DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Construction, Forestry, Mining and Energy Union
v
Director of the Fair Work Building Industry Inspectorate
(C2016/4195)

SENIOR DEPUTY PRESIDENT O'CALLAGHAN
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE

ADELAIDE, 19 SEPTEMBER 2016

Appeal against decision [[2016] FWC 3322] of Vice President Watson at Melbourne on 31 May 2016 in matter number RE2016/363 – entry permit application – fit and proper person – CFMEU behaviours.

DECISION OF SENIOR DEPUTY PRESIDENT O'CALLAGHAN

[1] This decision deals with an appeal, for which permission is required, against a decision[1] issued by Vice President Watson on 31 May 2016. The appeal is made pursuant to s.604 of the *Fair Work Act 2009* (the FW Act).

[2] Whilst the appeal is made against limited aspects of the Vice President's decision, I have summarised the decision itself before dealing with the matters in contention.

[3] In his decision, the Vice President dealt with an application, made by the Construction, Forestry, Mining and Energy Union (the CFMEU), pursuant to s.512 of the FW Act, for the issue of a right of entry permit for Mr Tadic, an official of the CFMEU. The application was opposed by the Director of the Fair Work Building Industry Inspectorate (the Director).

[4] The Vice President noted the provisions of ss.512 and 513 of the FW Act, which state:

> **"512 FWC may issue entry permits**
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> 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.
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> **513 Considering application**
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> (1) In deciding whether the official is a fit and proper person, the FWC must take into account the following permit qualification matters:

(a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;

(b) whether the official has ever been convicted of an offence against an industrial law;

(c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:

(i) entry onto premises; or

(ii) fraud or dishonesty; or

(iii) intentional use of violence against another person or intentional damage or destruction of property;

(d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;

(e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;

(f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:

(i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or

(ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;

(g) any other matters that the FWC considers relevant.

(2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

Note: Division 3 of Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them."

[5] Having considered the objects of Part 3-4 of the FW Act within which the right of entry permit considerations sit, the Vice President referred to various matters dealing with the balancing of entry permit rights with those of employers and the owners of premises. The

Vice President then reviewed various decisions which then addressed the concept of a "fit and proper person".[2] In this respect he stated:

> "[9] As highlighted in the cases referred to above the permit qualification matters must be taken into account to decide whether an official of an applicant organisation is a fit and proper person to hold the entry permit that has been applied for by the organisation. The applicant in this matter is the CFMEU. The permit applied for is for an official of the Victoria/Tasmania Branch of the Construction and General Division of that union. The context of the application therefore requires a consideration of the role of an official exercising rights of entry with respect to that branch of the union. It is therefore relevant to have regard to the consideration of that context by the Federal Court in other proceedings. The Federal Court has been called upon to consider that context on a number of occasions. Recently Mortimer J said the following:
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> 118. Just as in other penalty proceedings involving the CFMEU, the applicant attached to his submissions a table setting out the prior contraventions of industrial laws by the CFMEU. That table had 106 separate entries, dating back to 1999. In 2015 alone, there were 10 decisions of this Court finding contraventions against the CFMEU, in relation to conduct occurring between 2012 and 2014.
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> 119. The applicant attached a second table showing the history of coercion contraventions involving the Victoria/Tasmania Branch of the Construction and General Division of the CFMEU, the branch responsible for this conduct. This table shows 23 separate proceedings in which contraventions have been proven, dating back to 2004. In 2015 there were four proceedings resulting in orders, relating to conduct between 2012 and 2014.
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> 120. …
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> 121. Neither respondent challenged any aspect of these tables and I accept them as accurate.
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> 122. In the Myer Emporium Case [2015] FCA 1213 at [63], in a statement with which I respectfully agree, Tracey J said:
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> Neither the CFMEU nor any individual respondent is to be punished again for earlier misconduct. They are, however, to be punished more severely than they would have been had they had no adverse record or been responsible for only a few isolated incidents over a period of many years. Their continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, had not had a deterrent effect: cf Veen v R (No 2) [1988] HCA 14; (1988) 164 CLR 465 at 477-8. The longer such recidivism continues the more likely it is that this consideration will carry greater weight than the principle that the maximum available penalty must be reserved for the worst possible offending.
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> 123. To describe what is revealed by each of these tables, and the first table in particular, as evidence of a "continuing attitude of disobedience of the law" is to apply, in my opinion a relatively neutral description.

124. I also agree with the observations of Jessup J in the Mitcham Rail Case [2015] FCA 1173 at [29] that this kind of evidence "bespeaks an organisational culture in which contraventions of the law have become normalised".

…

139. I have referred above to the number of previous contraventions by the CFMEU, and by the Victoria/Tasmania Branch of its Construction and General Division. What is notable is not only the sheer number of contraventions, but the frequency of them. The conduct involved in those contraventions ranges from very similar conduct to these contraventions (that is, conduct and threats designed to force an employer to accept a CFMEU delegate on site); to blockades to achieve other industrial outcomes; to abuse (including racial abuse: Director of the Fair Work Building Industry Inspectorate v Upton [2015] FCA 672) when unlawfully on work sites; to seeking to coerce employers to employ CFMEU members and fire non-CFMEU members; to using blockades, obstructing access to sites and making threats during enterprise bargaining negotiations; to engaging in bullying behaviour while on work sites and refusing to leave sites; to encouraging workers not to attend work sites; to threatening industrial action unless a CFMEU member was reinstated. This list is taken from only the first 20 or so entries in the table attached to the applicant's submissions, and could be multiplied and expanded several times over, particularly given this Court has continued to make similar findings against the CFMEU and its members since the list was compiled in November 2015: see Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 1462; Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413; Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 414.

140. The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties. An alternative inference – that the CFMEU weighs up the cost of engaging in such action (that is, likely prosecution and imposition of penalties) and nevertheless concludes it is a collateral cost of doing its industrial business – reflects no better on the organisation or its officials.

141. There is no evidence that any individuals are disciplined in any way by the hierarchy of the CFMEU for contraventions of the kind I have outlined above. Indeed, the individuals involved are often part of the CFMEU hierarchy, as is the case with Mr Myles. Rather, the evidence suggests this ongoing behaviour is tolerated, facilitated and encouraged by all levels of the organisation. There is no evidence that it has been proposed that members' funds cease to be available to pay penalties and that individual office holders or employees should pay those penalties themselves, as an internal incentive for individuals within the CFMEU to be encouraged to begin to respect industrial laws. In this case, there was no evidence Mr Ralph Edwards sought

> to distance himself from the contravening conduct, to condemn it, or to take any action to ensure it did not occur again.
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> 142. I also consider it relevant to note from the applicant's table that a large proportion of the contraventions and penalties stem from agreed facts and agreed ranges of penalty. In other words, the CFMEU (and the Victoria/Tasmania Branch of its Construction and General Division) have a history of eventually admitting to contraventions. In some contexts, this might be seen as a mitigating factor. I do not see it in that way, in all of the circumstances. Rather it seems to me to be part of a deliberate and calculated strategy by the CFMEU to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the penalties for its actions can be tolerated as the price of doing its industrial business."
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> (references omitted)

[6] There is no issue taken with the Vice President's conclusions that the evidence before him was that Mr Tadic was an officer of the CFMEU and held the position of Organiser and Occupational Health and Safety Adviser within that particular division of the CFMEU.

[7] Additionally, there is no issue taken with the following findings made by the Vice President relative to Mr Tadic. Mr Tadic was first granted an entry permit in 2006. A further permit was granted in 2009. On 11 April 2008 a decision was issued in *Cahill v CFMEU*.[3] In that decision, Mr Tadic and other CFMEU officials were found to have contravened s.197AB of the *Workplace Relations Act 1987* (the WR Act). A penalty was imposed on the CFMEU.

[8] On 7 March 2011 a decision in *White v CFMEU*[4] in which a penalty of $105000 was imposed on the CFMEU and a penalty of $8000 was imposed on Mr Tadic for contraventions of ss.38 and 43 of the *Building Construction Industry Improvement Act* (the BCII Act).

[9] On 7 April 2011 a decision in *Cozadinos v CFMEU & Ors*[5] Mr Tadic was found to have breached s.38 of the BCII Act and received a penalty of $2500. A penalty of $30000 was imposed on the CFMEU in that same matter.

[10] On 25 March 2013 Mr Tadic was issued with a further entry permit. In the issuing decision, the Fair Work Commission Delegate, Mr Furlong considered these Court decisions and concluded that, "on balance"[6] an entry permit should be granted subject to a limiting condition in the following terms:

> "If any findings made or penalties imposed that are relevant to the permit qualification matters at s.513(1)(a)-(f) of the Fair Work Act 2009, or proceedings commenced that may lead to findings made or penalties imposed that are relevant to the permit qualification matters at s.513(1)(a)-(f) of the Fair Work Act 2009, then the permit holder is to notify the Fair Work Commission within 2 weeks of the finding being made, the penalty imposed or the proceeding commenced. See decision [2013] FWCD 478 issued on 25 March 2013."

[11] On 17 March 2015 a decision in *Director of the Fair Work Building Industry Inspectorate v CFMEU*[7] was issued. In that decision the CFMEU, Mr Tadic and other CFMEU officials were found to be in contempt of court and the CFMEU was fined $125000.

[12] In his decision the Vice President noted that, on 5 February 2016, the CFMEU notified the FWC that Mr Tadic was named as a respondent in further proceedings commenced by the Director.[8] The Vice President also noted that, on 16 April 2016, the CFMEU had confirmed that the Director had commenced proceedings in *Director of the Fair Work Building Industry Inspectorate v CFMEU & Ors*[9] and that Mr Tadic was named as a respondent in that matter.

[13] The Vice President stated:

> "[24] The current application for an entry permit contained a declaration from Mr Tadic, as the proposed permit holder, and a declaration from Mr Setka, as the Member of the Committee of Management, making the application in accordance with the Act. The declarations stated that Mr Tadic:
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> - has received appropriate training about the rights and responsibilities of a permit holder
> - has never been convicted of an offence against an industrial law, apart from the following matters:
>   - Cahill v CFMEU [2008] FCA 495
>   - White v CFMEU [2011] FCA 192
>   - Cozadinos v CFMEU & Ors [2011] FMCA 284
>   - Director of the Fair Work Building Industry Inspectorate v CFMEU [2015] FCA 226
>   - Director of the Fair Work Building Industry Inspectorate v CFMEU & Anor (VID955/2015)—proceedings commenced but matter yet to be determined.
> - has never been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country involving entry onto premises; or fraud or dishonesty; or intentional use of violence against another person or intentional damage or destruction of property
> - Mr Setka's declaration states that apart from the matters outlined above, Mr Tadic has never been ordered to pay a penalty under the Act or any other industrial law in relation to action taken by him, nor has any other person been ordered to pay a penalty in respect of such action. Mr Tadic's declaration does not reference the above matters, and simply states that he has never been ordered to pay a penalty under the Act or any other industrial law in relation to action taken by him, nor has any other person been ordered to pay a penalty in respect of such action
> - has not had revoked or suspended any permit issued under Part 3-4 of the Act or a similar law of the Commonwealth. Permit number RE2012/1403 was issued with a limiting condition
> - has not had cancelled, suspended or had imposed conditions on a permit for industrial or occupational health and safety purposes, by any court, or other person or body, under a State or Territory industrial law or an OHS law
> - has not been disqualified, by any court, or other person or body, under a State or Territory industrial law or OHS law, from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law."

[14] In his decision, the Vice President addressed the evidence given by Mr Tadic in the following terms:

"[25] Mr Tadic gave evidence that in relation to Cahill, he does not recall that he was found to have contravened s.187AB of the Workplace Relations Act 1996 (WR Act). Mr Tadic said that he does not recall exactly what occurred on that day. He said that the amount of training he had as a shop steward and OHS representative did not cause him to be aware of the seriousness of the conduct. He said the actions he took on that day were as a result of the wishes or directions of the workers.

[26] In relation to Cozadinos, Mr Tadic said that while not recalling the specifics, he does not dispute the findings that were made in that matter. He said that he did receive the paperwork in relation to the orders that were issued. Mr Tadic said that he did not pay the $2,500 penalty that was imposed on him for contravening s.38 of the BCII Act and he assumes that the penalty was paid by the CFMEU.

[27] In relation to White, Mr Tadic said that he does not dispute the finding of the Federal Court in the matter. He said that the CFMEU paid the $8,000 penalty that was imposed on him in that matter.

[28] Mr Tadic claimed the privilege against self-incrimination and objected to giving evidence about the extant proceedings and the proceedings in Director of the Fair Work Building Inspectorate v CFMEU.

[29] In relation to whether Mr Tadic feels remorse in relation to his previous conduct, Mr Tadic said under cross-examination that he believes that he is learning and has made significant improvements in respect of the use of his entry permit and going onto sites."

(references omitted)

[15] The Vice President reached conclusions with respect to each of the matters required to be considered pursuant to s.513. In terms of s.513(1)(d), these findings detailed the nature of the actions that led to the Court proceedings in *Cahill, White and Cozadinos.* Additionally, and significantly for the purposes of this appeal, the Vice President stated:

"[44] On 17 March 2015, in Director of the Fair Work Building Inspectorate v CFMEU, the CFMEU was ordered to pay a fine of $100,000 for contempt of court as a result of the conduct of Mr Tadic and other CFMEU officials. In April 2014 Mr Tadic participated in a blockage of the Bald Hills Wind Farm Project and other conduct, after undertakings to the Federal Court had been given by the CFMEU to allow free access to the site. Mr Tadic was not a respondent in the matter and no individual penalty order was made against him in the proceedings. I consider this to be a relevant matter to take into account – noting that the proceedings were not taken against Mr Tadic personally. I note that Tracy J said the following:

31. The CFMEU submitted that the contraventions of paragraphs 1.1 and 1.4 of the undertaking given by it should be treated as a single offence.

32. It sought to explain the relevant circumstances as follows. It said that there was a dispute regarding the employment of Mr Stavlic. It was the CFMEU's view that Mr Stavlic was unfairly targeted and it wanted "his employment to resume". To this end the blockade was mounted on 15 April 2014. The CFMEU acknowledged that some of

the workers on the Bald Hill site were prevented from working on that day and that a number of delivery trucks were prevented from having free access to the site for a period of just over eight hours. It said that the blockade had not attracted any media attention and that it had taken place in a remote location away from public observation.

33 The CFMEU relied on a number of factors which, it said, mitigated the seriousness of the offending by comparison with some of its earlier contraventions of Court orders. To this end it emphasised that:

- There had been no violence, no abuse and no trespassing in the course of the blockade.
- No large implements had been placed across driveways which were abandoned there upon completion of the blockade.
- 30 to 40 percent of the workforce had been able to attend the site on 15 April 2014 by using entrances which were not normally used.
- Deliveries had been delayed by matters of hours and, at the most, by two days.
- There was no jeering at workers and delivery truck drivers who sought access to the site.
- No sophisticated planning was involved.

34. Some, but not all, of these contentions may be accepted. Before dealing with them, however, it is necessary to say something about the unstated assumptions which underpin the CFMEU's actions. It considered that Mr Stavlic had been badly done by and should be reemployed at the site. When potential employers refused its demands the CFMEU could have pursued a number of lawful options with a view to resolving the disputes about Mr Stavlic's employment. This would have required it to justify its complaints about the treatment of Mr Stavlic and to justify its view that reemployment was an appropriate remedy. Rather than do this it sought to impose its will on some of the companies engaged at the site by preventing work from proceeding as normal on 15 April 2014. In doing so it opted for a show of industrial force in preference to engagement in lawful dispute settling procedures. The CFMEU has failed to explain why it chose this course of action despite having undertaken to the Court that it would not so act less than a fortnight before these events occurred. The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means.

35. The organisation of the blockade required planning and preparation. The wind farm site was located in a remote area of South Gippsland some 175.7 kilometres away from Melbourne. It was divided into three compounds. Compound A was separated from the other two. Compounds B and C had a common border. The closest point of Compound A to Compound B was about 700 metres. The closest points between Compound A and Compound C were about 2.5 kilometres apart. Each compound had a main entrance. They were identified as Gates A, B and C. Access to the compounds could also be obtained, in each case, by tracks and smaller gates. These alternative access points were not normally used but were utilised by some employees to enter the compounds on 15 April 2014.

36. On that morning cars were parked across Gates A, B and C at various times between 5:30 and 5:45 am. The vehicles prevented other vehicles entering the

compounds through the gates. Barbeque trailers were also located at two of the gates. The vehicles and trailers remained in place until early afternoon. At least 10 of the vehicles were registered to the CFMEU. In the course of the day food was cooked on the barbeques. Pictures taken at the gates show CFMEU flags attached to vehicles and fences. Other vehicles blocked access to four of the alternative entrance points. At least eight paid officials of the CFMEU were present.

37. A more detailed account of the blockade is to be found in the Director's Summary. The facts recounted here are sufficient to gainsay the proposition that no sophisticated planning was involved in mounting the blockade. The contrary is plainly true. I readily infer that the officials had travelled from Melbourne in the union owned vehicles and other vehicles in time to block the gates before the usual time for commencement of work at the sites. Food and banners were brought. These arrangements required planning and co-ordination.

38. As a result of the blockade only about 30 to 40 percent of the workforce engaged on Compound A was able to enter the site on 15 April 2014. Fifteen quarry trucks carrying about 600 tonnes of bluestone and other aggregate were unable to enter Compound A. The material which they were carrying had to be dumped in a turnout bay about four kilometres away. Once the blockade had been lifted Hazell Bros workers had to reload the material on to trucks using a front end loader. This work was not completed until 17 April 2014. Other trucks, delivering gravel to Compound A, arrived during the morning and could not enter Compound A until the blockade had been lifted.

39. I accept that a number of the aggravating features which had accompanied earlier action by the CFMEU which constituted contempt of Court and with which comparisons were drawn during submissions were not present during the blockade on 15 April 2014. There was no violence. Workers attempting to enter the site were not abused. When the blockade finished there was no debris left at the site.

[16] The Vice President noted that, whilst proceedings involving Mr Tadic in VID955/2015 had commenced, that matter had yet to be determined. He considered that the allegation in that matter was "relevant to be taken into account - noting that there are no findings of fact in relation to the allegations.[10]

[17] Similarly, the Vice President noted that subsequent to the application being filed, another proceeding (VID194/2016) involving Mr Tadic had commenced, but again, while the allegations were relevant, no findings of fact had been made.

[18] In reaching his findings about whether Mr Tadic was a fit and proper person to hold an entry permit, the Vice President stated:

"[47] The Federal Court has found that the branch of the CFMEU which seeks a right of entry permit with respect to Mr Tadic has displayed a continuing attitude to disobedience of the law and has an organisational culture in which contraventions of the law have become normalised. In my view this context establishes a higher bar than normal for considering whether Mr Tadic is a fit and proper person to hold the right of entry permit in question.

> [48] In my view it is highly relevant to consider Mr Tadic's attitude and track record to compliance with legal obligations including when the organisation of which he is an official is supporting or organising unlawful action. In the circumstances of Mr Tadic, training and understanding of legal obligations is secondary. It appears to me that his preparedness to comply with legal obligations is far more important."

[19] The Vice President noted that considerations pursuant to s.513(1)(a),(b),(c) and (f) operated in Mr Tadic's favour. He noted that the penalties imposed on Mr Tadic in *Cahill, White and Cozadinos* occurred some years earlier and Mr Tadic's incomplete memory of aspects of those matters. He noted that Mr Tadic did not pay the fines imposed on him and that Mr Tadic assumed those fines were paid by the CFMEU. In terms of the *Cozadinos* matter, the Vice President noted that Mr Tadic's statement did not express remorse over that incident.

[20] The Vice President stated:

> "[54] Mr Tadic claimed a privilege in relation to the Bald Hills wind farm contempt proceedings and the incomplete extant proceedings. No adverse inference can be made from that circumstance. Nevertheless, the findings of the Federal Court are on the public record and relevant parts are extracted above. The conduct of the CFMEU, through its officials, including Mr Tadic was serious, planned and organised. The Court's findings in the matter are particularly damning. I reject the submission advanced by the CFMEU that the Bald Hills proceedings are not relevant to the application for a permit with respect to Mr Tadic."

[21] Finally, the Vice President concluded*:*

> "[55] I have carefully considered all of these matters. A permit was granted to him in 2013 as a matter of fine balance. Since then, in 2014, he engaged in conduct which has been found to be a serious contempt of the Federal Court on the part of the CFMEU. Further allegations have been made against him in relation to conduct later in 2014.
>
> [56] Mr Tadic can no longer claim that he was inexperienced and untrained in relation to his legal obligations. He appears to have played little role in the legal proceedings relating to his conduct. More importantly he appears to have taken little interest in the proceedings and the outcomes from the proceedings. The CFMEU has not provided him with any specific training or guidance to avoid a repetition of this conduct. Mr Tadic has not demonstrated that he has learnt lessons from the proceedings. He has not demonstrated an understanding of the conduct that led to findings of unlawfulness. He has not explained how he has adjusted his conduct to ensure that he has and will comply with the law in the future. The only expression of remorse emerged from cross-examination as a denial of an allegation that he lacked remorse.
>
> [57] It may be that these matters are common amongst officials of the branch of the CFMEU. It appears that the union does not expect or demand any different behaviour. However, given the culture of disobedience of the union a person will not be fit and proper to hold a right of entry permit unless they demonstrate different personal qualities, capabilities and a preparedness to act in accordance with those qualities and capabilities. I am not satisfied that the CFMEU and Mr Tadic have established such a

case. Nor do I consider that any conditions that might be imposed on the grant of a permit would alter the conclusion I have reached. Accordingly I am not satisfied that Mr Tadic is a fit and proper person to hold a right of entry permit.

[58] Although I have attached little weight to the allegations made against him in the extant proceedings, it may be that as a result of those proceedings, a different position will emerge. There would appear to be no impediment on the CFMEU making a further application at a subsequent time that would be considered on the basis of the circumstances at the time and intervening events."

The Appeal

[22] The CFMEU appeal is made on the following grounds:

"1. The Vice President acted on wrong principle by requiring Mr Tadic be a fit and proper person to be granted an entry permit in the context of Mr Tadic being an official of this branch of the union.

2. The Vice President acted on wrong principle by the application of a higher bar than normal to establish whether Mr Tadic is a fit and proper person to be granted an entry permit in the context of Mr Tadic being an official of this branch of the union.

3. The Vice President acted on wrong principle by failing to apply the Briginshaw standard to allegations of a serious nature or with serious consequences.

4. The Vice President erred in that there was no material before him upon which he could be satisfied of the conduct referred to in the extant Federal Court proceedings.

5. The Vice President acted on wrong principle by taking into account extraneous or irrelevant matters being the existence of and/or allegations contained in the extant Federal Court proceedings.

6. The Vice President acted on wrong principle by taking into account material contrary to section 91 of the Evidence Act 1995 or similar principle.

7. The Vice President acted on wrong principle by taking into account extraneous or irrelevant matters being whether Mr Tadic had personally paid civil penalties imposed upon him in earlier court proceedings.

8. The Vice President acted on wrong principle by taking into account extraneous or irrelevant matters being the findings of fact and/or reasons for decision and/or orders in Director of Fair Work Building Industry Inspectorate v CFMEU 12015] FCA 226 ("the Bald Hills proceeding").

9. In the alternative to ground 8 above, the Vice President erred in that there was no material before him upon which he could be satisfied that:

(a) Mr Tadic's conduct was found to be in contempt of court on the part of the CFMEU; and/or

(b) the CFMEU was ordered to pay a fine of $100,000 for contempt of Court as a result of the conduct of Mr Tadic and other CFMEU officials; and/or

(c) in April 2014 Mr Tadic participated in a blockage of the Bald Hills Wind Farm Project and other conduct, after undertakings to the Court had been given by the CFMEU to allow free access to the site; and/or

(d) the conduct of the CFMEU, through its officials, including Mr Tadic was serious, planned and organised and that the Court's findings in the matter are particularly damning; and/or

(e) in 2014, Mr Tadic engaged in conduct which was found to be a serious contempt of Court on the part of the CFMEU.

10. The Vice President erred in failing to provide any adequate reasons for the finding that:

(a) Mr Tadic was not a fit and proper person to be granted an entry permit; and/or

(b) The extant Federal Court proceedings were relevant matters; and/or

(c) The Bald Hills proceeding was a relevant matter; and/or

(d) Mr Tadic's conduct was found to be in contempt of court on the part of the CFMEU;

(e) The CFMEU was ordered to pay a fine of $100,000 for contempt of Court as a result of the conduct of Mr Tadic and other CFMEU officials; and/or

(f) in April 2014 Mr Tadic participated in a blockage of the Bald Hills Wind Farm Project and other conduct, after undertakings to the Court had been given by the CFMEU to allow free access to the site; and/or

(g) The conduct of the CFMEU, through its officials, including Mr Tadic was serious, planned and organised and that the Court's findings in the matter are particularly damning; and/or

(h) In 2014, Mr Tadic engaged in conduct which was found to be a serious contempt of Court on the part of the CFMEU.

11. The Vice President erred in that the decision was not open to him on the material before the Commission."

[23] In the appeal hearing, these grounds were condensed to the extent that there were three primary complaints with the Vice President's decision and two ancillary concerns. The CFMEU's primary complaints were:

1. The Vice President's consideration of, or taking account of, CFMEU contraventions which did not involve Mr Tadic,

2. The extent to which the Vice President took account of the Bald Hills proceedings, and
3. The extent to which the Vice President took into account two Federal Court matters involving Mr Tadic where findings had not been made.

[24] The two ancillary complaints about the Vice President's decision went to the extent to which the CFMEU asserted that he did not apply the *Briginshaw* standard of proof and its allegation that the Vice President failed to give adequate reasons for his conclusion.

[25] In terms of the permission required for the appeal to proceed, the CFMEU noted that the Vice President's decision was of a discretionary nature and accepted that the general approach in *House v King* was applicable in the following terms, namely:

> "… The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in court of first instances. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[11]

[26] In this regard the CFMEU asserted that the Vice President's decision was unreasonable and plainly unjust. Further, that it represented a substantial injustice to Mr Tadic and to the CFMEU. The CFMEU asserted that the errors in the decision were of a serious nature such that they attracted the public interest consistent with the Full Bench statement in *GlaxoSmith Kline Pty Ltd v Makin*,[12] in the following terms:

> "[27] Although the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters, it seems to us that none of those elements is present in this case."

The Submissions

[27] In its submissions, the CFMEU contended that the decision was manifestly in error in that the Vice President took account of the behaviour of that branch of the CFMEU which employed Mr Tadic in order to assess his suitability as a fit and proper person for the issuing of an entry permit and required that Mr Tadic be a fit and proper person in the context of his employment by the CFMEU. In this respect the CFMEU asserted that the Vice President

misapplied the FW Act in that s.508 provided the FWC with the capacity to address concerns about an organisation's misuse of entry rights rather than visiting those concerns on Mr Tadic. In this respect the CFMEU referred to the Full Bench decision in the *Director of Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union*[13] in support of its contentions that it was Mr Tadic's behaviours and characteristics that were relevant rather than those of the CFMEU.[14]

[28] The CFMEU asserted that the approach applied by the Vice President ran contrary to judicial opinions regarding the characterisation of a person as fit and proper. In these respects it referred to *Teachers Registration Board of South Australia v Edwards*[15] and the High Court decision in *Australian Broadcasting Tribunal v Bond*[16] together with other decisions,[17] in support its position in this respect.

[29] In terms of the Bald Hills proceedings,[18] the CFMEU asserted that Mr Tadic was not a party to this proceeding and that the Vice President's conclusion[19] that Mr Tadic's conduct in that matter was a relevant matter to take into account – noting that the proceedings were not taken against Mr Tadic personally, was an extraneous or irrelevant matter and, in the alternative, that the Vice President mistook the facts in reaching his conclusion about Mr Tadic's conduct. The CFMEU asserts that:

> "29. Mr Tadic was not a party to the Bald Hills contempt proceedings and he did not accept the summary of facts presented to the Court. In any case, the summary of facts was for the purpose of the proceeding only. The Appellant submits that although the Commission is not bound by the rules of evidence, they are not irrelevant and cannot be set aside in favour of a course of inquiry which results in unfairness, see, for example, re CFMEU (PR935310) 25 July 2003 Vice President Ross (as he then was) at [36], King v Freshmore M Print S4213 [2000] AIRC 1019 from [60] and, in relation to a similar provision applying to the AAT, Dolan v AOTC (1993) 42 FCR 206 at 207-8."[20]

[30] The CFMEU position is that a proper approach to the admission of evidence would require that the Bald Hills matters not be taken into account. Further, that the Court's decision did not implicate Mr Tadic in the manner contended in the Vice President's decision and that his conclusions did not meet the standard necessary in terms of the *Briginshaw* standard of proof.

[31] The CFMEU assert that the Vice President erred by determining that two unresolved Federal Court proceedings involving Mr Tadic were relevant matters and that his reasons do not adequately explain the account taken of these matters. In this respect it submitted that:

> "23. … the Commission must act on probative evidence when considering the grant of an entry permit. Mere allegations or suspicions cannot be the basis of decision making. Further, the serious consequences for an official being denied an entry permit and the seriousness of the allegations against Mr Tadic are such that the Briginshaw principle would apply in assessing evidence adverse to him."[21]

[32] Further the CFMEU asserted that the Vice President's decision was in error in that he took into account an irrelevant consideration, being that Mr Tadic had not paid the civil penalties imposed on him in earlier court proceedings.[22] The CFMEU asserted that this fact does not go to the considerations of Mr Tadic's character or attributes.

[33] The CFMEU position is that the Vice President did not adequately explain the reasons why he determined that certain material was relevant[23] or the extent of the weight he put on that material.

[34] In reply, the Director's position was that permission to appeal should not be granted in that the decision does not depart from established reasoning or judicial authorities and does not contain arguable error or any injustice to Mr Tadic.

[35] In the alternative, the Director asserts that the Vice President's decision should be construed such that the CFMEU had, through its servants and agents, demonstrated a propensity to breach the FW Act and the BCII Act, demonstrated by observations made in various Court decisions and, it was in this context that the Vice President observed that "a higher bar than normal"[24] needed to be established. The Director asserted that, in this respect, the observation was consistent with the approach in *Australian Broadcasting Tribunal v Bond* in that the fit and proper test was applied by reference to the peculiar circumstance associated with the pattern of behaviour demonstrated by the CFMEU. The Director asserted that in this respect, the Vice President's decision was also consistent with established authority *(Kong)*.[25] The Director asserted that:

> "22. What must be assessed by the Commission in determining an application for an entry permit is whether or not the individual who is to hold the permit is a fit and proper person. This requires an assessment of the personal characteristics of the individual concerned. It also involves consideration of the environment in which the individual will be placed. The brakes that the organisational structure of the employing organisation might put in place on an individual with relevantly undesirable propensities, are relevant factors under section 513(1)(g) of the Act. So too is evidence tending to suggest that the employing organisation lacks such structures, including evidence of a large number of serious contraventions of the FW Act by that organisation's employees and officials. As Mason CJ said in Bond (at 349):
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> > *"The Federal Court seems to have thought that, no matter how great the capacity for control of a licensee exercisable by a person with relevantly undesirable propensities, s.88(2)(b)(i) does not authorize the making, without regard to the character and performance of the board of directors of the licensee and of those persons who comprise its management, of a finding that the licensee is no longer a fit and proper person to hold its licence. This proposition cannot be sustained either as a matter of law or by way of interpretation of s.88(2). .... Especially is this so when it is established that the person having the capacity to control participates in the decision-making processes of a licensee and procures the making of reprehensible decisions which are designed to enhance and protect his own interests." (our emphasis)*[26]

[36] The Director asserted that the CFMEU has been found to show complete disregard for compliance with industrial law, that the evidence indicated that Mr Tadic had faced no adverse consequences from being subject to civil penalties in *White* and *Cozadinos* and accordingly the environment in which Mr Tadic was engaged was a relevant consideration.

[37] In terms of the Bald Hills proceedings, the Director asserted that the CFMEU chose not to put Mr Tadic's conduct in dispute in the proceedings before Tracey J so that it was now estopped from doing so. The Director asserted that the findings made by Tracey J were admissible and relevant to the matter to be determined by the Vice President.

[38] With respect to the matters asserted to be irrelevant, the Director argues that the commencement of proceedings in the Court involving Mr Tadic were serious issues but that a proper reading of the Vice President's decision established that, because no findings had been made in those matters, the Vice President gave little weight to them.

[39] To the extent that the CFMEU asserted that the decision departed from the Briginshaw test, the Director asserted that, given the nature of the findings made by the Vice President, this test was either not relevant or adequately met in the decision.

[40] To the extent that the CFMEU relied on the *Evidence Act 1995* in relation to the findings about the Bald Hills proceeding, the Director contends that the FW Act neither requires the Commission to apply the *Evidence Act* nor prohibits consideration of matters of this nature where the CFMEU was a party to the Bald Hills proceeding, did not call evidence or contest the assertions that led to Tracey J's findings. Those findings identified Mr Tadic and the behaviours he engaged in.

Permission to appeal

[41] I consider that permission to appeal should be granted. The Full Bench in *Director of the Fair Work Building Industry Inspectorate v CFMEU*[27] (*Kong*) granted permission to appeal[28] in relation to an appeal against a Delegate decision in order to provide guidance for the benefit of future decision making with respect to applications of this nature. In that decision the Full Bench stated:

> "[21] The determination under ss.512 and 513 of the Act as to whether a particular union official is a fit and proper person to hold an entry permit necessarily involves an assessment of the suitability of the official to properly discharge the functions and exercise the rights and privileges associated with the holding of an entry permit, as was explained by the Full Bench in The Maritime Union of Australia:
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> > "[23] As is apparent from the above, the relevant question, in determining whether the Commission is permitted to exercise the discretion to issue an entry permit to an official of an organisation under s.512, is whether the official "is a fit and proper person to hold an entry permit". The description "fit and proper person" in s.512 is not defined and standing alone, it carries no precise meaning. Generally though, the description is used as a measure of suitability to perform or carry out a particular function, to be appointed to a particular position or to be given a particular right or privilege. However, the description will take its meaning from its context, from the activities in which the person to be assessed is or will be engaged and the ends to be served by those activities. Taking into account context, the structure of s. 512 and the activities to be engaged in by an official if an entry permit will issue, it seems to us clear that that description is to be applied by reference to the suitability of the official "to hold the entry permit".

> [24] The permit qualification matters in s.513, which must be taken into account in deciding whether an official is a fit and proper person, must therefore be considered and applied in a way that assists in answering the question posed by s.512, namely whether the official "is a fit and proper person to hold the entry permit". The permit qualifications matters are not matters to be considered at large without reference to the question that needs to be answered in s.512. They are not matters to be considered to determine whether a person is a "fit and proper person" per se. Rather the permit qualification matters must be taken into account to decide whether an official of an applicant organisation is a fit and proper person to hold the entry permit that has been applied for by the organisation.
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> [25] A holder of an entry permit is empowered to exercise entry rights and rights associated with entry, such as inspections and employee interviews. Those rights are exercisable subject to conditions, such as notice and purpose. They are also subject to limitations, such as on times for entry and places for interview, and responsibilities such as complying with site occupational health and safety requirements and not hindering or obstructing a person. The question of whether an officer is a fit and proper person to hold an entry permit will therefore necessarily require a consideration of the rights the holder of an entry permit may exercise, the limitations on and conditions attaching to the exercise of those rights, and the responsibilities that must be discharged in the exercise of those rights. These are all to be found in Part 3-4 of the Act."

[22] Thus the "fit and proper person test" is necessarily concerned with the personal characteristics of the person for whom the issue of an entry permit is sought. The large number of cases concerned with the use of the "fit and proper person" criterion in a variety of statutory contexts have consistently taken that approach. In the South Australian Supreme Court Full Court decision in Teachers Registration Board of South Australia v Edwards, Anderson J said:

> "[103] The cases show in my view that although the expression "fit and proper person" takes its meaning from the content of the legislation, there are nevertheless certain consistent notions which emerge in the relevant decisions.
>
> [104] These are that a consideration of whether a person is fit and proper looks to the suitability and eligibility to hold a position. The suitability in turn is viewed against a consideration of the person's previous conduct and their general reputation."

[23] Various formulations have been used in the cases concerning the matters relevant to an assessment of whether a person meets the "fit and proper" standard to engage in particular activities; for example in the High Court decision in Australian Broadcasting Tribunal v Bond, Toohey and Gaudron JJ referred to a person's conduct, character and reputation as being part of a non-exhaustive list of considerations, while in the earlier High Court decision in Hughes & Vale Pty Ltd v The State of New South Wales (No 2) Dixon CJ and McTiernan and Webb JJ characterised the fitness aspect of the criterion as involving honesty, knowledge and ability. Whatever the formulation, it is clear that the assessment process required by the standard, although one which "give[s] the widest scope for judgment and indeed for rejection",

necessarily involves assessing the relevant personal characteristics of the individual concerned in relation to the activities for which satisfaction of the standard is required. That position is in no way altered by the fact that, under the Act, it is the organisation which may apply for a particular official to be issued with an entry permit rather than the official personally.

[24] Section 513(1) of the Act requires the Commission, in considering whether an official is a fit and proper person to hold an entry permit, to take into account a number of matters (described as "permit qualification matters") specified in paragraphs (a)-(g) of the subsection. It is apparent, as the CFMEU/ CFMEIUEQ submitted, that the permit qualification matters in paragraphs (a)-(f) are all concerned with matters personal to the official for whom the issue of an entry permit is sought. Paragraph (g) requires the Commission to take into account any other matters which it considers to be relevant. It is not necessary to apply the eiusdem generis presumption to conclude that the relevance referred to in paragraph (g) is relevance to the question of whether the particular official concerned is a fit and proper person to hold an entry permit, so that for a matter to be considered relevant, the Commission must form the view that it relates to those personal characteristics of the official in question which are pertinent to the discharge of the functions and the exercise of the rights and privileges associated with the holding of an entry permit.

[25] A matter is only required to be taken into account under s.513(1)(g) if the Commission "considers" it to be relevant - that is, the requirement operates upon the opinion as to relevance formed by the Commission. Because the formation of an opinion as to the relevance of a matter to the broad judgment required by the "fit and proper person" criterion will necessarily involve a degree of subjectivity, it is in the nature of a discretionary decision. Therefore in an appeal which challenges an opinion formed for the purposes of s.513(1)(g) it will be necessary for the appellant to demonstrate error in the decision-making process.

[26] We do not consider that the Director has demonstrated any error in the process by which the Delegate determined that the CMFEU's history of contraventions was not relevant to his determination as to whether Mr Kong was a fit and proper person to hold an entry permit. It was reasonably open to the Delegate to conclude, as he did, that there was nothing in the annexure to the Director's General Submissions which bore upon Mr Kong's "status and attributes".11 There was no suggestion that any of the identified contraventions involved any act or omission on the part of Mr Kong. **While it may be accepted that the susceptibility of an official to comply with a direction from his or her employing organisation to engage in unlawful conduct might well be considered to be a relevant matter under s.513(1)(g), there was nothing put to the Delegate at first instance or to us on appeal that suggested that the industrial history set out in the annexure demonstrated anything with respect to any personal susceptibility on Mr Kong's part in that respect.**

[27] That is not to say that past contraventions of industrial or other relevant laws by an organisation can never be relevant to the consideration of an official's fitness or propriety to hold an entry permit where those contraventions did not involve any direct contravening conduct on the part of that official. If, for example, the facts of a particular contravention or contraventions supported an inference that an official with management responsibility in an organisation omitted to

take reasonable steps to ensure that others under his or her control complied with the law, or encouraged or tolerated a general culture of non-compliance with the law, then conceivably that might be considered to be a relevant matter under s.513(1)(g). However in this case it was simply not made apparent that the CFMEU's history of contraventions said anything about Mr Kong's personal conduct, character or reputation either as relevant to the exercise of rights of entry under the Act or at all."

(the emphasis is mine)

[42] I take no issue with the findings in *Kong*. It is simply the case that this matter involves information that was before the Vice President that did raise the issue of Mr Tadic's susceptibility to be regarded as a fit and proper person in the context of his employment by the CFMEU and the behaviours of that union. It seems to me that, as there may be other instances where persons engaged by unions who appear to commonly disregard industrial laws may seek entry permits, there is some benefit in further consideration of the issues addressed in *Kong*.

[43] Just as the Full Bench in *Kong* considered a broad cross section of decisions involving the phrase "a fit and proper person", so too have I considered these authorities. Again, without differing from the conclusions reached in *Kong*, I particularly note the principles set out by Hatcher VP in *Director of the Fair Work Building Inspectorate v CEPU*[29] (Mooney) in the following terms:

"[32] The proper approach to the assessment of whether a person is a fit and proper person to hold an entry permit for the purpose of the s.512 of the Act has been set out in a number of decisions including The Maritime Union of Australia, CEPU v Director of the Fair Work Building Industry Inspectorate, Director of the Fair Work Building Industry Inspectorate v CFMEU, Construction, Forestry, Mining and Energy Union, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland and Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate. The relevant principles may be summarised as follows:

- A "fit and proper" standard, generally speaking, involves assessing the relevant personal characteristics of the individual concerned in relation to the activities for which satisfaction of the standard is required.

- The expression "fit and proper person" in s.512, read in its context, is to be applied by reference to the suitability of the relevant official to hold an entry permit.

- The permit qualifications matters are not matters to be considered at large without reference to the question that needs to be answered in s.512. They are not matters to be considered to determine whether a person is a "fit and proper person" per se, but **rather whether an official of an applicant organisation is a fit and proper person to hold the entry permit that has been applied for by the organisation.**

- The question of whether an official is a fit and proper person to hold an entry permit will therefore necessarily require a consideration of the rights the holder of an entry permit may exercise, the limitations on and conditions attaching to the exercise of

those rights, and the responsibilities that must be discharged in the exercise of those rights.

- The requirement to take the permit qualification matters into account means that the consideration of them must be treated as a central element in the deliberative process and that each matter must be given proper, genuine and realistic consideration and appropriate weight.

- The permit qualification matters are all concerned with matters personal to the official for whom the issue of an entry permit is sought.

- While each of the permit qualification matters are to be evaluated and given due weight, there is no statutory indication that any particular permit qualification matter should be given more weight than any other. In such circumstances it will generally be a matter for the first instance decision maker to determine the appropriate weight to be given to each of the matters which are required to be taken into account in exercising the power in s.513(1).

- Relevance referred to in s.513(1)(g) is relevance to the question of **whether the particular official concerned is a fit and proper person to hold an entry permit, so that for a matter to be considered relevant, the Commission must form the view that it relates to those personal characteristics of the official in question which are pertinent to the discharge of the functions and the exercise of the rights and privileges associated with the holding of an entry permit."**

(emphasis is mine)
(references omitted)

[44] Those principles were cited with approval in the subsequent appeal against the decision in that matter.[30]

[45] The approach in *Kong* is consistent the High Court decision in *Australian Broadcasting Tribunal v Bond & Others*[31] in the following terms:

"The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

Whether the fitness and propriety of a licensee to hold a commercial licence are sufficiently ascertained by reference to its character or reputation, or must be ascertained by reference to the conduct of its affairs and activities, is a question the

> answer to which must be found by implication from the provisions of the Broadcasting Act dealing with the grant, renewal and revocation or suspension of a commercial licence and from the activities to be undertaken pursuant to the licence."[32]

[46] In the context of ss.512 and 513, the character and demonstrated behaviour of the applicant organisation can become a relevant consideration pursuant to s.513(1)(g). While those considerations are matters of discretion available to the Commission, they will clearly depend on what is argued in a matter and the material before the Commission. While the focus must be on the individual being assessed as a fit and proper person, the environment in which they work can become relevant. Put another way, the assessment of whether a person is a fit and proper person to hold an entry permit cannot be undertaken in a vacuum and the characteristics of the organisation for which they work may represent a significant influence on the requests, demands or circumstances within which they work. That conclusion does not detract from the significance of s.508 of the FW Act which has its primary focus on the union or organisation. Equally, it does not detract from the obligation in s.513 to direct attention on the person seeking the entry permit.

[47] Consequently, I consider that the Vice President in this matter was able to have regard to the demonstrated behaviour of the CFMEU in his consideration of whether Mr Tadic was a fit and proper person pursuant to s.513(1)(g). I have then considered that material and the conclusions then available to the Vice President.

[48] The Vice President recited only a small number of the many determinations which addressed the behaviour of the CFMEU branch that employed Mr Tadic. Notwithstanding this, I am satisfied that the conclusion expressed by the Vice President to the effect that the Federal Court findings that the branch of the CFMEU which employed Mr Tadic *"has displayed a continuing attitude to disobedience of the law and has an organisational culture in which contraventions of the law have become normalised"*[33] was clearly open to him and does not reflect error.

[49] The Vice President's subsequent statement: "*In my view this context establishes a higher bar than normal for considering whether Mr Tadic is a fit and proper person to hold the right of entry permit in question*",[34] could be argued to infer that a different standard of personal attributes is required by a CFMEU official to those which would be required of an employee of another "normal" organisation. Were that construction to be adopted, I consider that it could import a degree of prejudice not made out by the evidence and an approach directed at the CFMEU rather than Mr Tadic. However, my view is that, read fairly, the Vice President is simply pointing out the obvious fact that, because of its demonstrated attitude to the law and its culture, an official for whom the CFMEU seeks an entry permit must satisfy the FWC that he or she is a fit and proper person to properly discharge the functions and exercise the rights and privileges associated with holding an entry permit for a union which has an organisational culture which normalises contraventions of the law. The Vice President's observation in the following paragraph makes it clear that the Vice President was, quite properly, fundamentally directing his attention at Mr Tadic's characteristics and attributes.

[50] The behaviour, characteristic of the CFMEU and remarked upon by the Courts was clearly a factor which, in accordance with the discretion in s.513(1)(g), the Vice President regarded as relevant in as much as it affected the circumstances under which Mr Tadic worked. This construction of the Vice President's decision is consistent with the remainder of

his decision in as much as he continued to detail the basis for his conclusions about whether Mr Tadic was a fit and proper person.

[51] The Vice President's conclusion that Mr Tadic has not demonstrated behaviour which indicates that he will comply with the law was clearly consistent with the application of s.513(1) of the FW Act.

[52] Leaving aside my later consideration of the asserted errors in the Vice President's consideration of the material before him, I see no inherent error in recognising that, where a union demonstrates a culture which endorses common disdain for industrial laws, an official needs to be assessed as a fit and proper person, not against the behavioural norms in that union, but against the standards elsewhere applicable. In his conclusion[35] the Vice President summarised his concern that an official of the CFMEU needed to demonstrate personal qualities different to those which appear commonplace in that branch of the CFMEU because of the behavioural traits of that union. Further, that an official of the CFMEU needed to demonstrate a capability and preparedness to act in accordance with the law and that neither circumstance had been established in Mr Tadic's case.

[53] I am satisfied that the material before the Vice President relating to both Mr Tadic's behaviours and the more general behaviours of the CFMEU enabled the Vice President to reach these conclusions. In effect, I am satisfied that to the extent that the CFMEU, by its actions, puts its employees and officials at risk of breaching industrial laws, it simply creates a greater number of circumstances where the behaviour of those officials must be considered. To the extent that the CFMEU believes that its demonstrated behaviour should not be considered as part of the deliberations of the FWC under s.513(1)(g) in so far as it impacts on the circumstances in which its employees and officials work, a change in that behaviour would address this concern.

[54] In his decision, the Vice President detailed his specific conclusions about whether Mr Tadic was a fit and proper person. Whilst I have addressed various of those findings in greater detail, I do not regard his findings relevant to ss.513(1)(a)-(f) demonstrate any form of appealable error.

[55] In considering Mr Tadic's conduct at the Bald Hills site as part of his consideration of s.513(1)(g), the Vice President noted that the Bald Hills action was not taken against Mr Tadic personally[36] and that Mr Tadic claimed a privilege in relation to those proceedings[37] and the other incomplete Court proceedings.

[56] The Vice President's observations about Mr Tadic's behaviour of the Bald Hills site reflected undisputed material before the Court. Indeed I think it would have been inappropriate for the Vice President to have done anything other than to have had regard to that behaviour.

[57] The CFMEU was clearly a party to the Bald Hills proceedings and did not dispute the allegations which formed the basis of the findings referred to by the Vice President, including the findings relevant to both the CFMEU and those which identified Mr Tadic. Consequently, I do not regard the Vice President's conclusions relating to s.513(1)(g) to reflect error.

[58] To the extent that the CFMEU assert that s.508 of the FW Act represents the more appropriate vehicle for consideration of its conduct, I note that the application of that section

is, and remains open, to the Commission. However, the Vice President's decision in this matter goes fundamentally to Mr Tadic, his characteristics and behaviours including those in the working environment created by the CFMEU.

[59] I am not satisfied that, in these circumstances, the FWC is bound by the provisions of the *Evidence Act 1995*. In any event, the Vice President's consideration of the Bald Hills findings did not offend the principles of natural justice and was an approach open to him in the exercise of the broad discretion inherent in s.513(1). It is almost inconceivable that, having conceded the matters referenced by Tracey J, the CFMEU now contends that consideration of those circumstances was not open to the Vice President. In that respect, the Bald Hills findings shed light on Mr Tadic's suitability to hold an entry permit and on the extent to which that branch of the CFMEU continues to be involved in actions which breach industrial laws and hence creates the environment in which its officials and employees operate. The findings demonstrate that Mr Tadic was involved in those actions. That material demonstrates that Mr Tadic participated in CFMEU actions which breached undertakings the CFMEU had given and represented contempt of Court. In effect, it established that Mr Tadic was unable or unwilling to refuse to participate in unlawful conduct.

[60] The CFMEU complaints that the evidence before the Vice President did not permit the conclusions reached, in that the standard of proof did not meet the test in *Briginshaw v Briginshaw*.[38] Broadly stated, that test requires that the balance of probabilities be applied so as to take account of the seriousness of a matter and hence not be founded on inexactness, indefiniteness or indirect inferences.

[61] That complaint is not made out in these circumstances. Not only did the Vice President not purport to make findings relevant to Mr Tadic's conduct in the various undetermined court matters, or for that matter, the substantive Bald Hills matter, the conclusions he had regard to with respect to Bald Hills were conceded by the CFMEU before the Court.

[62] I have considered the CFMEU complaint that the Vice President erred by not sufficiently detailing the weight or significance he attached to consideration of the extant court proceedings. In his decision,[39] the Vice President stated:

> "[45] On 23 December 2015 the Director commenced proceedings in the Federal Court in which Mr Tadic was named as the second respondent (VID955/2015). In these proceedings the Director has alleged that while exercising a State or Territory OHS right within the meaning of Division 3 of Part 3-4 of the Act on 13 June 2014, Mr Tadic intentionally hindered an inspector appointed under the OHS Act and otherwise acted in an improper manner, and thereby contravened s.500 of the Act. The matter is yet to be determined. I consider that the allegation in this matter is relevant to take into account – noting that there are no findings of fact in relation to the allegations.
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> [46] In addition, since the filing of the CFMEU's application for an entry permit for Mr Tadic, a further proceeding has been commenced by the Director in which Mr Tadic is named as the third respondent (VID194/2016). In these proceedings the Director alleges that, while exercising a State or Territory OHS right within the meaning of Division 3 of Part 3-4 of the Act on 1 August 2014, Mr Tadic acted in an improper manner (through the use of indecent and profane language and by acting in

> an aggressive manner towards a project manager) and thereby contravened s.500 of the Act. I consider that the allegations in this matter are relevant on the same basis as the other incomplete extant proceeding."

[63] In my view that conclusion makes it more than sufficiently clear that, while relevant, those matters had little weight in the Vice President's overall conclusions. To the extent that the Vice President recognised these matters, I consider this was a normal exercise of the discretion inherent in s.513 and that his approach was consistent with the position adopted by various other Members of the FWC.[40]

[64] To the extent that the Vice President took into account that Mr Tadic did not pay the fines imposed on him in the earlier court matters and did not express remorse or contrition relative to his conduct, these are considerations available under s.513(1) and the evidence before the Vice President permitted those conclusions.

[65] The evidence before the Vice President establishes that Mr Tadic last achieved an entry permit in 2013 as a matter of balance. Taking into account all of the material put before the Vice President in this application there was sufficient material to enable the Vice President to decide that in 2016 he should not be granted such a permit, even without taking the extent to which Mr Tadic is an official of a union which has consistently been found to have, and continues to breach and disregard industrial laws and involve its officials in breaches of industrial laws. The evidence before the Vice President confirmed those continuing behaviours and the environment in which Mr Tadic works. It also confirmed that Mr Tadic's actions did not demonstrate that he was of a character which differentiated him from behaviours which are inconsistent with the requirements of an entry permit holder. I am not satisfied that the decision discloses error in this respect.

[66] For these reasons, I would dismiss the appeal.

DECISION OF DEPUTY PRESIDENT CLANCY AND COMMISSIONER LEE

[67] We have had the opportunity of reading a draft of the reasons for decision of Senior Deputy President O'Callaghan but we are unable, with respect, to join in them.

[68] This is an appeal brought pursuant to s.604 of the *Fair Work Act 2009* (FW Act) by the Construction, Forestry, Mining and Energy Union – Construction and General Division, Victorian/Tasmanian Branch (CFMEU) from a decision[41] of Vice President Watson on 31 May 2016 to reject the grant of an entry permit to Mr Alex Tadic. The CFMEU had made application to the Fair Work Commission (Commission) pursuant to s.512 of the Act for the issuing of such a permit.

[69] The background to this appeal, the grounds upon which it is made and the submissions of the parties are set out in the decision of the Senior Deputy President and we do not repeat them.

Nature of the Appeal

[70] As was succinctly put by the Full Bench in *Director of the Fair Work Building Industry Inspectorate v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[42]:

> "Appeals brought pursuant to s.604 of the Act involve an appeal by way of re-hearing, and the Commission's powers on appeal are exercisable only if there is error on the part of the primary decision-maker. An appeal may only be made with the permission of the Commission; there is no right of appeal."[43] (reference omitted)

[71] The appeal is from a discretionary decision and as to the exercise of discretion, it was said by Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied v AIRC*[44]:

> ""Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment." (references omitted) ""Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.
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> …
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> Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal."[45] (references omitted)

[72] *House v The King*[46] determined the manner in which an appeal against an exercise of discretion should be determined:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[47]

Permission to Appeal

[73] Section 604(2) of the FW Act states that if we are satisfied that it is in the public interest to do so, we must grant permission to appeal. The Full Bench in *GlaxoSmith Kline Pty Ltd v Makin*,[48] characterised the concept of public interest as follows:

> "[27] … the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters…"

[74] We have decided to grant permission to appeal because the appeal raises an important question about the correct approach to the construction and application of sections 512 and 513 of the FW Act and for the reasons that follow we have decided to uphold the appeal and quash the decision to reject the grant of an entry permit to Mr Tadic.

[75] We do not propose to recite the 11 grounds for appeal raised by the CFMEU in its notice of appeal because we consider that we need only deal with the second alleged error. Our position on the other grounds is made clear later in this decision.

[76] The second alleged error is as follows:

> "2. The Vice President acted on wrong principle by the application of a higher bar than normal to establish whether Mr Tadic is a fit and proper person to be granted an entry permit in the context of Mr Tadic being an official of this branch of the union."

[77] Having outlined sections 512, 513 and 480 of the Act and case law in which the task of the Commission under s.512 of the Act has been discussed, the Vice President stated it was relevant for him to have regard to the consideration that had been given by the Federal Court[49] of the role of officials exercising rights of entry with respect to the CFMEU. The Vice President outlined evidence and background matters before considering each of the specific matters required to be taken into account under s.513 of the Act.

[78] The Vice President then commenced addressing the question, "*Is Mr Tadic a Fit and proper Person?*"[50] with:

> "[47] The Federal Court has found that the branch of the CFMEU which seeks a right of entry permit with respect to Mr Tadic has displayed a continuing attitude to disobedience of the law and has an organisational culture in which contraventions of the law have become normalised. **In my view this context establishes a higher bar than normal for considering whether Mr Tadic is a fit and proper person to hold the right of entry permit in question**."
>
> (emphasis is ours)

[79] As to this, the CFMEU submitted the Vice President had taken into account matters external to the relevant personal characteristics of the individual concerned in relation to the activities for which the satisfaction of the standard is required.[51]

[80] The CFMEU also submitted that the Vice President was in error to require Mr Tadic to meet a higher bar for the granting of an entry permit, asserting nothing in the Act indicates that the standard to establish an official is a fit and proper person will change depending on the particular union or branch of the union making an application.[52]

[81] The Director submitted that the fitness and reputation of the CFMEU, the organisation that has the 'capacity to control' Mr Tadic and has made decisions to consistently breach industrial laws and orders of the Courts, was a relevant factor under s.513(1)(g) of the Act.

[82] As did the Senior Deputy President, we have noted the principles set out by Hatcher VP in *Director of the Fair Work Building Inspectorate v CEPU*[53] (*Mooney*):

> "[32] The proper approach to the assessment of whether a person is a fit and proper person to hold an entry permit for the purpose of the s.512 of the Act has been set out in a number of decisions including The Maritime Union of Australia, CEPU v Director of the Fair Work Building Industry Inspectorate, Director of the Fair Work Building Industry Inspectorate v CFMEU, Construction, Forestry, Mining and Energy Union, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland and Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate. The relevant principles may be summarised as follows:
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> - A "fit and proper" standard, generally speaking, involves assessing the relevant personal characteristics of the individual concerned in relation to the activities for which satisfaction of the standard is required.
>
> - The expression "fit and proper person" in s.512, read in its context, is to be applied by reference to the suitability of the relevant official to hold an entry permit.
>
> - The permit qualifications matters are not matters to be considered at large without reference to the question that needs to be answered in s.512. They are not matters to be considered to determine whether a person is a "fit and proper person" per se, but rather whether an official of an applicant organisation is a fit and proper person to hold the entry permit that has been applied for by the organisation.
>
> - The question of whether an official is a fit and proper person to hold an entry permit will therefore necessarily require a consideration of the rights the holder of an entry permit may exercise, the limitations on and conditions attaching to the exercise of those rights, and the responsibilities that must be discharged in the exercise of those rights.
>
> - The requirement to take the permit qualification matters into account means that the consideration of them must be treated as a central element in the deliberative process and that each matter must be given proper, genuine and realistic consideration and appropriate weight.

- The permit qualification matters are all concerned with matters personal to the official for whom the issue of an entry permit is sought.

- While each of the permit qualification matters are to be evaluated and given due weight, there is no statutory indication that any particular permit qualification matter should be given more weight than any other. In such circumstances it will generally be a matter for the first instance decision maker to determine the appropriate weight to be given to each of the matters which are required to be taken into account in exercising the power in s.513(1).

- Relevance referred to in s.513(1)(g) is relevance to the question of whether the particular official concerned is a fit and proper person to hold an entry permit, so that for a matter to be considered relevant, the Commission must form the view that it relates to those personal characteristics of the official in question which are pertinent to the discharge of the functions and the exercise of the rights and privileges associated with the holding of an entry permit."

(references omitted)

[83] We have also noted those principles were cited with approval in both the subsequent appeal against the decision in that matter[54] and further Full Bench consideration of sections 512 and 513(1) if the Act.[55]

[84] We agree with the observation of Hatcher VP in *Mooney* and the Full Bench in *CFMEU v Director of the Fair Work Building Inspectorate*[56] that there is no statutory indication that any particular permit qualification matter should be given more weight than any other. We also agree that it will be for the first instance decision maker to determine the appropriate weight to be given to matters it considers relevant pursuant to s.513(1)(g) of the Act.

[85] We also consider that *Director of Fair Work Building Inspectorate v CFMEU*[57] (*Kong)* establishes:

- The susceptibility of an official to comply with a direction from his or her employing organisation to engage in unlawful conduct can be considered to be a relevant matter under s.513(1)(g); and

- past contraventions of industrial or other relevant laws by an organisation can also be relevant to the consideration of an official's fitness or propriety to hold an entry permit, and such contraventions do not necessarily have to involve any direct contravening conduct on the part of that official.

[86] We agree that it is highly relevant to consider an applicant's attitude and track record relating to compliance with the relevant legal obligations, however, we consider it erroneous to elevate a context of past contraventions of industrial or other relevant laws by an organisation so that it automatically operates to impose a 'higher bar than normal' for an individual to clear in order to satisfy the Commission that he or she is a fit and proper person to hold an entry permit, regardless of his or her past behaviour.

[87] We believe that there was error in the decision-making process of the Vice President because he framed the task of considering whether Mr Tadic was a fit and proper person to hold an entry permit with the opening statement "*In my view this context establishes a higher bar than normal for considering whether Mr Tadic is a fit and proper person to hold the right of entry permit in question.*"[58] On our reading of s.513(1) of the Act and our consideration of the authorities referred to above, we do not consider this approach was open to him and we have concluded he acted on a wrong principle in doing so. On the basis of this error in the decision making process, we have decided to uphold the appeal and quash the Vice President's decision to reject the grant of an entry permit to Mr Tadic.

[88] The effect of the Senior Deputy President's decision is to reject the other grounds of the appeal and to the extent necessary we agree with him in that respect and his reasons for so doing.

[89] Our interpretation of sections 512 and 513 of the Act does not mean that a context of continuing disobedience of the law by an organisation and organisational cultures in which contraventions of the law have become normalised cannot be addressed as far as rights of entry are concerned. Section 508 of the Act empowers the Commission to restrict rights of entry where those rights have been misused by an organisation or its officials. The action the Commission may take, on its own initiative or on application by an inspector, outlined in s.508(2) of the Act includes:

(a) imposing conditions on entry permits;

(b) suspending entry permits;

(c) revoking entry permits;

(d) requiring some or all of the entry permits that might in future be issued in relation to the organisation to be issued subject to specified conditions;

(e) banning, for a specified period, the issue of entry permits in relation to the organisation, either generally or to specified persons;

(f) making any order it considers appropriate.

[90] Having determined to quash the decision raises the question as to how to dispose of the appeal.

[91] During the hearing, the Full Bench asked the parties for submissions relating to the manner of disposition of the appeal, should it be upheld.

[92] The CFMEU submitted that the question in effect turns on whether the Full Bench felt it had sufficient material to deal with the matter itself and this in turn, would depend on the grounds upon which the appeal was upheld. A scenario in which the Full Bench upheld the appeal by excluding the Bald Hills, extant proceedings and 'the cultural argument' was canvassed by the CFMEU. It submitted that in such a scenario, the Full Bench was probably in a position to determine whether Mr Tadic ought be granted a permit, either unconditionally or with conditions.

[93] In the alternative, the CFMEU submitted that if the Full Bench felt it did not have sufficient material before it, the application would need to be sent back to another member of the Commission for determination, and this could include a member of the Full Bench. The CFMEU also submitted "*…it would be appropriate in all the circumstances that it be a member other than the Vice President because of the various findings which he has already made*." [59]

[94] The Director did not agree with the CFMEU's submission that the matter ought not be remitted to Vice President Watson. The Director submitted that the Vice President has had the advantage of hearing witnesses give evidence and that it was possible that further evidence would be needed, depending on the grounds upon which the appeal was upheld. If the Full Bench was to indicate that it was not open to the Vice President to have regard to the findings of Tracey J and the agreed statement of facts appended to his Bald Hills decision, for example, the Director submitted that consideration would need to be given to whether or not further evidence going to actually what took place on that occasion would need to be put before the Commission. The Director submitted that if the matter was to be remitted in such circumstances, it should be remitted to the Vice President for him to be able to consider what, if any, further evidence should be adduced by the parties and then determine the matter having regard to the evidence he has already heard and any additional evidence that he chooses to admit.

[95] Having considered the matter, we have determined that the best course is for the matter to be remitted to Vice President Watson for determination. We do not feel that there is sufficient material before us to determine the matter. We agree with the Director that the Vice President has had the advantage of hearing witness evidence and should either party seek to bring further evidence, this is a matter best dealt with by the Vice President. It follows that we do not agree with the CFMEU submission that it is not appropriate, based on the findings that he has already made, to remit the matter to the Vice President.

[96] We grant permission to appeal, uphold the appeal, quash the decision and remit the application by the CFMEU for the issuing of a permit to Mr Tadic to Vice President Watson for rehearing and determination according to law.

SENIOR DEPUTY PRESIDENT

Appearances:

H Borenstein QC and N Campbell of Counsel for the Appellant.
C O'Grady QC and R Nelson of Counsel for the Respondent.

Hearing details:

2016.
Melbourne:
August 16.

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[1] [2016] FWC 3322

[2] [2016] FWC 3322, paras [7] and [8]

[3] [2008] FCA 495

[4] [2011] FCA 192

[5] [2011] FMCA 284

[6] [2013] FWCD 478, para [58]

[7] [2015] FCA 226

[8] *Director of the Fair Work Building Industry Inspectorate v CFMEU & Anor* VID955/2015

[9] *Director of the Fair Work Building Industry Inspectorate v CFMEU & Anor* VID194/2016

[10] [2016] FWC 3322, para [45]

[11] (1936) 55 CLR 499, at 504-505

[12] [2010] FWAFB 5343 at [27]

[13] [2014] FWCFB 5947

[14] *Kong* para [27]

[15] (2013) 117 SASR 246 at [103-104]

[16] [1990] 170 CLR 321 at 348 and 380

[17] *Director of Fair Work Building Inspectorate v CFMEU* [2014] FWCFB 5947 at [22]-[23] ; *Re Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union* [2015] FWC 1522 at [32] ; *Director FWBII v CEPU* [2015] FWCFB 3358 at [13]-[14] ; *CFMEU Construction and General Division, Victoria-Tasmania Divisional Branch* [2015] FWC 5843 at [7]

[18] *Director of Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 226

[19] a submission which we understand relates to [2016] FWC 3322, para [44]

[20] Exhibit CFMEU1, para 29

[21] Exhibit CFMEU1, para 23

[22] [2016] FWC 3322, paras [23] and [24] and [48]

[23] [2016] FWC 3322, paras [41]-[43]

[24] [2016] FWC 3322, para [47]

[25] *Director of Fair Work Building Industry Inspectorate v CFMEU* [2014] FWCFB 5947, paras [26] and [27]

[26] Exhibit FWBI1, para 22

[27] [2014] FWCFB 5947

[28] [2014] FWCFB 5947, para [18]

[29] [2015] FWC 1522

[30] [2015] FWCFB 3358, para [13]

[31] [1990] 170 CLR 321

[32] [1990] 170 CLR 321, at 380

[33] [2016] FWC 3322, para [47]

[34] [2016] FWC 3322, para [47]

[35] [2016] FWC 3322, para [57]

[36] [2016] FWC 3322, para [44]

[37] [2016] FWC 3322, para [54]

[38] (1938) 60 CLR 336 (362-3)

[39] [2016] FWC 3322 paras [45] and [46]

[40] see for example *CFMEU v Gerard Benstead* [2016] FWC 4256 and *CFMEU – Graauwmans* [2016] FWC 4180

[41] [2016] FWC 3322.

[42] [2015] FWCFB 3358

[43] Ibid at [4].

[44] (2000) 203 CLR 194.

[45] Ibid at at 204-205.

[46] (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ.

[47] Ibid at 505.

[48] [2010] FWAFB 5343 at [27]

[49] *Director of Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union (No.2)*[2016] FCA 436.

[50] [2016] FWC 3322, para [47]

[51] Exhibit CFMEU1, para 12

[52] Exhibit CFMEU1, para 14

[53] [2015] FWC 1522

[54] [2015] FWCFB 3358, para [13]

[55] *Director of Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union – Construction and general Division, Queensland Northern Territory Divisional Branch [2015] FWCFB 6035.*

[56] [2014] FWCFB 7194.

[57] [2014] FWCFB 5947

[58] [2016] FWC 3322, para [47]

[59] Extract of Transcript of Proceedings 2.28pm, Tuesday, 16 August 2016 – PN4.