FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Geelong Grammar School Case) [2018] FCA 1698

File number:	VID 494 of 2016
Judge:	**MORTIMER J**
Date of judgment:	9 November 2018
Catchwords:	**INDUSTRIAL LAW** – application for declarations to be made that respondents engaged in conduct in contravention of s 500 of the *Fair Work Act 2009* (Cth) and for pecuniary penalties to be imposed in relation to conduct alleged – question of liability to be determined first and separately – whether second respondent as a permit holder exercising or seeking to exercise rights in accordance with Pt 3-4 of the *Fair Work Act 2009* (Cth) intentionally hindered or obstructed persons working on a construction site – whether second respondent as a permit holder exercising or seeking to exercise a right under Pt 3-4 of the *Fair Work Act 2009* (Cth) otherwise acted in an improper manner – contraventions of s 500 established on evidence
Legislation:	*Evidence Act 1995* (Cth), s 191 *Fair Work Act 2009* (Cth), ss 484, 486, 487, 489, 500, 512, 550, 793 *Workplace Relations Act 1996* (Cth), s 767
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (*Laverton North and Cheltenham Premises Case*) [2017] FCA 802 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 88 *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797; 252 FCR 393 *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 *Director of the Fair Work Building Industry Inspectorate v Bragdon* [2015] FCA 668; 147 ALD 373 *Director of the Fair Work Building Industry Inspectorate v*

	McDermott [2016] FCA 1147 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (*Footscray Station Case*) [2016] FCA 872 *Setka v Gregor (No 2)* [2011] FCAFC 90; 195 FCR 203
Date of hearing:	18 and 20 October 2017
Date of last submissions:	17 September 2018
Registry:	Victoria
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	121
Counsel for the Applicant:	Mr B J Avallone
Solicitor for the Applicant:	Sparke Helmore Lawyers
Counsel for the First and Second Respondents:	Ms S M Kelly
Solicitor for the First and Second Respondents:	Ms Kristen Reid of the Construction, Forestry, Maritime, Mining and Energy Union

ORDERS

VID 494 of 2016

BETWEEN:	**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	BRENDAN MURPHY Second Respondent
JUDGE:	**MORTIMER J**
DATE OF ORDER:	**9 NOVEMBER 2018**

THE COURT DIRECTS THAT:

1. On or before 23 November 2018, the parties are to file a proposed agreed form of declaration regarding Mr Murphy's liability and reflecting the findings in the Court's reasons dated 9 November 2018.
2. On or before 23 November 2018, the parties are to inform the Court by way of joint note:
   (a) what is the position of the parties in relation to the s 793 issue; and
   (b) whether any further findings need to be made in relation to this issue, with or without further submissions and with or without a further oral hearing;
   (c) whether an oral hearing is sought on penalty, or whether the matter can be dealt with by written submissions.

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

REASONS FOR JUDGMENT

MORTIMER J:

1 The applicant, whom I will describe as the Commissioner, brings proceedings against both the first respondent, now known as the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and the second respondent, Mr Brendan Murphy, in relation to an incident that occurred on a construction site under the control of Harris HMC Interiors (Vic) Pty Ltd, at Geelong Grammar School in Victoria on 3 December 2014. Mr Murphy was the individual CFMMEU officer who attended the Harris HMC construction site that day, and it is his conduct which is alleged to give rise to contraventions of s 500 of the *Fair Work Act 2009* (Cth). The Commissioner alleges that if Mr Murphy is found to have contravened s 500, the CFMMEU should be taken, pursuant to s 550 of the FW Act, also to have contravened s 500. In these reasons, and despite the first respondent's change of name, where I refer to events substantially contemporaneous with the conduct on which the Commissioner's allegations are based, I refer to the CFMMEU as the CFMEU.

2 The parties submitted, and the Court accepted, that the finalisation and publication of these reasons should await the Full Court's decision on appeal from the orders of Bromberg J in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 802 (the *Laverton North and Cheltenham Premises Case*), and further submissions of the parties following that decision. That decision was handed down on 14 June 2018, and the parties made submissions after that date addressing the implications of the Full Court's decision for the issues in this proceeding.

3 For the reasons that follow, I am satisfied the Commissioner has proven his allegations against Mr Murphy. Due to the way the parties dealt with the matter in their post hearing submissions, the liability of the CFMMEU cannot yet be finally determined, for reasons I explain at [105] to [116].

BACKGROUND

4 On 9 June 2016, I ordered that the question of the respondents' liability was to be determined separately from, and prior to, the determination of the question of relief sought by the Commissioner on the originating application and set the proceeding down for hearing in April 2017 on the question of liability. Orders were also made that the trial proceed by way of oral evidence, and for the filing of any outlines of evidence on which the parties intended to rely.

5 In February 2017, the hearing on liability was vacated and relisted for October 2017 at the Commissioner's request because two of the Commissioner's witnesses were to be on leave during the period for which the matter was originally listed.

6 In March 2017, the Court was advised that the respondents did not intend to file and serve outlines of evidence of the witnesses they proposed to call at hearing, nor to serve copies of the documents on which they intended to rely. The Court was advised that the respondents took this course of action on the basis that, as pleaded, the second respondent claimed the privilege against self-incrimination and exposure to civil penalties and intended to rely on that privilege until the Commissioner's case was concluded. The Court was informed that the first respondent reserved its right to rely upon any evidence that may be called from or by the second respondent.

7 The day prior to the date on which the hearing was due to commence, and following discussions between the parties, the Court was informed that the parties had reached agreement to limit the issues in dispute. The parties informed the Court that, as a result of this agreement, the proceeding would require two of the four days for which it had been listed. Leave was sought, and granted, for the parties to amend their pleadings and to file a further statement of agreed facts. A further amended statement of claim, a further amended defence and a further agreed statement of facts were subsequently filed, as were amended outlines of submissions that reflected the revised position of the parties.

8 At trial, and although outlines of evidence had been filed on behalf of a greater number of individuals, the Commissioner relied on oral evidence from three individuals. They were:

- Mr Dion Hetherington – self-employed operator of a business known as "2 Deeconstruct";
- Mr Sebastian Digirolamo – HSR/Labourer at Harris HMC; and
- Mr Andrew John Headberry – General Manager at Harris HMC.

9 The parties also relied on two sets of agreed statements of facts which were admitted pursuant to s 191 of the *Evidence Act 1995* (Cth).

10 The respondents called no evidence themselves, but tendered, without objection, two sworn statements that had been filed on behalf of the Commissioner. Those were:

- The statement of John Paul Hunt – Operations Manager, Harris HMC dated 3 February 2015; and
- The statement of Paul Michael Hunt – Site Manager, Harris HMC dated 25 February 2015 (subject to certain deletions agreed between the parties).

11 Accordingly, by the time the matter came on for trial, most of the facts relevant to the events on 3 December 2014 had been agreed, or at least, were not disputed. Argument at hearing thus focused on two matters relevant to the resolution of the Commissioner's claim: the proper characterisation of the facts as agreed, and of Mr Murphy's conduct in the context of s 500 of the FW Act; and the state of the authorities concerning the scope and operation of s 500. On these two matters there was a substantial divide between the parties.

12 The matter which occupied the most time in the parties' submissions was whether s 500 required that a permit holder was "exercising or seeking to exercise, rights" in accordance with Pt 3-4 of the FW Act before a contravention could occur, and what the meaning of that phrase was. The respondents contended that, when he entered the construction site, Mr Murphy was not exercising or seeking to exercise a right under s 484 of the FW Act, a provision that provides permit holders with a right to enter premises for the purposes of holding discussions with workers.

13 The respondents contended that Mr Murphy could not have been exercising such a right because he had failed to give notice under s 487 of the FW Act, notice being a precondition to the exercise of the right in s 484. For this proposition, the respondents relied on the decision of Bromberg J in the *Laverton North and Cheltenham Premises Case*. The Commissioner submitted that the Court should find Bromberg J's decision in the *Laverton North and Cheltenham Premises Case* to be plainly wrong, and should not follow it.

14 At the time of the hearing in this proceeding, the Commissioner had lodged an appeal from Bromberg J's decision. The appeal had not been heard and determined. The respondents submitted that in light of the potential bearing of the Full Court's decision on that proceeding, the Court should reserve its judgment until after the determination of the appeal. The Commissioner did not oppose this course of action.

POST-HEARING SUBMISSIONS AND FURTHER AMENDMENTS TO THE PLEADINGS

15 The Full Court's decision in the *Laverton North and Cheltenham Premises Case* was delivered on 14 June 2018: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 88. The appeal was allowed.

16 The Court subsequently provided parties with an opportunity to file further submissions addressing issues arising from the Full Court's decision. In response, the Commissioner filed further submissions addressing the impact of the Full Court's decision on its case in this proceeding.

17 The Court was informed the parties had engaged in discussions as a result of the Full Court decision, to see if the issues between them could be further narrowed. The parties jointly requested the respondents have leave to further amend their defence. Leave was granted, and the respondents filed a second further amended defence in which a number of further admissions were made. Supplementary closing submissions were also filed by the respondents clarifying the impact of the amendments to the second further amended defence on the respondents' case.

18 The respondents submit that the effect of the further admissions contained in the second further amended defence is that they now admit the totality of the conduct alleged against them, and the legal consequences of that conduct, save as to the conduct pleaded in [21] of the Commissioner's further amended statement of claim. As I explain below, that is not quite the case: in my opinion the respondents' latest position means the question of the liability of the CFMMEU for Mr Murphy's conduct has also not been clearly resolved.

19 Importantly, and in contrast to their position at trial, the respondents admit that Mr Murphy exercised or sought to exercise a right under s 484 of the FW Act to enter the construction site for the purposes of holding discussions with the subcontractors and their employees, in accordance with Pt 3-4 of the FW Act. This admission, it is submitted, follows from the Full Court's decision in the *Laverton North and Cheltenham Premises Case.*

20 The respondents further admit that by engaging in the conduct alleged (with the exception of the conduct alleged in paragraph [21], which is not admitted), Mr Murphy, in contravention of s 500 of the FW Act:

(1) intentionally hindered and/or obstructed the subcontractors and employees of subcontractors who attended a meeting that occurred on the construction site; and

(2) intentionally hindered and/or obstructed Harris HMC; and

(3) acted in an improper manner.

21 Additionally, the respondents further admit that the CFMMEU has also contravened s 500 of the FW Act. Admissions are made in the amended pleadings with respect to some allegations concerning the CFMMEU's liability, but not with respect to others.

22 The matters that remain in dispute between the parties thus concern the scope of the contravening conduct engaged in by Mr Murphy, (and therefore by the CFMMEU if it is liable for his conduct), and questions concerning characterisation of that conduct.

APPLICABLE LEGISLATION

23 Section 500 of the FW Act provides:

> **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 (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).

24 The term "permit holder" is defined in s 12 to mean the holder of an entry permit. The term "entry permit" is defined in s 12 by reference to s 512. In turn, s 512 provides:

> **512 FWC may issue entry permits**
>
> The FWC may, on application by an organisation, issue a permit (an ***entry permit***) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.

25 By s 487, a permit holder is required to give notice of an intention to enter a site:

> **487 Giving entry notice or exemption certificate**
>
> *Entry under Subdivision A or B*
>
> (1) Unless the FWC has issued an exemption certificate for the entry, the permit holder must:

(a) before entering premises under Subdivision A—give the occupier of the premises and any affected employer an entry notice for the entry; and

(b) before entering premises under Subdivision B—give the occupier of the premises an entry notice for the entry.

(2) An ***entry notice*** for an entry is a notice that complies with section 518.

(3) An entry notice for an entry under Subdivision A or B must be given during working hours at least 24 hours, but not more than 14 days, before the entry.

(4) If the FWC has issued an exemption certificate for the entry, the permit holder must, either before or as soon as practicable after entering the premises, give a copy of the certificate to:

(a) the occupier of the premises or another person who apparently represents the occupier; and

(b) any affected employer or another person who apparently represents the employer;

if the occupier, employer or other person is present at the premises.

Entry under Subdivision AA

(5) If the permit holder enters premises under Subdivision AA, the permit holder must, either before or as soon as practicable after entering the premises, give an entry notice for the entry to the occupier of the premises or another person who apparently represents the occupier if the occupier or other person is present at the premises.

26 Section 484 provides:

484 Entry to hold discussions

A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:

(a) who perform work on the premises; and

(b) whose industrial interests the permit holder's organisation is entitled to represent; and

(c) who wish to participate in those discussions.

Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold discussions with any person on the premises described in this section.

27 Section 486 provides:

486 Permit holder must not contravene this Subdivision

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

28 Section 489 provides:

489 Producing authority documents

(1) If the permit holder has entered premises under Subdivision A or AA, the permit holder must produce his or her authority documents for inspection by the occupier of the premises, or an affected employer:

(a) on request; and

(b) before making a requirement under:

(i) paragraph 482(1)(c) or 483B(1)(c), or subsection 483D(2); or

(ii) subsection 483(1), 483C(1) or 483E(1).

Note: Paragraphs 482(1)(c) and 483B(1)(c) and subsection 483D(2) deal with access to records and documents while the permit holder is on the premises. Subsections 483(1), 483C(1) and 483E(1) deal with access to records and documents at later times.

(2) If the permit holder has entered premises under Subdivision B, the permit holder must produce his or her authority documents for inspection by the occupier of the premises on request.

(3) ***Authority documents***, for an entry under Subdivision A, AA or B, means:

(a) the permit holder's entry permit; and

(b) either:

(i) a copy of the entry notice for the entry; or

(ii) if the FWC has issued an exemption certificate for the entry—the certificate.

29 In this matter, it was an agreed fact that Mr Murphy held an entry permit and was, for the purposes of s 500, within the meaning of the term "permit holder". I did not understand there to be any debate that he was a "permit holder" for the purposes of any of the provisions I have set out where that term is used. As I have set out above, it became an admitted fact that Mr Murphy did seek to exercise rights under Pt 3-4 of the FW Act.

30 Section 550 provides:

550 Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy

provision is taken to have contravened that provision.

Note: If a person (the ***involved person***) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

(2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

31 Section 793 provides:

793 Liability of bodies corporate

Conduct of a body corporate

(1) Any conduct engaged in on behalf of a body corporate:

(a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

State of mind of a body corporate

(2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

(b) that the person had that state of mind.

Meaning of ***state of mind***

(3) The ***state of mind*** of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or

purpose.

Disapplication of Part 2.5 of the Criminal Code

(4) Part 2.5 of Chapter 2 of the *Criminal Code* does not apply to an offence against this Act.

Note: Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility.

(5) In this section, ***employee*** has its ordinary meaning.

THE RELEVANT SEQUENCE OF EVENTS

32 The findings I make in this part of my reasons for judgment are taken largely from the two agreed statements of fact admitted pursuant to s 191 of the Evidence Act, and the two sworn statements of employees of Harris HMC tendered by the respondent.

33 The only real factual matter remaining in dispute between the parties is the matter alleged in [21] of the Commissioner's further amended statement of claim. There, the Commissioner makes the following allegation:

> The conduct of the Subcontractors alleged in paragraph 20(a) herein was:
>
> (a) organised by Murphy; and/or
>
> (b) counselled or procured by Murphy; and/or
>
> (c) induced by Murphy.

34 It was this matter which was the focus of the short oral evidence given in the proceeding on behalf of the Commissioner. I make the necessary findings on this remaining factual dispute in my consideration below.

35 The respondents admit that at all material times on 3 December 2014, Mr Murphy was acting in his capacity as an office holder of the CFMEU, acting on behalf of the CFMEU and within the scope of his actual or apparent authority. It is also uncontested that the background to what occurred on 3 December 2014 was that, from approximately mid-November 2014, Harris HMC had a contract with Geelong Grammar School to refurbish and build an extension to a building known as the "Manifold Boarding House". Geelong Grammar School is a well-established Victorian private school, located in the suburb of Corio, just outside Geelong. Harris HMC was the head building contractor at the site, and as such the parties agreed it occupied and controlled the construction site on which the alleged conduct occurred. The construction site was in a fenced off area, separated from the remainder of the grounds of the school. There were a number of subcontractors engaged by Harris HMC to perform building and construction works

at the site and who were present on 3 December 2014. These included demolition sub-contractors, plumbers and electricians.

36 The events of 3 December 2014 unfolded in the following way.

37 At around 8.55 am, Mr Murphy arrived at Geelong Grammar School. There was no evidence about how or why he came to attend the site on that day. Some inferences might be drawn from what he said once on the site, but I return to those matters below. Mr Murphy signed into the school's "Contractor/Visitor Sign In/Out and Key Register", which was located in the Maintenance office. He was accompanied by Mr Peter Booth, who was at the time also an organiser with the CFMEU. Once he had signed the school's register, Mr Murphy was given a "contractor pass" by the school. There was no evidence whether Mr Booth was given one too, and it does not matter to my findings whether he was or was not. Mr Digirolamo confirmed in evidence that these passes were issued by the school, and were not passes issued by Harris HMC. Mr Digirolamo also confirmed in evidence that any person who had only a contractor pass from the school, rather than a Harris HMC pass, would be questioned by him about why they were on the site, and who they were.

38 About 35 minutes later, around 9.30 am, Mr Murphy and Mr Booth walked onto the part of the school grounds marked off as the Harris HMC construction site.

39 Near the site office that morning, around that time (that is, 9.30 am), was Mr Paul Michael Hunt, who was then the site Manager of Harris HMC. There are two "Mr Hunts" in this narrative, so I shall call him Mr PM Hunt. There was a discussion between Mr PM Hunt and Mr Murphy, the contents of which formed part of the facts agreed by the parties. The content of the discussion is agreed to have been as follows:

(a) Mr Murphy requested to conduct discussions with workers at the site, saying words to the effect of *"I want to talk with the demolition workers and to see my members"*;

(b) Mr PM Hunt asked Mr Murphy to produce his entry permit;

(c) Mr Murphy showed Mr PM Hunt a contractor pass issued by the school;

(d) Mr PM Hunt told Mr Murphy he was not allowed to be on the site without showing his entry permit;

(e) Mr Murphy did not produce his entry permit;

(f) Mr PM Hunt told Mr Murphy he was not allowed to be on the site, asked Mr Murphy again for his entry permit and asked Mr Murphy to leave;

(g) Mr Murphy did not show Mr PM Hunt his entry permit and said words to the effect of *"I want to see everyone on site"*;

(h) Mr PM Hunt said words to the effect of *"You're not allowed to be on site"* and that Mr Murphy could not be on the construction site without showing his entry permit;

(i) Mr Murphy started to walk away from the site office, further into the construction site;

(j) Mr PM Hunt said words to the effect of *"I will call the police"*; and

(k) Mr Murphy said words to the effect of *"Go ahead to do it. You know better than that."*

40 It was common ground that the contractor pass issued by Geelong Grammar School to Mr Murphy did not entitle him to, or grant him the right to, enter the construction site controlled and occupied by Harris HMC. It was also common ground that Mr Murphy had not given Harris HMC an entry notice within the meaning of s 487 of the FW Act and did not show his entry permit when, on more than one occasion, employees of Harris HMC requested him to do so.

41 Although it is not an agreed fact, the evidence of Mr John Hunt, an Operations Manager for Harris HMC and at the relevant time the Operations Manager for the Geelong Grammar School site, was that Mr Murphy then had a telephone conversation with Mr J Hunt. I accept this evidence. Mr J Hunt asked Mr Murphy why he had entered the construction site "illegally" and also asked whether Mr Murphy understood that he needed to give *"24 hours' notice with a genuine reason and show an entry permit on site"*. Mr J Hunt's evidence is that Mr Murphy responded *"I'm not happy with a sub-contractor you have on-site"*.

42 Mr J Hunt's evidence was that, relevantly, the rest of the conversation went thus:

(a) Mr J Hunt said *"Which Sub-contractor?"*

(b) Mr Murphy said *"Bargain Barn. You're scraping the bottom of the barrel with these contractors."*

(c) Mr J Hunt said *"I've never heard of them. They're not on our site."*

(d) Mr J Hunt said *"It's illegal what you're doing and you must give us notice"*.

(e) Mr Murphy said *"Well, you're in my back yard now."*

(f) Mr J Hunt said *"Like us, you need to follow the rules by giving 24 hours' notice, giving reason and showing your permit on entry"*.

(g) Mr Murphy said *"You're the reason Ireland's economy has gone down."*

(h) Mr J Hunt stated he kept reiterating the right of entry procedures, but Mr Murphy would not acknowledge what he was saying and would go off topic. Mr J Hunt stated he believed Mr Murphy was trying to get him to react to his comments and get Mr J Hunt agitated.

(i) Mr J Hunt said *"This is just going around in circles here. We'll get back to you very soon"*.

43 Mr J Hunt's evidence was that after this conversation, the following events occurred:

> Around 9.45am I contacted Andrew Headberry (Headberry), General Manager of Harris HMC and told him that I had spoken to Murphy on site. I said Murphy was not co-operating or listening to me. I asked if he could assist in the matter as I was required on another project. I gave Headberry the contact number for Murphy who said he would contact Murphy.
>
> I then returned to normal duties.
>
> At a later stage I was advised by either Headberry or Capell that the site had been shut down by Murphy.

44 Immediately after this discussion with Mr J Hunt, Mr Murphy spoke to the demolition workers and other subcontractors working on the construction site. The parties agreed as a fact that words to the following effect were said by Mr Murphy:

(a) "*I want to see the subbies in the sheds"*;

(b) "*Come over here. I want to talk to you"*;

(c) "*Do you have an EBA?"*;

(d) "*I want to see everyone in the sheds"*;

(e) "*Why are you working in dark rooms?";*

(f) "*Everyone out and to the shed"*; and

(g) to Mr Digirolamo, "*Why the fuck are they working in the dark? You're the HSR, it's your fucking responsibility."*

45 The reference to "HSR" is, it was common ground, a reference to Mr Digirolamo's then position with Harris HMC as the Health and Safety Representative on the site.

46 For the next fifteen minutes or so, Mr Murphy refused multiple directions from Mr PM Hunt to leave the construction site. Instead he responded to Mr PM Hunt, by saying that "*I am going to talk to the guys in the shed*", and when Mr PM Hunt said to him "*you can't do this*", Mr Murphy responded *"I can do what I want"*.

47 Around 9.45 am, as he had asserted he would, Mr Murphy began a fairly brief "meeting" with the subcontractors who had by this time assembled in the site shed. Mr Hetherington confirmed that the site shed was a regularly used location for meetings, which occurred frequently, and often were informally called. The "meeting" lasted for approximately 10 to 15 minutes and there were around 20 subcontractors present, as well as a few employees of subcontractors.

48 The parties have agreed facts that during the meeting, Mr Murphy said:

(a) *"Who has an EBA and Incolink?"*;

(b) Businesses are getting work done cheaper by not having enterprise agreements; and

(c) *"I am closing the site because of poor lighting. Once it's rectified you can come back to work."*

49 The relevance of the reference to Incolink, and what Incolink is, was not addressed in the evidence.

50 It is agreed as a fact that immediately after the meeting, the following words were exchanged between Mr Murphy and Mr PM Hunt:

(a) Mr Murphy said to Mr PM Hunt words to the effect that:

(i) "*I want to talk to your management"*; and

(ii) "*I'm not leaving until everyone's off site. I'm shutting the site down"*;

(b) Mr PM Hunt said to Mr Murphy words to the effect that Mr Murphy *"Can't do this"*, that Mr Murphy cannot shut the site down, and that Mr Murphy needed to show his entry permit;

(c) Mr Murphy did not produce his entry permit;

(d) Mr PM Hunt said to Mr Murphy words to the effect of : "*You're not allowed to do this*"; and

(e) Mr Murphy said to Mr PM Hunt words to the effect of *"They're going home"*.

51 After Mr Murphy had concluded what he wanted to say to the subcontractors, at least some subcontractors began packing up and readying themselves to leave the site, and several of them did leave shortly thereafter. Mr Digirolamo gave evidence that the plumbers waited a little longer than the other subcontractors, as they were expecting a delivery. Once the delivery arrived, they left.

52 While on the construction site, Mr Murphy made a telephone call to Mr Campbell Capell, who was at the time the Project Manager of Harris HMC. There is no agreed fact as to the entirety of this conversation, but the parties agreed that Mr Murphy made the following statements during his conversation with Mr Capell:

(a) *"I'm not happy with the subcontractors you have engaged"*;

(b) referring to Bayside Demolition Pty Ltd**,** a subcontractor engaged by Harris to perform works on the Site:

(i) *"They are bottom of the barrel contractors"*;

(ii) *"They don't have an EBA in place"*;

(c) *"You're shitting in my backyard ... I'm going to shut down this site."*

53 After the meeting Mr Murphy also had a telephone conversation with Mr Andrew Headberry, the General Manager of Harris HMC. Mr Headberry emphasized in his oral evidence that his primary concern was to get the site open again. He told Mr Murphy *"The site needs to open as soon as possible"*. Mr Murphy's response was *"No, it won't"*.

54 It was also common ground that Mr Murphy remained at the construction site until the subcontractors and their employees had left the site.

55 Mr Digirolamo gave evidence that Mr Murphy said, on leaving:

> …he will be back tomorrow just to make sure the site wasn't open.

56 The departure of the subcontractors and employees meant that works scheduled to occur on the construction site that day were not completed. Mr Hetherington gave oral evidence that he paid his subcontractors who left for the whole day, although a couple of them returned the money or refused to take it. He estimated he lost approximately $1,000.

WITNESSES

57 I found the evidence of all three witnesses called on behalf of the Commissioner to be reliable. Each gave straightforward evidence, without embellishment, and was candid in terms of what he could and could not recall. I accept their evidence.

RESOLUTION

58 Following the respondents' filing of a second further amended defence, and further admissions, it is only necessary to make findings about the following issues:

(1) First, whether, in "exercising or seeking to exercise, rights" in accordance with Pt 3-4 of the FW Act, Mr Murphy:

(a) intentionally hindered and/or obstructed the subcontractors and employees of subcontractors who attended the meeting in the shed; and/or

(b) intentionally hindered and/or obstructed Harris HMC; and/or

(c) acted in an "improper manner";

including as a result of conduct alleged in [21] of the further amended statement of claim. If a finding is made to that effect, there will be a contravention of s 500 of the FW Act.

(2) Second, if Mr Murphy is found to have contravened s 500, whether the CFMMEU can also be found to have contravened that prohibition, and on what basis.

59 The first issue, namely, the scope of Mr Murphy's conduct in intentionally hindering or obstructing the persons identified by the Commissioner and, or alternatively, whether he acted in an "improper manner", is the issue which engages most significantly with the evidence.

First issue: "Hinder or obstruct"

60 The hinder or obstruct allegation is put by the Commissioner against Mr Murphy in two ways. It is alleged Mr Murphy, by what he said and did as reflected in the agreed facts, hindered or obstructed the subcontractors and their employees in the performance of the work they were contracted to do on the construction site. He did so, the Commissioner contends, because he told them to come and attend a meeting, and said at that meeting that he was shutting down the site and that he would stay on the site until all the subcontractors left. The Commissioner contends that the natural consequences of this conduct were that the subcontractors' work

would be interrupted, that they would leave the site and that no further work would be performed by them on the site, at least on the relevant day.

61 Additionally, or alternatively if the first contention is not accepted, the Commissioner contends Mr Murphy hindered or obstructed Harris HMC in the performance of its scheduled works on the construction site on that day by insisting the subcontractors and their employees attend a meeting and then purporting to close the site, thereby inducing the subcontractors and their employees to leave the site.

62 In relation to both the subcontractors and their employees, and in relation to Harris HMC, the Commissioner's argument about the way that Mr Murphy hindered and obstructed work on the site has two parts:

(1) First, the Commissioner contends that the subcontractors and their employees were diverted from their ordinary duties by Mr Murphy's conduct in speaking to the members and in calling and conducting the meeting. As a result, Harris HMC's work on the site was also hindered and obstructed; and

(2) Second, the Commissioner contends that the conduct of the subcontractors and employees of subcontractors when, following the end of the meeting, they ceased work and left the site for the remainder of the day, was organised and/or counselled or procured, and/or induced by Mr Murphy.

63 The second of these contentions is set out in [21] of the further amended statement of claim. It is this allegation that remains in dispute between the parties, notwithstanding the respondents' admission that Mr Murphy engaged in conduct that contravened s 500 of the FW Act. The respondents' admission as to contravention of s 500 is based on the first of the Commissioner's allegations.

64 The scope of the contravention of s 500 may have a bearing on the nature of any penalties imposed against both Mr Murphy and the CFMMEU, given the loss of the remainder of the day's work is likely to be said to flow from the conduct in [21].

65 In the *Footscray Station Case* (*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (the *Footscray Station Case*) [2016] FCA 872), Tracey J summarised, and agreed with, the approach to the phrase "hinder or obstruct" which had been taken by Flick J in at least two earlier cases. Tracey J said:

> [47] In *Director of the Fair Work Building Industry Inspectorate v Bragdon* (2015) 147 ALD 373 Flick J dealt with an allegation that two union officials had contravened s 500 of the Act by telling workers who were engaged in pouring concrete to get off the deck and that they (the officials) were "stopping the pour". His Honour found this conduct to constitute "hindering" of the work being undertaken at the site and to be "improper conduct". In dealing with the phrase "intentionally hinder or obstruct any person" his Honour adhered to some observations which he had earlier made in *Darlaston v Parker* (2010) 189 FCR 1 at 17 where he had said that:
>
> > "[52] For the purposes of s 767(1) it is considered that the reference to 'intentionally hinder or obstruct' is a reference 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. The act must be of such a nature that it is an 'appreciable' obstruction or interference. A trivial act, or even an act which could not reasonably be regarded as an obstruction or interference, would not fall within s 767(1)."

66 I respectfully agree with the approach of Flick and Tracey JJ. In *Director of the Fair Work Building Industry Inspectorate v Bragdon* [2015] FCA 668; 147 ALD 373, Flick J found Mr Bragdon's conduct in telling workers who were pouring concrete to "*get off the deck*" and stating that the union officials were "*stopping the pour*" to constitute "hindering" of the work being undertaken at the site. Flick J also found this to be "improper conduct". Flick J's decision was overturned on appeal for different reasons, but the Full Court did not disapprove of his Honour's statement of principle in relation to the characterisation of conduct as "hindering" or "obstructing".

67 In the *Footscray Station* case, Tracey J found (at [81]-[83]) that the conduct of one respondent, Mr Myles, in standing in front of a concrete truck for a short time, after being told to move, constituted "hindering or obstructing". A similar finding was made against Mr Myles, in relation to another concrete truck. Tracey J also found that Mr Myles' further conduct, in standing between the chute of a concrete truck and the concrete pump, after being asked to move, also meant Mr Myles was hindering and obstructing the concrete pour. I note in the *Footscray Station* case, there was considerable argument about occupational health and safety concerns said to have activated the conduct of the CFMEU officials in that case. Tracey J rejected those arguments, but I note there are no similar arguments put in the present proceeding.

68 The Commissioner submitted that he was required only to prove that Mr Murphy had an intention to engage in the acts or omissions constituting the hindering or obstruction. He submitted he was not required to prove that Mr Murphy intended to hinder anyone, or intended

to obstruct anyone. In that sense, the Commissioner contends, the provision is, by the use of the concept of intention, distinguishing between conduct that is accidental (or, perhaps, unavoidable) and conduct that is not. He submits that here, Mr Murphy's conduct was plainly intentional: the Commissioner submitted that the way that Mr Murphy acted, and the things that he admits to saying, do not have the hallmarks of accidental conduct. This approach would appear to be supported by the Full Court's remarks in *Setka v Gregor (No 2)* [2011] FCAFC 90; 195 FCR 203 at [33]-[34] in relation to s 767, a similar provision that existed under the *Workplace Relations Act 1996* (Cth):

> Mr Setka directed attention to decisions of the Court in which it had been held that it was necessary to establish that the offender had a subjective intention to hinder or obstruct before a contravention of s 767(1) can be established: see *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2010) 186 FCR 88 at 94 (per Spender J) and 99 (per Dowsett J); *Pine v Doyle* (2005) 143 IR 98 at [22] (per Merkel J).
>
> Mr Setka's submissions encounter a number of difficulties. The first is that, for the reasons which we have already given, s 767(1) is not confined in its reach to conduct which hinders or obstructs. There is, therefore, no requirement that an applicant must establish an intention on the part of the respondent to hinder or obstruct.

69 The respondents did not challenge this approach in their submissions. I accept it appears to reflect the state of Full Court authority, by which I am bound.

70 I am satisfied on the balance of probabilities that Mr Murphy's conduct, in what he said and did as I have set out above, was the reason that the sub-contractors and their employees left the site on that day, and therefore brought a halt to the work on the site for that day. I find that Mr Murphy hindered or obstructed the subcontractors and their employees on the Harris HMC site, and by reason of his interference, he also hindered or obstructed Harris HMC, in the way alleged in [21] of the further amended statement of claim.

71 My finding about the reason the sub-contractors and their employees left is a finding by way of inference from the evidence. There was no direct evidence about the reason they left. Although there could have been more evidence on a number of matters, I am satisfied there is sufficient evidence to draw that inference.

72 The evidence of Mr Murphy's assertions about what he intended to occur is clear. Remarks such as *"I am closing the site"*, *"I'm shutting the site down"*, *"I'm not leaving until everyone's off site"* and *"they're going home"*, and *"I'll be back tomorrow just to make sure the site is not open"* all provide ample basis on which to infer that Mr Murphy intended to close down the Harris HMC site that day, by having the workers leave. This is confirmed by his retort –

"No, it won't" – to Mr Headberry, after he told Mr Murphy *"The site needs to open as soon as possible"*.

73 I find, by reason of his own statements, Mr Murphy came onto the site intending to procure the workers to leave, and to close the site, and he was intent on achieving that objective at all times while he remained on the site. He did not want simply to "have a discussion" with them, and then leave the site so they could go back to work. He did intend to talk to the workers and discuss a number of matters – at least in terms of asking them questions and trying to get responses – but having done that, his overarching objective was to have the workers leave the site without performing any more work. That is, I infer, why he remained until all the workers had left: he wanted to make sure that no further work would be done on the site that day.

74 Mr Headberry's evidence, which I accept, is that Mr Murphy's preoccupation was with the identity and reputation of the subcontractors Harris HMC had retained. That is also the clear import of the words the respondents have admitted he used. I am not satisfied there was any real health and safety issue, despite Mr Murphy's references to people working in the dark. I accept Mr Hetherington's evidence that he was not aware of any lighting issues on the site. Mr Murphy's references were contrived.

75 The likely effect of some of the statements made by Mr Murphy are a factor in drawing the inference I have. His language was aggressive. He was swearing. He was intent on a confrontation. He was not, on the evidence, asking the workers what they wanted to do. Rather, the evidence is that he told the Harris HMC management "*they're going home*". It is a reasonable inference that this is how the workers understood the situation as well.

76 Mr PM Hunt's evidence was:

> During the process of dealing and conversing with Murphy I felt intimidated and a confronting situation to be in. [H]e was quite loud.

77 It should be recalled, that on Mr Headberry's evidence (which I accept) Mr Murphy's principal objection was to the identity of the subcontractors. In those circumstances, with an assertive, confrontational CFMEU official berating the head contractor for using particular subcontractors, and telling an employee of the head contractor "*you're shitting in my backyard*", in my opinion it was not only natural but almost inevitable that the subcontractors who were the target of the tirade would wish to avoid any escalation of the situation and would prefer to do what the CFMEU official wanted them to do, which was leave.

78 Mr PM Hunt also gave the following evidence:

> The only thing I recall the other CFMEU person saying or doing was "This is Brendan's town. He's passionate about his town."

79 This, together with the "*you're shitting in my backyard*" comment, goes some way to explaining the virulence of Mr Murphy's behaviour. He was, I find, angry that in "his town", a head contractor like Harris HMC was using subcontractors of which he, and the CFMEU, did not approve. That attitude made not only Harris HMC the target of Mr Murphy's anger, but also the subcontractors themselves.

80 Mr Murphy's statements made it quite clear he asserted he could close the site, and was going to do so. His behaviour was assertive and confrontational. He took a stand and gave no indication he was going to back down. That a CFMEU official was behaving in such a way, on the basis that particular sub-contractors had been hired and not others, would not have been lost on the subcontractors themselves, and their employees. During the present proceeding, a positive disinclination to get into any debate or confrontation with a CFMEU official was, in my opinion, on display in the evidence given by Mr Hetherington about why he and his employees left the Harris HMC site on 3 December 2014.

81 The respondents contend that there was no obligation on the subcontractors and their employees to leave, and indeed they could have been directed to stay. Mr Digirolamo gave the following evidence during cross-examination:

> MS KELLY:
>
> …
>
> And what's Mr Hunt doing during this period? – I don't recall exactly what he was doing. He was – he did say to the contractors that they didn't have to leave. And he did say – yes. He said that Brendan can't make you leave. But –
>
> Did he say that once or more often? – It was – it was a couple of times.
>
> And was he speaking to individual subcontractors when he said it or was he directing it to the group? – He was directing it to the group.
>
> Did you hear Mr Hunt, at any stage, direct the subcontractors to remain on the site? – So directly say don't leave? I don't recall him saying that directly to any subcontractors.
>
> So all you recall in – is that he said you don't have to leave. Brendan can't make you? – Yes.
>
> You heard no other form of direction from Mr Hunt to any subcontractor to remain onsite? – Not that I can recall.

82 It may well be the correct legal position, as counsel for the respondents submitted, and as Mr Hetherington and Mr Headberry conceded, that the subcontractors were contractually obliged to comply with lawful directions given by Harris HMC in relation to work on the site, and therefore Harris HMC (whether through Mr PM Hunt or someone else) could have directed them to remain on site and they would have been contractually obliged to do so. It is correct on the evidence that no such direction was given. Instead, subcontractors and their employees decided to leave the site, and no employee of Harris HMC tried to stop them.

83 However, I consider from all the circumstances the inference I have identified can be comfortably drawn. These factual matters fall to be determined by focussing on the practical realities on the construction site on the day, and not by the way the legal relationship between Harris HMC and the sub-contractors might have been properly construed, and enforced at some later time. The subcontractors and their employees were going about their work on site on a normal working day. There were no other issues or impediments to them working that day. There was a little rain, and Mr PM Hunt gives some evidence that due to the rain, workers were coming down off the roof "*as per standard practice*". There is no evidence the rain was so hard that it was going to interfere with work continuing for the whole day. There is absolutely no suggestion in the evidence that the weather caused the subcontractors and their employees to leave.

84 There had been no accidents or injuries. There were no safety issues on the site that day: Mr Digirolamo confirmed this in his evidence. The only relevant event that occurred was Mr Murphy and his colleague entering the site, criticising Harris HMC's choice of contractors, making abusive remarks about them (saying they were "*bottom of the barrel*" contractors), making threats that there would be no work the following day; insisting that he would ensure everyone left the site immediately, and waiting until that occurred.

85 In those circumstances, it is not difficult to identify, on the balance of probabilities, the likely reason for the subcontractors leaving the site: it was Mr Murphy's conduct. Mr Hetherington's evidence confirms this, albeit he was circumspect in his evidence. That is understandable, for a person such as him who has to continue to work in the Victorian building industry.

86 Mr Hetherington was, as I have found, a reliable witness who gave straightforward evidence. His recounting of the events of 3 December 2014 seemed to me to suggest clearly that he felt he was caught up in what could become a tense and problematic situation, the CFMEU having intervened on the site and Mr Murphy having expressed strong, aggressive views about what

was going on at the site, especially which subcontractors were being used by Harris HMC. It is clear from his evidence that Mr Hetherington decided he did not want any trouble, or to be involved in any disputes and, I am prepared to infer, nor did he want to cross Mr Murphy or the CFMEU.

87 What he would have done had he been given a direction to remain on the site and continue work by a person on behalf of Harris HMC is sheer speculation. He may have complied, he may not have. What I am prepared to infer is that he was not willing to cross Mr Murphy or the CFMEU, and saw that the way to avoid doing this was to leave the site.

88 As I have noted, there is no evidence, direct or indirect, about the attitudes of the other subcontractors. However, since they all left promptly (the plumbers waiting for a delivery and then leaving), and did not return to work that day, I consider the same inference is available: none of them wished to cross the stance taken by the CFMEU. There is no other tenable explanation about why they would otherwise leave, when there was work to be done, there was no other reason to leave and it was plain that Harris HMC employees were trying to stop Mr Murphy entering the site and causing what they considered to be a disruption.

89 I find further that Mr Murphy engaged in the conduct constituting the hindering or obstruction intentionally. He consciously and deliberately came onto the site with the apparent purpose of confronting Harris HMC about the contractors it was using. He made unequivocal statements about closing the site, and about the workers "*going home*". He told Mr Headberry "*No, it won't*" when Mr Headberry said that the site needed to be reopened as soon as possible. He was plainly not interested in having any discussion or negotiation with any employee of Harris HMC: his sole intention was to get all the workers off the site, and to make the point he wished to make about what happens to head contractors who engage subcontractors of which the CFMEU did not approve. There was nothing accidental about his conduct. There was nothing merely incidental about the statements he made. Mr Murphy's statements and conduct were all calculated to achieve the aim of stopping work on the site, which they did.

90 I find the Commissioner has established that Mr Murphy, as a permit holder exercising or seeking to exercise rights in accordance with Pt 3-4 of the FW Act, intentionally hindered and obstructed the subcontractors and their employees from continuing to work on the Geelong Grammar School site on 3 December 2014. In doing so (accepting the second way in which the Commissioner put the contravention), Mr Murphy also hindered and obstructed Harris

HMC from continuing work on the Geelong Grammar School project, as they were contracted to do.

91 To be clear, my findings are that Mr Murphy hindered and obstructed the subcontractors and their employees, and Harris HMC both in relation to:

(1) calling and conducting a meeting; and

(2) what he said and what he did on the site being the reason that the subcontractors and their employees left the site that day, and work ceased.

"Improper manner"

92 The respondents admit the allegations about Mr Murphy acting in an improper manner. Paragraph [21] of the further amended statement of claim relates only to the "hinder or obstruct" element of s 500. The Commissioner made submissions about the effect of the Full Court's decision in the *Laverton North and Cheltenham Premises Case* on this aspect of s 500, but the respondents did not.

93 I consider it is appropriate that, even though this might properly be seen as an aspect of the Commissioner's case that is now admitted, I should explain the reason I am prepared to find that Mr Murphy acted in an improper manner, and so contravened s 500 on that basis as well.

94 Acting in an improper manner connotes something other than hindering or obstructing: see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [25], White J, referring to *Setka* at [30]. There is no requirement to prove that a person intended to act in an improper manner, as the adverb "intentionally" only governs the term "hinder or obstruct": *Setka* at [35], especially given the presence of the word "otherwise" before the improper manner prohibition. One purposive reason given by the Full Court in *Setka* was that, if subjective intention to so act had to be proved, a person who had no understanding of how to conduct him or herself in society could never be held to contravene the prohibition. Therefore, this is a characterisation that can be objectively applied to a person's conduct.

95 Unsurprisingly, given the adjective "improper", this limb of s 500 has been held to require conduct which falls below that standard which can reasonably be expected of those who occupy positions of responsibility: *Bragdon* at [97], per Flick J. It connotes conduct deserving of criticism, but also conduct that is to be measured against appropriate, objective standards expected of persons in the position of the respondent against whom the allegation is made. I

see no reason why the phrase would not include extreme rudeness, bullying or harassing behaviour, extreme language, verbal abuse or threats. I do not consider the approach taken by Tracey J in the Full Court's decision in the *Laverton North and Cheltenham Premises Case* at [115] is substantively different.

96 The Commissioner contended at trial that Mr Murphy's failure to provide a notice in accordance with s 487 of the FW Act constituted "acting in an improper manner", relying on the decision of White J in *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 (the *SAHMRI case*) at [173]-[174] and Charlesworth J in *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147.

97 This question also arose before the Full Court in the *Laverton North and Cheltenham Premises Case.* Allsop CJ at [7], rejected the contention that a failure to satisfy statutory obligations, such as those in s 487 of the FW Act, would **necessarily** constitute improper conduct. White J at [192]-[201], while finding that it was not necessary to resolve the question, agreed with Allsop CJ's reasons and rejected the contention that his Honour's own findings in the *SAHMRI Case* were authority for the proposition that a mere failure of a permit holder to have provided a notice of entry was sufficient to warrant conduct being characterised as improper. Failure to comply with a provision of the FW Act such as s 487 may, for example, involve an innocent mistake, or accidental oversight and such instances may be unlikely to be characterised as conduct that was "improper".

98 Rather, Allsop CJ, White J agreeing, held that it was necessary to look at all of the circumstances in considering whether a permit holder had acted improperly. Allsop CJ referred to and endorsed White J's reasons in the *SAHMRI Case* at [173]-[174]:

> Counsel for the respondents commenced with a submission to the effect that an entry on to premises for the s 484 purpose without the prior provision of a s 487 notice should not be regarded as improper because s 487 is not itself a civil remedy provision.
>
> I do not accept that submission. Section 487 is directed to that which a permit holder must do before entering premises, and not to the consequence of the permit holder entering without having provided notice of entry in accordance with its terms. Further, I am not able to identify any reason why an entry on to premises without there having been antecedent compliance with s 487 may not, **in conjunction with other circumstances**, amount to improper conduct for the purposes of s 500.
>
> (emphasis added)

99 It is not necessary for the purpose of this proceeding for me to address whether the mere failure by an entry permit holder to provide the notice required under s 487 of the FW Act is capable of constituting "improper" conduct for the purposes of s 500. In submissions filed following the Full Court's decision in the *Laverton North and Cheltenham Premises Case*, the Commissioner confirmed that he no longer pressed this argument. Further, as in the *Laverton North and Cheltenham Premises Case* and the *SAHMRI Case*, there is a broader factual foundation for the characterisation of Mr Murphy's conduct as improper than simply the failure to give a s 487 notice. An entry permit holder can be expected to know that she or he is required to give notice under s 487, and if the evidence supports a finding that she or he consciously decided not to give such notice, then this is behaviour capable of being characterised as falling below the standard expected of an official who has been granted such a permit. Of course, each case will turn on its own particular facts, and it should not be assumed every failure to give notice will constitute improper conduct for the purposes of s 500 (an honest or reasonable mistake about the need for a notice being perhaps one example where there would be no impropriety): however, the point is that such conduct is capable of doing so.

100 On the evidence, the other features of Mr Murphy's conduct which warrant characterising it as improper, together with his failure to adhere to his responsibility to give notice as a permit holder, are:

- his aggression and rudeness, which were inappropriate for an office holder who purports to enter a site for industrial reasons;
- the making of threats about the site not re-opening as soon as possible, again because the making of threats, as a way of securing a desired outcome, is conduct that is inappropriate for an office holder; and
- refusing to leave the site when confronted by Mr PM Hunt and also by Mr J Hunt, in circumstances where it should have been clear to him he ought to have done so (cf White J's findings in *SAHMRI's Case* at [179]).

101 I also rely on at least two aspects of the admitted conversations, and Mr Murphy's statements, which support the finding, I am satisfied, that Mr Murphy knew he had to give notice as a permit holder and had gone onto the site choosing not to do so. The first is the passage I set out at [41] above, but will repeat here for convenience:

> Mr J Hunt asked Mr Murphy why he had entered the construction site "illegally" and also asked whether Mr Murphy understood that he needed to give *"24 hours' notice*

> *with a genuine reason and show an entry permit on site*". Mr J Hunt's evidence is that Mr Murphy responded *"I'm not happy with a sub-contractor you have on-site"*.

Mr Murphy simply avoided the point Mr J Hunt was making.

102 The second is part of what I extract at [42] above, and again repeat here for convenience:

> Mr J Hunt said *"It's illegal what you're doing and you must give us notice"*.
>
> Mr Murphy said *"Well, you're in my back yard now."*
>
> Mr J Hunt said *"Like us, you need to follow the rules by giving 24 hours' notice, giving reason and showing your permit on entry"*.
>
> Mr Murphy said *"You're the reason Ireland's economy has gone down."*

103 Particularly in the first response in this extract, Mr Murphy demonstrates, I find, that he did not care about the (accepted) absence of a s 487 notice, and was only concerned to put a stop to what was going on in his "backyard", to which he – as a CFMEU official – objected.

104 I find that Mr Murphy, as a permit holder exercising or seeking to exercise rights in accordance with Pt 3-4 of the FW Act, otherwise acted in an improper manner within the meaning of s 500. Given the subsequent admission of the respondents about the "improper manner" allegation, I do not consider some of the arguments the respondents put at trial about why the Court should find Mr Murphy did not act in an improper manner.

Second issue: CFMMEU liability

105 The respondents' position on this matter is mixed. In their second further amended defence, the respondents have admitted the allegations in [27]-[28] of the further amended statement of claim. That is, they admit:

> 27. By reason of the matters alleged in paragraph 3 herein:
>
> (a) all actions of Murphy alleged herein, were also actions of the CFMEU; and
>
> (b) the CFMEU possessed the same states of mind as Murphy in relation to those actions, as alleged herein.
>
> **Particulars**
>
> The Applicant refers to and relies on s. 793 of the FW Act.
>
> 28. By reason of the matters alleged in paragraph 27 herein, the CFMEU contravened s. 500 of the FW Act, as alleged in paragraph 26 herein.

106 However, the respondents continue to either deny [29]-[31] of the further amended statement of claim, or contend the pleadings do not disclose a cause of action, or are ambiguous and embarrassing and should be struck out.

107 None of these matters are addressed in the respondents' supplementary submissions. Under the heading "What remains in dispute", the respondents' submissions deal only with their contentions around [21] of the further amended statement of claim.

108 At [2] and [7] of their further submissions, the respondents submit:

> The effect of these admissions [referring back to a list of their new admissions in [1] of the submissions which includes admissions with respect to [27] and [28] of the further amended statement of claim] is that the respondents admit the totality of the conduct alleged against them, and the legal consequences of that conduct, save as to the conduct pleaded in paragraph 21 of the statement of claim.
>
> …
>
> The effect of the admissions in paragraphs 27 and 28, is that the respondents also admit that the conduct of Murphy was the conduct of the CFMEU and that, accordingly, the CFMEU also contravened s 500 of the FW Act.

109 I take the effect of the respondents' submissions to be, despite their continued position in their pleadings about [29]-[31] of the further amended statement of claim, they no longer put in issue the matters in those paragraphs because of their admissions on [27]-[28]. In other words, they treat what is in [29]-[31] as pleadings in the alternative, and seek to preserve their position on the Commissioner's allegations, on the basis (I infer) they may be raised against the CFMMEU in other proceedings.

110 Since no submissions about [29]-[31] are developed by the respondents, after their concession about the CFMMEU's liability under s 793, I do not propose to deal with or decide the allegations in those paragraphs. The CFMMEU have admitted liability under s 793 of the FW Act, and subject to what I say below, findings can be made accordingly.

111 However, I recognise that the primary way the Commissioner put the liability of the CFMMEU was based on s 550 of the FW Act. This position was maintained in his supplementary submissions after the hearing, but only by a cross-reference back to his principal closing submissions. That is, the Commissioner did not engage with the consequences of the CFMMEU's admissions about s 793 for his own position.

112 That leaves the Court in a rather unsatisfactory position. This is because:

(1) The contention now formally admitted by the respondents in their pleadings, was relied on by the Commissioner in written submissions only as a secondary, and an alternative argument. Indeed, in oral submissions, the Commissioner clarified that he only pressed the CFMMEU's liability under s 550 (and not s 793).

(2) The position about CFMMEU's liability under s 793 is not straightforward, mostly because of a decision of Charlesworth J in *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797; 252 FCR 393, in which her Honour found that the CFMEU (as it then was) could not, as a body corporate, be held personally and directly liable for a breach of a statutory prohibition that is directed on its express terms to a natural person holding a particular statutory status, and could thus not be liable for a contravention of s 500 of the Act by the operation of s 793 in and of itself.

113 Although the Commissioner made a formal submission that Charlesworth J in *McDermott (No 2)* was wrong in her Honour's approach to s 793, and wrong in the conclusions she reached, he did not develop any submissions on this at trial. I did not understand that I was invited at trial by the Commissioner to make a finding that Charlesworth J was clearly wrong in relation to s 793, largely because the Commissioner only put liability under s 793 as an "alternative" argument.

114 Nevertheless, the issue has now come into sharper focus, because of the admissions of the respondents, and the failure of both parties to address the consequence of them.

115 Judgment in this matter has been significantly delayed, because of the need to await the outcome of the appeal in the *Laverton North and Cheltenham Premises Case*, and then by the need to give the parties a considerable period of time to revise their positions (after the respondents made it clear that was what would occur) and make further submissions. I do not propose to delay judgment any further. The parties can deal with the issue about s 793 and, if they choose, the other ways in which liability of the CFMMEU is alleged either through an agreed position, if they can reach one, or in further argument on the proposed form of orders.

116 Regrettably, that means complete final orders cannot yet be made. Orders can be made about the respondents' contraventions of s 500, but relief concerning the position of the CFMMEU will have to await further decision, once the parties clarify their position and address what they need to for the Court to determine this. That will mean further delay, but the parties have brought that consequence upon themselves by the way they have dealt with the CFMMEU's liability in their supplementary submissions: or rather, have not dealt with it.

Conclusion

117 I am satisfied that the Commissioner has proven the alleged contravention of s 500 by Mr Murphy on 3 December 2014, as to both the "intentionally hinder or obstruct" limb, and the otherwise act in an improper manner" limb. On the former, I make that finding of contravention in relation to both Mr Murphy's conduct in calling and conducting a meeting on the Geelong Grammar site, and in relation to the subcontractors and their employees leaving the site after the meeting, and not completing scheduled work that day. Declarations to this effect should be made.

118 There is an admission by the CFMMEU in relation to its liability under s 793 of the FW Act, which may or may not result in orders of contravention against the CFMMEU, depending on clarification of the parties' respective positions, and what is said about the decision in *McDermott (No 2)*.

119 Directions will be given relating to the filing of a proposed agreed form of declaration as to Mr Murphy. Given the extensive delay in this matter, the Court expects the parties to be able to reach agreement on the form of declaration, and for there not to be any further argument about this matter.

120 The parties will be directed to inform the Court by way of a joint note what the position is about the s 793 issue, and whether any further findings need to be made, with or without further submissions, and with or without a further oral hearing.

121 At the time of filing proposed orders, the parties can also inform the Court of the proposed course to deal with any other relief sought by the Commissioner, such as penalties. No order for costs is sought by the Commissioner, and accordingly no order as to costs shall be made.

I certify that the preceding one hundred and twenty-one (121) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

Dated: 9 November 2018