechanisms which are designed to ensure that there will be no repetition of the breaches which have led to the present proceeding. Specific deterrence does not, therefore, loom large as a consideration in determining penalty. It does not follow that the need for general deterrence may be disregarded. As Finkelstein J said in *CPSU v Telstra Corporation Limited* [2001] FCA 1364; (2001) 108 IR 228 at 231: "even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct ..." No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] FCA 383; [2001] ATPR 41-815 at [13].

10 It is relevant to consider whether there is evidence of contrition on the part of the wrongdoer, something most often seen by the taking of steps to alleviate any wrongdoing, and the taking of steps with a view to preventing any future contraventions. [2]

11 Though any penalty ought to be commensurate with the seriousness of the conduct engaged in, any such penalty should not be crushing or oppressive. [3]

12 In the present matter, there was no evidence of loss or damage having been suffered by any of the contractors or members of the consortium. In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20, the Full Court observed that the absence of loss or damage is a circumstance which usually gave rise to the imposition of a less severe penalty than in circumstances where significant harm had been established. The Court has had regard to such principle.

13 The Court also has been mindful of the fact that Rielly is no longer a relevant permit holder, and therefore would be unable in the future to be involved in conduct of the kind giving rise to the current litigation. The Court has also been mindful of what was held by Rangiah J in *CFMMEU v FWO* at [63] – [65] where it was said:

> [63] In *Pattinson (HC),* the plurality held that the purpose of a civil penalty under the Act is "primarily, if not solely", the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act: at [9]. The power conferred by s 546 of the Act is not subject to constraints such as a notion of proportionality drawn from the

2 *ACE Insurance Ltd v Trifunovski (No. 2)* [2012] FCA 793 at [113] – [114] per Perram J.
3 *Fair Work Ombudsman v Promoting You Pty Ltd* [2012] FMCA 58.

criminal law: at [10]. Section 546 of the Act does not require that the maximum penalty be reserved for the most serious examples of misconduct: at [49].

[64] The plurality held that what is required is that there be some reasonable relationship between the theoretical maximum and the final penalty imposed: at [10], [53]. That relationship is established where the maximum penalty does not exceed what is reasonably necessary to achieve the purpose of s 546: deterrence of future contraventions of a like kind by the contraveners and others: at [10].

[65] The plurality also observed that where it is evident that a contravention has occurred as a matter of industrial strategy pursued without regard for the law, it is open to a court to reasonably conclude that no penalty short of the maximum would be appropriate: at [67]. Section 546 requires the court to ensure that the penalty strikes a reasonable balance between deterrence and oppressive severity: a penalty greater than is necessary to achieved deterrence would be oppressive: at [40]–[41]. The plurality described the "real task" under s 546 as "fixing the penalty which [the Court] considers fairly and reasonably to be appropriate to protect the public interest from future contraventions of the Act": at [71].

14 The fact that Mr Lacy had been engaged by the union to appropriately educate union officials was a step in the right direction in terms of the union recognising that ongoing disobedience evidenced by contraventions of the FWA was widely accepted by the community at large as unacceptable. Due credit ought to be given to the union in that regard, as was acknowledged by Logan J in the *Titan Cranes Case*.

15 It was submitted on behalf of the applicant that penalties to be imposed ought to approach the maximum for the union, in part because of the long history of contraventions by the uinion as set out in *Annexure B* to the applicant's written submissions. The identified contraventions exceeded 200 in number, with increasing frequency, over a 22 year period.

16 It was further submitted on behalf of the applicant that a penalty of $6,930.00 – $8,190.00 would be an appropriate penalty for Reilly. The applicant submitted that there was a disconnect between Reilly attending on site purportedly for the carrying out of a safety inspection which in itself resulted in he and others being exposed to safety hazards by his unsupervised attendance on site. Though a clear contravention in doing so, the Court finds that the attendance on site by Reilly did not endanger either himself or others. The evidence before the Court satisfied the Court that to the extent that Reilly was unsupervised, no aspect of the site terrain or traffic constituted a real hazard to him, or otherwise resulted in any other person being endangered. It had been raining on the day in question, and work had largely ceased on site. The machinery present on site was not being operated and therefore could not realistically have constituted a danger to either Reilly or those who were present at the time

of his inspection. The Court acknowledged in its reasons for judgement handed down on 21 February 2023 that there was a possibility of injury being sustained by Reilly by reason of his unauthorised entry upon the site, but the Court does not put any such possibility of injury as being other than remote. The attempt to characterise Reilly's presence on site as dangerous was unmeritorious.

17 It was submitted on behalf of the respondents that any penalties ought to be at "the lower end of the scale" because Reilly no longer held a right of entry permit, and because Mr Lacy had been engaged to educate officials of the union as to how they ought to appropriately engage when seeking to exercise rights of entry under the FWA. There is merit in those submissions.

18 Reilly's conduct was not coercive in nature, but rather might best be characterised as high-handed and arrogant. The Court finds that Reilly's contraventions were the result of his own exercise of will, rather than constituting part of an orchestrated union ploy to disrupt work on site. There was no evidence that either senior management of the union, or any other union official, counselled or procured Reilly's contraventions. There was no evidence of other similar contravening conduct by Reilly on the day.

19 The Court accepts that the engagement of Mr Lacy constituted evidence of contrition on the part of the union. The union had attempted to take corrective action to prevent the behaviour of Reilly being repeated in the future.

20 There is nonetheless a requirement that any penalty act as a deterrent to dissuade others from being involved in conduct of the kind evident in the current matter. It was accepted by the respondents that the respondents had not co-operated with enforcement authorities. [4]

Penalty

21 It was admitted by the union that Rielly was relevantly involved in the relevant contraventions, and that it was accessorily liable by reason of such contraventions.

22 The maximum penalties able to be imposed for a contravention of s. 499 of the FWA at the relevant time were the sum of $63,000.00 for the Union, and the sum of $12,600.00 for Rielly. In this matter, the penalties to be imposed have not been discounted by reason of the fact that the respondents had not co-operated with the enforcement authority. [5]

4 Paragraph [23] of the Respondents' written submissions on penalty filed on 2 May 2023.
5 *Fair Work Ombudsman v AJR Nominees Pty Ltd (No. 2)* [2014] FCA 128 at [51] per Gilmour J.

23 Having had regard to all of the submissions made on behalf of both the applicant and the respondents, and the evidence before the Court, the Court is of the view that pecuniary penalties ought to be respectively imposed as follows:

(a)	As Against The Union	$37,500.00
(b)	As Against Rielly	$5,500.00

24 And it is so ordered.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Egan.

Associate:

Dated: 29 June 2023

FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (Cross River Rail Appeal) [2024] FCAFC 1

Appeal from:	*Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2023] FedCFamC2G 101 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2023] FedCFamC2G 564
File number(s):	QUD 322 of 2023
Judgment of:	**HALLEY, GOODMAN AND MCELWAINE JJ**
Date of judgment:	29 January 2024
Catchwords:	**INDUSTRIAL LAW** – Appeal from a decision of the Federal Circuit and Family Court of Australia (Division 2) – whether primary judge erred in finding visitor entry and conduct requirements were occupational health and safety requirements for the purposes of s 499 of the *Fair Work Act 2009* (Cth) – whether primary judge erred in finding breach of s 500 of the Act – appeal succeeds in part – penalties to be redetermined
Legislation:	*Fair Work Act 2009* (Cth) ss 499, 500 *Work Health and Safety Act 2011* (Qld) ss 117, 118, 119, 128
Cases cited:	*Australasian Meat Industry Employees' Union v Fair Work Australia* [2012] FCAFC 85; 203 FCR 389 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Monash Freeway Widening Case)* [2020] FCA 1727 *Curran v Thomas Borthwicks & Sons Ltd* (1990) 26 FCR 241 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2023] FedCFamC2G 101 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2023] FedCFamC2G 564 *Meneling Station Pty Ltd v Australasian Meat Industry*

Employees' Union (1987) 18 FCR 51

Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	59
Date of hearing:	8 November 2023
Counsel for the Appellants:	Mr CW Dowling SC and Mr H Clift
Solicitor for the Appellants:	Hall Payne Lawyers
Counsel for the Respondent:	Mr MD McKechnie and Ms N Abdalla
Solicitor for the Respondent:	K&L Gates

Table of Corrections

27 February 2024	In the final sentence of paragraph 57, "requirements" has been replaced with "requirement" and "to leave the tower crane pad and" has been removed.

ORDERS

QUD 322 of 2023

BETWEEN:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Appellant
	DEAN LESLEY RIELLY Second Appellant
AND:	**FAIR WORK OMBUDSMAN** Respondent

ORDER MADE BY: **HALLEY, GOODMAN AND MCELWAINE JJ**

DATE OF ORDER: **29 JANUARY 2024**

THE COURT ORDERS THAT:

1. The appeal is allowed, in part.
2. The declarations made in the Federal Circuit and Family Court of Australia (Division 2) in proceeding BRG 81 of 2022 on 21 February 2023 are varied by deleting from paragraph B, subparagraph (b)(i).
3. The orders made in the Federal Circuit and Family Court of Australia (Division 2) in proceeding BRG 81 of 2022 on 29 June 2023 are set aside.
4. The parties are to provide further written submissions as to what pecuniary penalties should be imposed consistently with these reasons limited to 3 pages as follows:
   (a) the respondent by 4 pm on 12 February 2024;
   (b) the appellants by 4 pm on 26 February 2024; and
   (c) the respondent in reply by 4 pm on 4 March 2024.
5. Subject to any further order of the Court, the pecuniary penalties question will be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 This appeal by the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) and its employee Mr Dean Lesley Rielly (**Mr Rielly**) concerns the exercise of a right of entry on 1 July 2021 by Mr Rielly to the **worksite** known as the Brisbane Cross River Rail Construction Project. Mr Rielly relied on a **Notice** of Entry to the worksite as a permit holder within the meaning of ss 497 and 500 of the *Fair Work Act 2009* (Cth) (**FW Act**).

2 Mr Rielly's entry was the subject of proceedings brought in the Federal Circuit and Family Court of Australia (Division 2) by the Australian Building and Construction **Commissioner**. The Commissioner alleged that Mr Rielly contravened s 499 of the FW Act by failing to comply with reasonable requests made by the **occupier** of the worksite, an unincorporated joint venture of four corporations, to comply with occupational health and safety (**OHS**) requirements with the result that he and the CFMMEU were each liable to the imposition of pecuniary penalties. The functions of the Commissioner were assumed by the Fair Work **Ombudsman** with effect from 6 February 2023, in consequence of the abolition of the Australian Building and Construction Commission. For convenience, we simply refer to the Ombudsman as the respondent in these reasons.

3 For reasons published on 21 February 2023, the primary judge largely upheld the claim, made declarations of contravention of ss 499 and 500 of the FW Act, determined that pecuniary penalties should be imposed and adjourned for further hearing the penalty quantum: *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2023] FedCFamC2G 101 (**liability judgment** or **LJ**). On 29 June 2023, the primary judge imposed penalties upon the first appellant in the amount of $37,500 and Mr Rielly of $5,500 pursuant to s 546(1) and (3) of the FW Act: *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2023] FedCFamC2G 564 (**penalty judgment**).

4 By a notice of appeal dated 26 July 2023, the appellants appeal both the liability judgment and the penalty judgment. For the reasons that follow, we have concluded that the appeal succeeds in part, with the consequence that the penalties imposed cannot stand. Counsel agreed at the hearing that the appropriate course of action, where not all findings could be upheld, was that we should redetermine the penalties following the receipt of supplementary written submissions.

BACKGROUND

5 Mr Rielly, a State Organiser employed by the CFMMEU and therefore an official of it, arrived at the worksite at around 2.30 pm on 1 July 2021. In his capacity as a permit holder within the meaning of ss 497 and 500 of the FW Act, he produced the Notice to employees of the occupier, namely Mr Hinrichsen, Mr Bekkers and Mr Maher. The Notice was given pursuant to s 119 of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) and relevantly provided:

> I reasonably suspect that the PCBU has not complied with s. 19(3)(A,B,C,D,E,F,G)
>
> - Primary Duty of Care
> - Risk Assessment in regards to working in inclement weather

6 The term PCBU is a work health and safety (**WHS**) term referring to the occupier in its capacity as "a person conducting a business or undertaking". Mr Rielly refused to sign-in or undertake a written site induction and was not given an oral sign-in or induction. Mr Rielly then conducted an inspection of the worksite, which included climbing a tower crane pad, an elevated platform of approximately 1.2m, to view certain excavation work being completed on the worksite from a higher vantage point and entering what the respondent contended was a "restricted area" where excavators had been working earlier that day (but were no longer working).

7 It was the respondent's case at trial that Mr Rielly, in entering the worksite and conducting his inspection, failed to comply with OHS requirements applicable to all visitors to the worksite including (as set out at [12] in the amended statement of claim):

> (a) a requirement to do the following prior to entering the Site:
>
> (i) sign the Visitor Register;
>
> (ii) complete a visitor induction; and
>
> (iii) make a COVID-19 Mandatory Health Declaration
>
> (**Visitor Entry Requirements**);
>
> (b) a requirement to do the following at all times while on the Site:
>
> (i) be accompanied by an escort from CBGU JV;
>
> (ii) read and obey all safety signs on the Site; and
>
> (iii) not enter any areas on the Site to which access was restricted
>
> (**Visitor Conduct Requirements**);
>
> (c) to comply with the demarcation between areas of the Site that are suitable for

visitors and areas that have restricted or no access; and

(d) to comply with the various signage containing health and safety warnings and directions to persons on the Site.

Particulars

Those requirements were recorded in a suite of documents including: WHS Management Plan of 12 May 2021, COVID-19 Project Management Plan of 28 June 2021, Security Management Plan of 23 April 2021, COVID-19 Mandatory Health declaration and the Visitor Induction Declaration.

8 By reason of his conduct, it was alleged that Mr Rielly breached ss 499 and 500 of the FW Act. Section 499 of the FW Act provides:

> **Occupational health and safety requirements**
>
> A permit holder must not exercise a State or Territory OHS right unless he or she complies with any reasonable request by the occupier of the premises to comply with an occupational health and safety requirement that applies to the premises.
>
> Note 1: This section is a civil remedy provision (see Part 4-1).
>
> Note 2: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

9 Section 500 of the FW Act provides:

> **Permit holder must not hinder or obstruct**
>
> 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.
>
> Note 1: This section is a civil remedy provision (see Part 4-1).
>
> Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.
>
> Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502).

10 At trial, the primary judge heard evidence from various witnesses for the respondent in support of the allegations, being Mr Hinrichsen, Mr Bekkers, Mr Maher and Mr Taylor, all employees of the occupier. The respondent's evidence focused both upon what happened during Mr Rielly's visit as well as the usual practice of the occupier with regards to the visitor entry and visitor conduct requirements. Mr Rielly did not give evidence on his own behalf, claiming privilege against self-incrimination.

11 The primary judge found that Mr Rielly failed to comply with the visitor entry requirements by refusing to sign the visitor register and complete an induction, in circumstances where it

was reasonable for these requirements to be imposed and complied with: LJ [21]-[23]. Although his Honour accepted that there was evidence that the entry requirements were not routinely enforced, this did not "absolve" Mr Rielly, in his capacity as a visitor, from compliance: LJ [26]. His Honour explicitly rejected the appellants' submission that Mr Rielly could have complied with the requirement had he been offered an oral sign-in and induction, finding that Mr Rielly's "intransigent stance" meant it was unlikely he would have agreed: LJ [28].

12 His Honour was not satisfied, however, that the making of a COVID-19 Mandatory Health Declaration was a necessary requirement, because at the relevant time there was no such requirement applicable to open air worksites: LJ [23].

13 In relation to Mr Rielly's conduct during the inspection, the primary judge found (at LJ [31]) that Mr Rielly disobeyed instructions conveyed and requests made to him by the occupier's employees including:

(a) not to enter the tower crane pad;

(b) to leave the tower crane pad;

(c) not to enter the restricted area; and

(d) to leave the restricted area;

in circumstances where the purpose of each was to ensure that Mr Rielly "did not suffer an injury on-site": LJ [33]. His Honour did not accept the respondent's submissions that Mr Rielly would have been unduly delayed or frustrated in carrying out his inspection if he had complied with the requests made of him: LJ [37].

14 Accordingly, the primary judge found that the pleaded breaches of ss 499 and 500 of the FW Act were made out, save for the COVID-19 Mandatory Health Declaration. As Mr Rielly was an official of the first appellant, it was also taken to have engaged in the contraventions pursuant to ss 793 and 550 of the FW Act.

APPEAL GROUNDS

15 The notice of appeal asserts nine grounds of appeal as follows:

> Visitor Entry Requirements – s 499
>
> 1. The learned trial judge erred at [21] of the **liability judgment** (*Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2023] FedCFamC2G 101) in finding that the Visitor Entry Requirements

were an occupational health and safety requirement for the purposes of s 499 of the *Fair Work **Act** 2009* (Cth).

2. The learned trial judge erred by failing to assess whether the requests to comply with the Visitor Entry Requirements were reasonable.

3. The learned trial judge erred at [23] and [29] of the liability judgment by determining that the requests to comply with the Visitor Entry Requirements, other than the Covid declaration requirement, were reasonable and that the second appellant had contravened s 499 of the Act.

Visitor Conduct Requirements - s 499

4. The learned trial judge erred at [31] of the liability judgment in finding that the second appellant failed to comply with:

   (a) requests to not enter upon the tower crane pad; and

   (b) requests to leave the tower crane pad.

5. The learned trial judge erred at [34] and [35] of the liability judgment in finding that the second appellant failed to comply with requests that he be accompanied by an escort.

6. The learned trial judge erred by failing to assess whether the requests to comply with the Visitor Conduct Requirements were reasonable.

7. The learned trial judge erred at [31], [36], and [37] of the liability judgment by determining that the requests to comply with the Visitor Conduct Requirements were reasonable and that the second appellant had contravened s 499 of the Act.

Section 500

8. The learned trial judge erred in finding at [40] and [41] of the liability judgment that the second appellant acted in an improper manner in contravention of s 500 of the Act, and should have found that the second appellant lawfully exercised his rights of entry.

Penalty

9. If the appellants succeed on some of, but not all, grounds 1 to 7, the learned trial judge erred by taking into account an irrelevant consideration, or mistaking the facts, or both, in the assessment of penalty in the penalty judgment (*Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2023] FedCFamC2G 564).

16 It is convenient to address the appeal grounds in groups.

Grounds 1, 2 and 3

17 The first issue is whether the primary judge erred in his finding that OHS policies and plans at the worksite were *requirements* within the meaning of s 499 of the FW Act. The primary judge reproduced in considerable detail large portions of the affidavit evidence-in-chief of employees of the occupier at LJ [13] (Mr Maher) and LJ [15] (Mr Bekkers). He found that Mr Maher's evidence was corroborated by the evidence of Mr Bekkers, Mr Hinrichsen and

Mr Taylor. Although each was cross-examined, the primary judge accepted the evidence of each on the visitor entry and visitor conduct issues, noting that each witness was "forthright, appeared honest, and gave evidence to the best of their ability bearing in mind the passage of a significant period of time": LJ [14].

18 Primarily relevant to this issue is the affidavit evidence of Mr Maher, which in summary was as follows. There were several safety risks at the worksite including collisions with heavy machinery and falls from heights. The occupier implemented several control measures to eliminate or minimise safety risks including the delineation of accessways for heavy vehicle movements, entry gates to prevent members of the public from accessing the worksite and pre-start meetings each day to discuss the programme of works and the major site risks. Additional safety requirements were implemented for visitors, primarily because they were likely to be exposed to unfamiliar safety risks. The visitor requirements included reporting to the sign-in area on Lot 1 to undertake a visitor induction, completion of a mandatory visitor COVID-19 Mandatory Health Declaration and a requirement to be always escorted by a representative of the occupier whilst on the worksite and to comply with any relevant directions given by a representative of the occupier.

19 On 1 July 2021, a contractor was performing work on Lot 3 including excavation and retention work for the construction of an underground shaft. There had been intermittent showers that morning. The head contractor did not require personnel to work whilst it was raining if it was not safe to do so. Examples include working with electric power tools. Some personnel worked during periods of rain, and as an example traffic controllers continued to work whilst it was raining on 1 July 2021. Those personnel were dressed in appropriate wet weather gear.

20 Inside Lot 3, there was a communal area for workers next to the entrance gate. Behind it there was an excavator and a tower crane base. The tower crane base was accessible by a set of scaffold stairs. A restricted area had been set up, with a gravel road, to facilitate heavy vehicle transport of materials. It was appropriately marked with hard barricading, delineated walkways and signage. Only certain persons were authorised to enter the restricted area.

21 Mr Maher arrived at the worksite early in the morning on 1 July 2021. At approximately 9 am, the worksite was visited by two officials from the CFMMEU. Each completed the visitor induction requirements, was escorted by an employee of the occupier and complied with all relevant safety rules. Later that day, at approximately 2.30 pm, Mr Maher was

alerted to the fact that Mr Rielly had approached other employees of the occupier outside of Lot 3. Mr Maher proceeded to that location from Lot 1, a distance of approximately 100m. Mr Maher explained to Mr Rielly that in order to enter the worksite, he would have to attend an induction on Lot 1 so that he could be "checked in". The conversation continued:

> Mr Maher: We need to take you the [sic] induction area at the lot one entry so that we can check you in and walk through the visitor induction process with the safety lead.
>
> Mr Rielly: I don't want to go back to the office, I want to go on site.
>
> Mr Maher: Our procedures require all visitors to report to the main site office.
>
> …..
>
> Mr Maher: What is this visit regarding?
>
> Mr Rielly: I have a few concerns regarding workers in the rain, also I want to take a look at your access and egress.
>
> Mr Maher: We're happy for you to continue onto site, but first we need to get you to come back to lot one and sign in.
>
> Mr Rielly: I don't need to do that. I want to go onto site.
>
> Mr Maher: Our procedures require this of all our visitors. If you can wait here, Mark Taylor is our safety guy, he's on his way down here and can work through the process with us.

22 Mr Rielly did not agree to attend Lot 1 for that purpose. Shortly thereafter, he followed a subcontractor through the entry gate. He was advised by Mr Bekkers that he could not enter the worksite without permission, and that he would "need to go back to Lot one and sign in". Mr Rielly did not respond.

23 A submission was put to the primary judge that Mr Rielly could have been, but was not, afforded an opportunity of orally complying with the visitor entry requirements. The primary judge rejected that contention at LJ [27] finding that:

> …The Court finds that the fact that he wasn't given that opportunity was, in the circumstances, of no significance. Mr Rielly had been directed to comply with the requirements but steadfastly refused to do so. The Court finds that even if he had been given an opportunity to orally undertake visitor entry requirements, he would have been unlikely to have agreed. Requests and requirements given to him were treated with disdain and ignored.

24 There is no appeal ground against that finding or the adjunct finding at LJ [28] that:

> The intransigent stance taken by Mr Rielly when first approached by representatives of the occupiers of the site clearly indicated his intention to be obstructionist and non-compliant from the outset. In such circumstances, and having regard to the relatively short period of time between when Mr Rielly arrived at the site and when he entered the site over the objections of the [occupier's] representatives then

> present, the Court finds that the representatives of the [occupier] on site didn't unreasonably fail to canvass with Mr Rielly whether he would, or would not, undertake visitor site entry requirements orally.

25 The amended statement of claim at paragraph [12] particularised the visitor entry and visitor conduct requirements as comprised within a suite of documents including a WHS Management Plan of 12 May 2021, a COVID-19 Project Management Plan of 28 June 2021, a Security Management Plan of 23 April 2021, a COVID-19 Mandatory Health Declaration and a Visitor Induction Declaration. Those documents were in evidence before the primary judge. Within those documents, the following should be noted. The Visitor Induction Declaration requires information as to the name of the visitor, the project area within the worksite, the employing entity of the visitor and the purpose of the visit. The first full sentence reads:

> Before proceeding on to the site we request you read and understand the following information, take note of your responsibilities and also any instructions given.

26 Next follows a list of hazards and a statement whereby the visitor is required to sign and acknowledge awareness of "my obligations" including, wearing appropriate personal protective equipment, reading and obeying all site safety signs and being accompanied at all times "when on site until I have had a site induction". The design and construction subcontract between the principal and the occupier, at cl 17 requires there to be a WHS and quality management system. By cl 17.3, the occupier accepts responsibility "for all aspects of health and safety" relating to the project and the worksite, is obliged to carry out the contract so as to ensure "so far as is reasonably practicable, the health and safety of workers and other persons" and accepts broad ranging responsibilities to comply with all applicable health and safety and workplace health laws.

27 There is also a WHS Management Plan dated 12 May 2021. Clause 1.1 states that its purpose includes the identification of safety and health obligations, hazards and risks associated with the worksite. The primary objective at cl 1.2 is to ensure that the works are undertaken and completed safely. Within the appendices there is a table entitled *Element 7 - Training and Competence*, where cl 7.1 requires there to be established "minimum" inductions including "Project Induction" and "Visitor Induction". The Visitor Induction must include "as a minimum" the "Project emergency response arrangements". By cl 7.2, all relevant persons must receive and successfully complete an induction "prior to commencing work or on arrival at site". Clause 7.10 requires that workers and visitors be given appropriate emergency response training, and in particular that there be communication of the

requirements of the emergency response plan to all workers and visitors "as part of the Project Induction/Visitor Induction."

28 There was cross-examination of the occupier's witnesses to the effect that the visitor sign-in and induction process was not uniformly enforced. The evidence most favourable to the appellants was given by Mr Hinrichsen:

> MR CLIFT: That policy of requiring staff and visitors to sign-in and out wasn't uniformly enforced, was it?---Yes, it was.
>
> In fact, I suggest to you, Mr Hinrichsen, that it wasn't really enforced at all?---It was by the person who the visitor was visiting at the time.
>
> In fact, I suggest to you, Mr Hinrichsen, that it wasn't really enforced at all?---It was by the person who the visitor was visiting at the time.
>
> HIS HONOUR: I'm sorry. What did you say then?---So if you had a representative coming to visit you at the time, you would need to escort them through a visitors induction with the Damstra terminal
>
> All right. Well, what if they weren't visitors? What if they were workers on site?---Sorry. I don't understand.
>
> Well, I will leave it to Mr Clift.
>
> MR CLIFT: Do I understand your answer, Mr Hinrichsen, to be that whether or not a visitor signed in would depend on the person they were visiting?---No.
>
> I will perhaps ask the earlier question again. I suggest to you that the signing in and signing out policy for both visitors and staff was not uniformly enforced?---Yes.
>
> You agree with that?
>
> HIS HONOUR: Well - - -
>
> MR CLIFT: And I suggest that it wasn't enforced at all?---No.
>
> HIS HONOUR: Well, what do you mean "no"?
>
> MR CLIFT: Do I understand your evidence to be that it was enforced but not much?---Yes.

29 Mr Taylor gave evidence to the effect that union officials were ordinarily signed in orally, particularly in the context of the morning attendance of officials from the CFMMEU:

> Did you have a practice of signing people in orally?---Yes.
>
> You also didn't do an induction – sorry, they didn't do an induction themselves either, did they?---My recall is that they refused to – to partake in it. So we, in those situations, would do it orally. Most people – most others would just, you know, do – follow the proper process normal – normal process.
>
> So you did an oral induction that day with Mr Seiffert and Mr Blakeley?---I – I don't recall, actually.
>
> But that was your usual process when someone refused to sign in?---Well, the only –

> the only persons that refused to do it are – are union officials.
>
> But when they did, you would give them an oral induction; is that correct?---If they stood there long enough and let me do it.
>
> And you would orally sign them in?---Yes.
>
> And you would take written notes of that?---We would ask them to sign in to a visitors register at the very least; they would generally refuse.

30 The finding of the primary judge that is impugned is at LJ [21]:

> The Court finds that Mr Rielly failed to comply with the visitor entry requirements duly given to him on 1 July 2021. It is of no moment that the two union officials who attended onsite for the first visit were given an oral onsite induction, as well as being orally signed in and given a requirement to make oral COVID declarations. The requirement for compliance with basic entry requirements was recognised by such union officials and complied with, albeit that the mode 0f compliance differed from the normal visitor written sign-in entry requirement procedures contained in the written procedures manual. As a matter of construction, a valid requirement may be made or given under s. 499 of the FWA, notwithstanding that the actual requirement which was given differed from earlier requirements given to other different visitors earlier on the same day

31 Crisply summarised, the appellants' argument is that because the sign-in and induction practice was not insisted upon with respect to all contractors and visitors to the site, it did not amount to an OHS *requirement that applies to the premises* within the meaning of s 499 of the FW Act. We are unable to accept that submission. It conflates what were the OHS requirements for the worksite with their enforcement. The contractual clauses we have summarised required compliance with relevant OHS laws, there was a WHS Management Plan and an express requirement for visitor induction, including written acknowledgement of worksite risks and visitor obligations. These were requirements relating to OHS applicable to the worksite. They did not cease to have that character because on the evidence their enforcement was not uniform as between workers, visitors and union permit holders.

32 In this respect we agree with the reasoning of Snaden J in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Monash Freeway Widening Case)* [2020] FCA 1727 at [105] as to what is a "requirement" within the meaning of the section:

> To qualify in that regard, it is not necessary that an occupational health and safety directive should find prior expression in any written instrument, such as a safety plan or policy that pertains in some way to particular premises: *Darlaston v Parker* (2010) 189 FCR 1, 27 [101] (Flick J). There is no obvious reason why an occupier's request should, if it is to fall within the contemplation of s 499 of the FW Act, be one that applies generally to all others in attendance at the particular site. Plainly enough (and for the purposes of s 499 of the FW Act), a request for compliance with one that

> doesn't might more readily be impugned as unreasonable; and a requirement that applies only selectively might more easily be impugned as one that isn't genuinely calculated to reduce exposure to health or safety risks. Nonetheless, conduct upon which an occupier insists in order to promote safety or good health at particular premises is likely to be conduct that reflects an "occupational health and safety requirement that applies to the premises", no matter how narrow its scope or recent its creation.

33 The evidence before the primary judge did not establish that the visitor sign-in and induction process was not one genuinely designed to reduce health and safety risks to the extent that it was not uniformly applied. The differing approach to members of the CFMMEU, who may have been orally inducted (if at all) does not detract from the documented requirements applicable to visitors to the worksite that were in place at the time. An additional acute difficulty for the appellants is the unchallenged finding at LJ [28] that Mr Rielly was intransigent and obstructionist from the outset and would not have in any event undertaken the visitor site entry requirements orally.

34 The second issue raised by grounds 2 and 3, concerns the reasonableness of the visitor entry requirements. The appellants' arguments emphasise that Mr Rielly had a statutory right of entry and inspection and that the broad purpose of s 499 of the FW Act is to strike a balance between the rights of a permit holder and those of an occupier, but the primary judge failed to undertake that balancing process before concluding at LJ [23] that the visitor entry requirements were reasonable.

35 The argument commences with certain provisions of the WHS Act. Section 117 confers a right of entry to a workplace in favour of a permit holder "for the purpose of inquiring into a suspected contravention" that "relates to, or affects, a relevant worker". Section 118 is concerned with rights that a permit holder may exercise while at a workplace, including to inspect systems, plant and structures. There is a right to consult with relevant workers in relation to the suspected contravention. Notice of entry and the suspected contravention is required by s 119, unless to do so would "defeat the purpose of the entry" or "unreasonably delay" the permit holder "in an urgent case". There was no suggestion in this case that the requirement to give notice of entry would have defeated the purpose of Mr Rielly's entry or that the case was urgent.

36 Section 128 is concerned with reasonable requests by the occupier and provides:

> A WHS entry permit holder must not exercise a right of entry to a workplace under division 2 or 3 unless he or she complies with any reasonable request by the relevant person conducting a business or undertaking or the person with management or

control of the workplace to comply with—

(a) any work health and safety requirement that applies to the workplace; and

(b) any other legislated requirement that applies to that type of workplace.

37 It will be noted that this provision is broadly similar to s 499 of the FW Act. Counsel for the appellants submits that the purpose of s 499 is to strike a balance between the rights of a permit holder and those of a workplace occupier, extending in the latter to the obligation to maintain a safe place of work. The appellants' contention is that the primary judge failed to approach the reasonableness question in that way at LJ [23], which records a conclusion that save for the COVID-19 Mandatory Health Declaration "it was reasonable for the other visitor entry requirements to be imposed and complied with" and at LJ [29], which records a like conclusion.

38 That s 499 reflects a balancing of respective interests is not in doubt: *Meneling Station Pty Ltd v Australasian Meat Industry Employees' Union* (1987) 18 FCR 51 at 61-62 (Keely, Gray and Ryan JJ); *Curran v Thomas Borthwicks & Sons Ltd* (1990) 26 FCR 241 at 257 (Gray J) and *Australasian Meat Industry Employees' Union v Fair Work Australia* [2012] FCAFC 85; 203 FCR 389 at [59]-[65] (Flick J, Jessup and Tracey JJ concurring). As orally developed, the appellants' argument is that the entry requirements operated to impede or hinder the exercise of Mr Rielly's right of entry. That submission cannot be accepted because Mr Rielly did not give evidence that the entry requirements impeded or hindered him in any way. Nor was evidence to that effect elicited in the cross-examination of the respondent's witnesses. No question of balancing the respective rights and interests arose on the facts. This was not an issue that the primary judge was required to resolve in the manner now contended.

39 Further, the submission reads selectively the reasons of the primary judge and distorts the context. We have set out above paragraphs [27] and [28] from the liability judgment. The only reasonableness question that arose on the evidence, whether Mr Rielly ought to have been offered an oral sign-in and induction, was decided adversely to the appellants on the intransigence and obstructionist findings.

40 For these reasons, there is no merit in grounds 1, 2 and 3.

Grounds 4, 5, 6 and 7

41 These grounds concern the visitor conduct requirements, following entry by Mr Rielly to the worksite. The particular findings of the primary judge were as follows. First at LJ [30] he

accepted entirely the evidence of Mr Maher as to what transpired after Mr Rielly made his way onto Lot 3. That evidence is as follows. Mr Rielly walked to a lectern in the common area and began examining documents. Mr Maher advised Mr Rielly that certain documents, in the form of risk assessments, that he requested to view were stored on Lot 1, and it would be necessary to go there to "go through the sign-in process". Mr Rielly did not respond. Mr Rielly then walked to a staircase leading to the tower crane base. From this vantage point, he viewed the worksite. He was not followed by any employee of the occupier. The requirement to "follow the correct induction process" was not repeated because Mr Maher "felt it would be futile to attempt to change his behaviour". The tower crane was not in operation, and thus did not present any material safety risk at the time. Mr Maher's evidence continued that: "I ensured that [Mr Rielly] remained within my view so I was able to monitor him without escalating the situation".

42 Mr Rielly remained on the tower crane base for between two and three minutes. He then walked around to the other side of the worksite towards the restricted area. He was asked by Mr Bekkers where he was heading to, and the requirement to "come back to the office and sign in" was repeated. Once again, Mr Rielly did not respond, but proceeded to walk around the barriers that marked the restricted area. He was advised by Mr Bekkers to leave that area because he had not completed a sign-in. Again Mr Rielly did not respond. Shortly thereafter, Mr Taylor attended the worksite and engaged in a discussion with Mr Rielly. In consequence of that no further action was taken in relation to his entry to the worksite.

43 The primary judge at LJ [32] records that it was not put to Mr Bekkers in cross-examination that there had not been demands made of Mr Rielly to not enter upon the worksite, to leave the tower crane pad, to not enter the restricted area or to leave the restricted area. The reason for each of these instructions and request was to ensure that Mr Rielly did not suffer an injury whilst at the worksite: LJ [33]. At LJ [34], the primary judge recorded three submissions made on behalf of the appellants, to the effect that there had been no contravention because Mr Rielly had been escorted, there was no safety risk from the excavators nor any danger to him when he was in the restricted area. The primary judge made findings in relation to those submissions at LJ [35] as follows:

> Dealing with each of those submissions, the evidence establishes that at no time during Mr Rielly's site visit was any close presence to Mr Rielly of any of the occupiers' representatives consensual from Mr Rielly's perspective. From the outset, Mr Rielly was told not to go on site but he ignored such reasonable requests, unilaterally deciding to enter upon Lot 3 when an opportunity first presented itself.

> As to the excavators, though they were not operative at the time, the engines were nevertheless in unfamiliar surroundings to Mr Rielly, and he could have slipped on uneven ground and come into contact with one. As to Mr Rielly being in the restricted area, Mr Bekkers drew a distinction between traffic controllers being able to control the risk of injury from traversing vehicles, and to there being no risk at all as a result of the presence of such traffic controllers. It is one thing for a traffic controller to control traffic, but quite another thing for a traffic controller to prevent injury to an unauthorised visitor who is found to be on-site. Mr Hinrichsen gave supportive evidence that aggregate had been placed in and about the site, and that that could also have been the source of danger to Mr Rielly due to his unfamiliarity with the site when walking around when on it. Mr Hinrichsen confirmed that Mr Rielly entered onto the site unescorted, but that Messrs Taylor, Maher and Bekkers followed him. The Court finds that the only likely way that Mr Rielly would have been effectively discouraged from entering upon the site, or otherwise going where he wanted to when he had entered upon the site, would have been for him to have been physically restrained. Employees in the position of those present on the day shouldn't be put in that position of possible physical harm to themselves when they have already given reasonable instructions relating to visitor entry requirements, and had made other requests, for Mr Rielly to leave the site once he had entered upon it.
>
> (Footnotes omitted.)

44 These findings caused the primary judge to conclude at LJ [36] that Mr Rielly failed to comply with reasonable requests not to enter the worksite whilst unaccompanied, to read and obey all safety signs, to not enter a restricted area and to only confine himself to areas suitable for visitors, each of which the primary judge concluded were unreasonable acts or omissions in contravention of s 499 of the FW Act. Finally at LJ [37] the primary judge found that:

> [H]ad Mr Rielly complied with the reasonable requests made of him, both before and after the time of his unauthorised entry upon the site, Mr Rielly would not have been unduly delayed or frustrated in the carrying out of his workplace health and safety site inspection which he was qualified to undertake. The Court does not accept the respondent's submissions to the contrary.

45 The appellants submit in support of grounds 4 and 5 that the evidence did not support findings that Mr Rielly failed to comply with a request to not enter upon the tower crane pad and later requests to leave it. Mr Maher in evidence-in-chief said that neither he nor Mr Bekkers followed Mr Rielly to the tower crane base and stated that he did not repeat Mr Bekkers' "directions to follow the correct induction process or make any comments to him as I felt it would be futile to attempt to change his behaviour". In cross-examination, he agreed that he "did not say anything else" to Mr Rielly when he was on the tower platform.

46 Mr Bekkers' evidence-in-chief was that after Mr Rielly had ceased looking through documents on the lectern, he then walked to the scaffold stairs and onto the tower crane pad at which point Mr Bekkers said: "Don't go up there, come back down, you're not authorised

to go up there", to which Mr Rielly did not respond. He remained on the tower crane pad. His evidence continued:

> …I repeated my direction for Mr Rielly to come down another one or two times. Mr Rielly did not respond to either request. While Mr Rielly was on the tower crane pad, Mr Taylor, Mr Maher, Mr Hinrichsen and I remained at the communal area, however, we ensured that Mr Rielly was always within our line of sight. After approximately two minutes, Mr Rielly walked back down the scaffold stairs and into the communal area.
>
> While Mr Rielly was on the scaffold stairs, Mr Maher said: "Please come down from there, we need to discuss your 117 notice." Mr Maher repeated this direction again at least two times during the time Mr Rielly was on the tower crane pad.

47 When cross-examined Mr Bekkers gave this evidence:

> He went up there while the four of you waited for him in the shaded pre-start area?---Yes.
>
> And the four of you watched him the whole time?---That's right, yes.
>
> He spent two or three minutes up there?---That sounds about right.
>
> And nobody said anything to him while he was up there?---I believe he was asked to come down, from memory.

48 Mr Hinrichsen's evidence-in-chief was that as Mr Rielly began walking toward the stairs that led to the tower crane pad, Mr Bekkers requested Mr Rielly to come back, that Mr Rielly did not respond and walked up the stairs onto the tower crane pad, that Mr Bekkers then said to Mr Rielly "Come down from there", and that Mr Maher said "You need to get down from there".

49 However, Mr Hinrichsen in cross-examination agreed that "no one said anything to [Mr Rielly] while he was up there" [that is, on the tower crane pad].

50 Mr Taylor did not arrive at the scene until Mr Rielly had left the tower crane pad.

51 In our view, there was evidence to support the finding of the primary judge that a request was made of Mr Rielly not to enter upon the tower crane pad. There was also evidence that, having entered upon it, a request was made to "come down", which was the evidence of Mr Bekkers in chief and in cross-examination. Although there are inconsistencies between the accounts of Mr Bekkers (that both he and Mr Maher requested Mr Rielly to leave the tower pad), Mr Maher (that he did not ask Mr Rielly to come down) and Mr Hinrichsen (in chief that both Mr Bekkers and Mr Maher requested Mr Rielly to come down from the tower crane pad, but in cross-examination that no one said anything to Mr Rielly whilst he was on the tower pad) it was open to the primary judge to find in accordance with the evidence of

Mr Bekkers who had a positive recollection of making a request to that effect which was unshaken in cross-examination that he had done so. For these reasons, ground 4 fails.

52 Ground 5 contends error by the primary judge in finding at LJ [35] and [36] that Mr Rielly failed to comply with a reasonable request "not to enter upon the site unaccompanied". In summary the evidence on this issue in cross-examination was as follows. Mr Maher accepted that whilst on the worksite, Mr Rielly was within his sight the entire time. Mr Hinrichsen accepted that he, Mr Maher, Mr Bekkers and Mr Taylor each "watched him the whole time". Mr Taylor denied that he escorted Mr Rielly "around the site", but what is clear from his other evidence is that he had personal discussions with Mr Rielly after the crane tower pad incident. Mr Bekkers disagreed that Mr Taylor had escorted Mr Rielly.

53 The respondent's pleaded case was that it was a requirement that Mr Rielly "be accompanied by an escort" from the occupier. The primary judge found at LJ [35] that after Mr Rielly had entered the worksite, Mr Taylor, Mr Maher and Mr Bekkers "followed him". The respondent submits that distinction should be drawn between accompanying a visitor to the worksite and merely following a visitor about. The Visitor Induction Declaration, as we have noted, contains a warning that the person is about "to enter a construction zone and must be accompanied at all times". By signing that document, the visitor acknowledges an obligation to "be accompanied at all times when on site". No detail is provided in the documentation as to what that entails. As a matter of ordinary language, "accompany" has shades of meaning: primarily to go in company. It does not require one to be escorted; a more rigid and formal form of accompanying another, usually for protection, although extending to guidance or even courtesy. In our view, the finding of the primary judge that at all material times whilst on the worksite, Mr Rielly was followed, when considered in the context of the other evidence as to the various requirements that were made of Mr Rielly, both before his entry to the worksite and during his visit, ought to have led him to the conclusion that the respondent failed to make out its case that the requirement was that Mr Rielly be escorted. That conclusion is affirmed by the fact that the workplace policies pleaded as imposing this requirement, make no mention of being escorted whilst at the worksite. Being satisfied of that error, this ground succeeds.

54 Relatedly, grounds 6 and 7 succeed in part, corresponding with partial success on ground 5. They fail as to the balance. The primary judge did assess whether the visitor conduct requests were reasonable commencing at LJ [33], with his finding that the purpose of the

requests was to address worksite safety and risk of injury to Mr Rielly, and the findings at LJ [35] plainly amount to an assessment of whether the particular requests were reasonable. Notably ground 6 contends a failure to assess, not whether the assessment was erroneous.

55 Ground 7 impermissibly invites a selective reading of LJ [31], [36] and [37], without reference to the whole of his Honour's reasons and the appellants' submissions in support do not account for the difference on the evidence between the requirements for workers and those for visitors. The primary judge did assess the reasonableness of the visitor conduct requirements. At LJ [9], his Honour found that the visitor conduct requirements "represented intended best practice", in accordance with the evidence of the respondent's witnesses. At LJ [33], as we have noted, his Honour makes his safety purpose finding. The findings and analysis at LJ [35] are each supported by the evidence and are comprehensive. Those findings found the reasonableness conclusions at LJ [36] and [37]. There is no error as contended.

Ground 8

56 The impugned findings of the primary judge are at LJ [40] and [41] are as follows:

> The Court finds that in the face of reasonable requests being made of him, Mr Rielly knew or ought to have known that he had no valid reason for failing to comply with the reasonable visitor entry requirements made of him, or requests made to him not to enter upon the site.
>
> The Court finds, as a consequence, that Mr Rielly acted in an improper manner in contravention of the provisions of s. 500 of the FWA.

57 The appellants' submission is that the findings of the primary judge rest on the anterior errors concerning s 499 of the FW Act. Save for the pleaded requirement to be accompanied whilst at the worksite, this ground fails.

Ground 9

58 This ground is contingent on success of one or more of the preceding grounds. The pecuniary penalties imposed by the primary judge proceed by reference to each breach as found in the liability judgment. As we have explained, the agreed position is that this Court should redetermine the quantum of any pecuniary penalty conformably with the outcome of the appeal and following receipt of further submissions.

CONCLUSION

59 We order as follows:

1. The appeal is allowed, in part.

2. The declarations made in the Federal Circuit and Family Court of Australia (Division 2) in proceeding BRG 81 of 2022 on 21 February 2023 are varied by deleting from paragraph B, subparagraph (b)(i).

3. The orders made in the Federal Circuit and Family Court of Australia (Division 2) in proceeding BRG 81 of 2022 on 29 June 2023 are set aside.

4. The parties are to provide further written submissions as to what pecuniary penalties should be imposed consistently with these reasons limited to 3 pages as follows:

   (a) the respondent by 4 pm on 12 February 2024;

   (b) the appellants by 4 pm on 26 February 2024; and

   (c) the respondent in reply by 4 pm on 4 March 2024.

5. Subject to any further order of the Court, the pecuniary penalties question will be determined on the papers.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Halley, Goodman and McElwaine.

Associate:

Dated: 29 January 2024