DECISION

Fair Work Act 2009
s.512—Right of entry

Construction, Forestry, Maritime, Mining and Energy Union-Construction and General Division, Australian Capital Territory Divisional Branch
(RE2019/1074)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 2 NOVEMBER 2020

Application by CFMMEU for issue of right of entry permit for Zachary Smith – satisfied that fit and proper person – permit issued.

[1] On 30 October 2019, the Construction, Forestry, Mining and Energy Union – Construction and General Division, Australian Capital Territory Divisional Branch (***CFMMEU***) made an application to the Fair Work Commission (***Commission***) under s 512 of the *Fair Work Act* 2009 (Cth) (***Act***) for an entry permit for Mr Zachary Alan Smith, who holds the position of ACT Divisional Branch Assistant Secretary of the CFMMEU.

[2] The previous right of entry permit held by Mr Smith[1] expired on 7 November 2019.

[3] The Australian Building and Construction Commissioner (***ABCC***) intervened in these proceedings and made submissions against the CFMMEU's application for a right of entry permit for Mr Smith.

[4] These proceedings were adjourned, by consent, on a number of occasions to permit other relevant proceedings in the Federal Court and Federal Circuit Court to be concluded. I address those proceedings further below.

[5] On 26 October 2020 I conducted a hearing, by video conference, to determine the application for a new right of entry permit for Mr Smith. No witnesses were required for cross examination. Oral submissions were made on behalf of each of the CFMMEU and ABCC to supplement the written submissions filed by each party. As to the evidence, the CFMMEU relied on a declaration made by Mr Jason O'Mara dated 30 October 2019. At that time, Mr O'Mara was the ACT Divisional Branch Secretary of the CFMMEU. The CFMMEU also relied on a declaration made by Mr Smith on 30 October 2019 dealing with the permit qualification matters and a further declaration made by Mr Smith on the same date concerning his identification. The ABCC relied on a witness statement made by Mr Ben Vallence, legal practitioner employed by the ABCC, dated 16 October 2020.

[1] RE 2016/1433

Statutory Framework

[6] Part 3–4 of the Act provides a framework within which officials of organisations may gain access to premises of employers and occupiers to represent members of organisations in the workplace, to hold discussions with members and potential members, and to investigate suspected contraventions of the Act, fair work instruments and State or Territory occupational health and safety laws.

[7] The object of Part 3–4 of the Act is to establish a framework that balances the right of organisations to represent their members, hold discussions with potential members and investigate suspected contraventions of relevant laws and instruments, the right of employees to receive information and representation, and the right of occupiers of premises and employers to go about their business without undue inconvenience.[2]

[8] Part 3–4 of the Act confers upon a permit holder a statutory right to enter premises owned or controlled by the occupier or employer that diminishes the common law rights of the occupier or employer.[3] The rights conferred, however, are not "untrammelled" and are subject to both express and implied constraints.[4] Accordingly, the right of entry scheme established by Part 3–4 of the Act should not be construed as giving any greater right than which is necessary to achieve the express or implied statutory purpose of the scheme.[5]

[9] Section 512 of the Act provides that the Commission may, on application by an organisation, issue an entry permit to an official of the organisation if it is satisfied that the official is a "fit and proper person" to hold the entry permit. The Commission's discretion whether or not to issue an entry permit is not conferred in general, unqualified terms. The discretion must be exercised having regard to the "permit qualification matters" set out in s 513(1) of the Act and in a way that is not arbitrary, capricious or so as to frustrate the legislative purpose. Further, the discretion is also confined by the subject matter, legislative context and purpose.[6]

[10] Section 513 of the Act sets out the permit qualification matters as follows:

> "**513 Considering application**
>
> (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;

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[2] Section 480 of the Act

[3] *Australasian Meat Industry Employees Union v Fair Work Australia and Anor* [2012] FCAFC 85; (2012) 203 FCR 389 at 405 [57] per Flick J

[4] Ibid at 405 [56] per Flick J

[5] *Citibank Ltd v Federal Commissioner of Taxation* (1988) 19 ATR 1479 at 1481 – 1482; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; and *Darlaston v Parker and Others* (2010) 189 FCR 1 at 13 [44]

[6] *Construction, Forestry, Mining and Energy Union v Fair Work Commission* [2017] FWCFB 4141

(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."

[11] Section 515 of the Act allows the Commission to impose conditions on entry permits. It relevantly provides as follows:

"**515 Conditions on entry permit**

(1) The FWC may impose conditions on an entry permit when it is issued.

(2) In deciding whether to impose conditions under subsection (1), the FWC must take into account the permit qualification matters.

(3) The FWC must record on an entry permit any conditions that have been imposed on its use (whether under subsection (1) or any other provision of this Part)."

[12] In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*,[7] Vice President Hatcher set out the following principles relevant to the interpretation and application of sections 512 and 513(1) of the Act as follows:

"[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 s.512 of the Act has been set out in a number of decisions including *The Maritime Union of Australia* [2014] FWCFB 1973*, CEPU v Director of the Fair Work Building Industry Inspectorate* [2014] FWCFB 4397*, Director of the Fair Work Building Industry Inspectorate v CFMMEU* [2014] FWCFB 5947*, Construction, Forestry, Mining and Energy Union* [2014] FWCFB *6497, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland* [2014] FWCFB 7154 *and Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2014] FWFCB 7194. 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.

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[7] [2015] FWC 1522

● 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."

[13] In *Maritime Union of Australia v Fair Work Commission* (***MUA v FWC***)[8], a Full Court of the Federal Court of Australia observed the following in relation to the phrase "a fit and proper person":

"[17] The phrase a 'fit and proper person' is used in many different statutory contexts: e.g., *Customs Act 1901* (Cth), ss 67H, 102CF; *Migration Act 1958* (Cth), s 290; *Marriage Act 1961* (Cth), ss 31(1), 33(1). Some statutes perhaps expand upon the generality of what would otherwise fall within the phrase 'fit and proper person' by expressly including a reference to whether an individual is of 'good fame, integrity and character...': e.g., *Tax Agent Services Act 2009* (Cth), s 20–15. But the correct ambit in which that phrase operates is always to be determined by reference to the specific statutory context in which it is employed: *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 380. Toohey and Gaudron JJ there relevantly observed:

> '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.'"[9]

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[8] [2015] FCAFC 56

[9] Ibid at [17]

[14] In *MUA v FWC*, the Full Court ultimately concluded as follows:

> "[42] When deciding whether to issue an entry permit pursuant to s 512 of the Fair Work Act, those considerations relevant to the exercise of the power are not confined (for example) to convictions and penalties imposed for prior contraventions solely for the manner in which rights under an entry permit have been exercised. The weight to be given to other considerations remains a matter for the decision-maker – at least initially. The prospect remains for judicial review founded upon (for example) alleged 'unreasonableness'."[10]

Consideration

[15] I will now take into account all of the permit qualification matters specified in s 513(1) of the Act in relation to the application for an entry permit for Mr Smith.

Permit qualification matters – ss 513(1)(a), (b), (c), (e) and (f)

[16] According to the declarations filed by the CFMMEU in support of the application for the grant of an entry permit to Mr Smith:

(a) Mr Smith has received appropriate training about the rights and responsibilities of a permit holder (s 513(1)(a) of the Act). Mr Smith completed an approved right of entry training course with the ACTU on 30 October 2019;

(b) Mr Smith has never been convicted of an offence against an industrial law (s 513(1)(b) of the Act);

(c) Mr Smith 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 (s 513(1)(c) of the Act);

(d) Mr Smith has not had any entry permit issued under Part 3–4 of the Act or a similar law of the Commonwealth revoked, suspended or made subject to conditions (s 513(1)(e) of the Act); and

(e) Mr Smith has not had an entry permit under State or Territory industrial or occupational health and safety laws which has been cancelled, suspended or been made subject to conditions, nor has he been disqualified under such laws from exercising or applying for an entry permit (s 513(1)(f) of the Act).

[17] I accept that the information set out in the previous paragraph, as disclosed in the declarations made by Mr O'Mara and Mr Smith concerning these matters, is true and correct. The permit qualification matters set out in s 513(1)(a)(b), (c), (e) and (f) of the Act weigh in favour of a conclusion that Mr Smith is a fit and proper person to hold an entry permit.

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[10] Ibid at [42]

Permit qualification matter – s 513(1)(d)

[18] Pursuant to s 513(1)(d) of the Act, in deciding whether Mr Smith is a fit and proper person I must take into account whether Mr Smith, or any other person, has been ordered to pay a penalty under the Act or any other industrial law in relation to action taken by Mr Smith. Such penalty orders have been made in two sets of proceedings.

[19] First, on 17 September 2020 Mr Smith was ordered by the Federal Circuit Court to pay a penalty of $6,000 for contravening sections 499 and 500 of the Act on 20 October 2013 whilst acting in the capacity as a permit holder. The applicable maximum at the time for each contravention was $10,200. The Court accepted that the two contraventions ought to be treated as a course of conduct and as such subject to a single penalty. The conduct on Mr Smith's part which led to the $6,000 penalty being imposed on him is described in the following parts of the liability and penalty judgments of Judge Neville:

> "*Commissioner of the Australian Building and Construction Commission v Hall & Ors (the 3 Site Canberra Case)* [2018] FCCA 3532 (liability judgment)
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> 216. To a very significant degree, the matters in dispute here centred on a fracas, which for some part became rather close and personal, between a senior official of the Village Company, long experienced in the construction and building industry, Mr Northey, and a significantly younger Union official, Mr Smith. To say that they did not see "eye to eye" (except literally on one occasion) would be something of an understatement. In short: Mr Northey directed Mr Smith to do, and not to do, a number of things on this site on this occasion, which are detailed below. There was some resistance by, and remonstration with, Mr Smith arising from these "directions." Mr Smith was attending this site for the first time and did so with Mr Hall.
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> 217. It is alleged that in the course of this interaction, Mr Smith breached ss. 499 and 500 of the FW Act, and that Mr Hall made misrepresentations in breach of s. 503. Mr Smith and Mr Hall deny this claim.
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> **Summary of Contraventions**
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> 218. This incident relates to the following alleged contraventions:
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> *a) Contravention 4*: that the Fifth Respondent (Smith) failed to comply with a reasonable Occupational Health & Safety request (OHS), in breach of s.499 of the FW Act;
>
> *b) Contravention 5*: that the Fifth Respondent (Smith) hindered, obstructed or acted in an improper way, in breach of s.500 of the FW Act; and
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> *c) Contravention 6*: that the First Respondent (Hall) made misrepresentations about the *Fair Work Act* and things authorised by it, in breach of s.503.
>
> 219. Section 499 of the FW Act provides:
>
> *(1) A permit holder must not exercise a State or Territory OHS right unless he or she complies with any reasonable request by the occupier of the premises to*

> *comply with an occupational health and safety requirement that applies to the premises.*
>
> *Note 1: This section is a civil remedy provision (see Part 4-1).*
>
> *Note 2: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).*

220. Section 500 of the *Fair Work Act* 2009 provides:

> *A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.*
>
> *Note 1: This section is a civil remedy provision (see Part 4-1).*
>
> *Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.*
>
> *Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502).*

…

287. Summarised, the evidence from Mr Smith's Affidavit, affirmed 8th April 2016, was as follows in relation to the events on the Nexus Site on 30th October 2013.
He said that he was driving with Mr Hall along Flemington Road when Mr Hall noticed some issues on the Nexus site regarding access points. Mr Smith said that he also noticed some workers without safety hats walking around.

289. He said that when they arrived on the site he and Mr Hall walked towards the site shed. They approached a person "who looked like management" (par. 9). Mr Smith confirmed that he now knows this person to be Mr Northey. He confirmed that this was the first time he had attended a Village building site.

290. Mr Smith confirmed that he and Mr Hall provided Mr Northey with their WHS Act permit ("state permit"). He said he did not recall being asked to show his "federal permit".

291. Mr Smith said that Mr Hall then asked Mr Northey to accompany the Union officials on site. He said that Mr Northey refused the request "straight away". He said he saw Mr Northey go inside the site shed and start making phone calls. When Mr Northey came out of the shed he said works to the effect of "we have to wait here until Mark gets here, I'm not taking you on until Mark gets here." (par. 16). He said he now knows that this was a reference to Mr Fox.

292. Mr Smith went on to say that Mr Hall "started complaining to Northey," saying that there was no reason to wait for a particular person and that Northey could escort the Union officials. Mr Smith quoted Mr Hall as saying words to the effect: "You

can't unreasonably delay or hinder or obstruct us from getting on site that is a contravention of the Act." (par. 17) He said Mr Hall kept asking Mr Northey to accompany the Union officials on site but that Mr Northey refused every time. He said that Mr Northey was getting more and more agitated. He said that Mr Northey and Mr Hall were talking about getting onto the site for about 15 minutes when Mr Fox arrived. After Mr Hall had identified to Mr Fox what he had seen as possible safety breaches Mr Fox agreed to escort them to the deck.

293. There was disagreement between the Union officials, and Mr Northey and Mr Fox, as to whether or not there was any safety issue as identified by Mr Hall. Mr Fox and Mr Northey did not accept that the deck was unsafe. Mr Smith confirmed (par. 22) that there was a heated discussion between "Hall, Northey and Fox" in relation to the alleged safety issues. During this conversation, Mr Smith said that Mr Northey kept making reference to Mr Smith's age and, on one occasion, called him a "young dickhead" and a "whippersnapper". Mr Smith said that while the heated conversation was taking place he was taking photographs of the decking. He also said that "for the most part I was trying to ignore Northey's insults…" (par. 24).

294. After the group left the deck, Mr Smith said that Mr Northey started talking about calling Worksafe. Mr Smith commented (par. 27) that while he had no issue with WorkSafe coming onto a site, sometimes there can be a substantial delay in WorkSafe arriving. In those circumstances, it was Mr Smith's view that he generally did not agree that Union officials were obliged to wait for WorkSafe to attend before starting their inspection.

295. Next, Mr Smith referred to the attempt by he and Mr Hall to inspect a safety barrier surrounding an excavation on the site. He said that Mr Northey and Mr Fox were "unhappy about us wanting to look at another area" (par. 28). Mr Smith said to the Village officers that if there was a safety issue then the union officials should be able to go and inspect it. Mr Smith said that Mr Hall and Mr Fox were walking in front of him.

296. Mr Smith then went on to say that as he was walking in the direction of the scaffolding he heard Mr Northey chasing behind him. He said that Mr Northey was angry. He said as follows (pars. 31 – 34):

> *31. "He said, "Get the fuck back here." Northey was saying things like "you can't just walk off, get the fuck back here"*
>
> *32. I swivelled around on the spot and by the time I turned around, Northey was in my face. I did not step into him, he had caught up to me by the time I turned around and he did not back off.*
>
> *33. He started yelling in my face and I responded by saying words to the effect of, "Are you trying to intimidate me, don't you dare try and intimidate me. We are permit holders and we have rights under the Act".*
>
> *34. I don't remember calling him a fucking idiot. The conversation was heated because Northey was yelling in my face."*

297. Both Mr Fox and Mr Hall walked over to Mr Smith and Mr Northey and each said to their respective colleagues words to the effect that they needed to settle down and they needed to get on with the inspection.

298. Mr Smith said that he raised his voice in response to Mr Northey's attacks about his age and alleged inexperience (par.36). Mr Smith said that even as they were leaving the site Mr Northey was still remonstrating with him about him not needing "young dickheads like this telling me what to do".

Oral Evidence of Mr Smith

299. Mr Smith's oral evidence was as follows.

300. After dealing with some preliminary matters regarding, among other things, him working with the Forestry Division of the CFMEU, Mr Smith confirmed that he did not have access to any contemporaneous notes in relation to the events that occurred on the 30th October, including any diary note or similar. He said he did not take notes on this particular occasion because, in his view, what happened on the site was nothing out of the ordinary. Mr Smith also said that he could not recall reading Mr Northey's or Mr Fox's Affidavits in order to refresh his memory regarding matters concerning the Nexus site on 30th October 2013. Nor had he read Mr Hall's Affidavit in relation to the proceedings generally, or in relation to this incident in particular. Mr Smith confirmed that he did not have any trade qualification in the construction industry.

301. Somewhat curiously, when Mr Smith was asked questions about his experience and going with Mr Hall to this particular site, he sought to make the point that the Forestry Division covered things like window installation and such matters which, he said, were aspects or matters for inspection on building sites. I do not recall there being any reference in any of the contraventions alleged here to the need to inspect any window installations. He also stressed that Mr Hall was "not supervising his work" as a new or prospective member of the Construction and General Division of the CFMEU. And it might be noted further that the alleged safety breaches alleged by Mr Hall did not refer at all to window installation or any other area of work experience articulated by Mr Smith.

302. In my view, accepting Mr Smith's general proposition about him not being sort of under-going "on the job training", he was clearly doing precisely this. Indeed, Mr Hamilton confirmed that he (Hamilton) was attending building sites in order to be relevantly trained about site inspections. It is no slight to Mr Smith, given his lack of practical and other experience in the Construction and General Division of the Union, to be attending a building site under the watchful mentoring of someone as senior and experienced as Mr Hall.

303. In relation to the inspection of "the deck", Mr Smith said that he recalled that there were construction workers on it, but he could not remember what trades they were. He said he also remembered a discussion between Mr Hall and Mr Northey regarding the fixing of yellow caps on some steel ring reinforcing rods, but he did not recall Mr Hall saying anything to the effect of "you'll have to shut the site". He said, however, that he disagreed that Mr Northey took on board the need to affix yellow caps on the steel rods.

304. Mr Smith denied that Mr Northey called out to him words to the effect of: "You can't wander off by yourself. Come back." Mr Smith said he did not recall Mr Northey saying, in earlier discussion in the site office, that it was a site requirement for visitors to stay together. He said he did not know it was a rule on this site because it was his first visit to it, but he did acknowledge it to be a rule on other sites. Indeed, he said that he would not disagree that it was practically a rule on every big construction site.

305. Mr Smith said he disagreed with the proposition that on this particular day his intention was to impress Mr Hall. This was so even though he agreed that Mr Hall was his mentor. He disagreed with the proposition that, after coming down from the deck, he, Mr Hall and Mr Northey headed back towards the site office and in the course of that met Mr Fox. It was put to him that Mr Hall said to Mr Fox (words to the effect): "here's the idiot that knows nothing about safety. You're useless, hopeless and out of your depth." Mr Smith said he did not remember that statement being made at all. He also said that Mr Hall did not say to Mr Fox words to the effect that he (Mr Hall) wanted to walk the whole site and do a general safety walk. He also disagreed with the proposition that a general safety walk was in fact what happened.

306. While there was a discussion with Mr Hall, Mr Northey and Mr Fox, Mr Smith confirmed that he had moved away from the group a distance of approximately 10-15 metres. This was towards an area where, he agreed, there was an excavation. Mr Smith also agreed that the excavation had an orange mesh barrier around it, and that such a barrier was appropriate around an excavation site.

307. Mr Smith said he recalled Mr Northey calling out to him, but not that he should come back to the group and to stick together. He denied that he was angry with Mr Northey. Eventually he accepted that he was frustrated. He confirmed that he thought that both he and Mr Northey were frustrated and both of them raised their voices.

308. In response to further questions about his manner and demeanour on this occasion, Mr Smith suggested that it was maybe a question of semantics, and that he would not describe himself as being angry. He said that while he and Mr Northey had raised their voices at each other he would not call it "yelling"; nor did he agree that he was aggressive to Mr Northey. He did not agree that he walked up to Mr Northey, but he did agree that their faces were close. He did not believe that he was gesticulating with his hands; he denied that he was pointing at Mr Northey or that he was yelling loudly at him. Again, Mr Smith disagreed that he was yelling but agreed that Mr Northey was trying to "stop us." There followed the following brief, curious exchange with Mr Smith

> *HIS HONOUR: So you were frustrated but you weren't yelling?---Yes.*
>
> *But you had raised voices. So you were frustrated, raised voices, but you weren't yelling?---Yes.*

309. Mr Smith denied that he was embarrassed about being "told off" in front of his mentor, Mr Hall.

310. After the "altercation" between Mr Smith and Mr Northey, Mr Smith agreed that he, Mr Hall and Mr Fox continued on the site looking at other matters. Somewhat curiously, however, he disagreed that he was doing "a general site safety walk on the Nexus site".

311. Mr Smith was a fair witness. He was a studiously careful witness, which rather belied his much more "robust" demeanour, attitude and language on the building site, on the evidence of Mr Northey and Mr Fox (plus the evidence of Mr Rogic), whose basic evidence (verified by their relatively contemporaneous, supporting record-keeping) I prefer and accept rather than that of Mr Smith, where there is any relevant difference. Mr Smith was very nuanced in his answers in Court, preferring to say, for example, that it was perhaps more a question of "semantics" as to whether he and or Mr Northey were more angry than simply frustrated. Such nuance, in my view, tended to down-play the tense dynamic that was plainly on display between these two men on this occasion. Such nuance also tended to down-play his own responsibility for the situation that had developed on site. Faced with the contemporaneous records of the Applicant's witnesses, it would have been best to be more straight-forward in the account of the evidence. Clearly, whilst on site, he was very direct in both demeanour and language. Directness in Court would also have been the better approach. In saying this I do not suggest that Mr Smith was attempting to give anything other than truthful evidence. It seemed however that time, and the circumstance and occasion of the litigation, had given him reason to be more tempered in his evidence.

…

319. In the light of these statements of principle, summarily I make the following findings on the evidence before the Court in relation to the contraventions alleged against Mr Smith and Mr Hall (which I find are relevantly established) on the Nexus site on 30th October 2013.

320. The essential issues are, for the purposes of s.499 of the FW Act, (i) whether Village (*via* Mr Northey) made a "reasonable request" to Mr Smith, (ii) to comply with an occupational health and safety requirement in relation to the premises in question, and (iii) whether Mr Smith complied with it;

(a) On the evidence of Mr Northey, (i) in his Affidavit, (ii) in the witness box, and perhaps most particularly, (iii) in his diary entries and (iv) in the recording he made on the day, he directed/requested Mr Smith, whilst on the deck "not to wander off on his own" because it was a Village site requirement that officials stay together with Village personnel. The same direction/request was made by Mr Northey to Mr Smith when they came down from the deck. I accept this evidence;

(b) In his evidence, Mr Rogic confirmed hearing Mr Northey make such a request to Mr Smith;

(c) The evidence of both Mr Smith and Mr Hall confirmed that it was common practice on construction sites for those with permits to be accompanied;

(d) Mr Smith confirmed that this occasion was his first visit to this site;

(e) In my view, a site rule of the kind in place here – to be accompanied – was, by its nature, a preventative measure and protective of permit holders (and others) on site. It was a more than reasonable occupational health and safety measure. So too was the direction/request, in this case to Mr Smith, "not to wander off" and to stay together. Mr Fox recalled that Mr Smith, when on the ground, "wandered off towards a taped-off area." Mr Smith fairly conceded that when on the ground he headed off towards an excavation that was cordoned off with a mesh barrier, doubtless for safety reasons;

(f) On all the evidence, there was a degree of "attitude" from both Mr Northey and Mr Smith. But that is not relevant to questions of liability. Such matters may be relevant, ultimately, to issues of penalty, but that is for another day. The issue, for the purposes of the contravention alleged here relates to the reasonableness of the request/direction regarding occupational health and safety from Mr Northey to Mr Smith, and the compliance, or otherwise, by Mr Smith with it. While there was some dispute regarding, at any one time, the precise distance each was from the other, the context is always important. On this site, significant construction was underway. This site was, for example, rather different to others (noted later in these reasons), where there was minimal construction in train, and therefore less obvious risk potentially involved;

(g) In my view, the directions/request of Mr Northey to Mr Smith on this occasion (a) not to wander off, and (b) as a site rule, to stay together, were reasonable. In my view, contrary to such direction, by "wandering off" and therefore acting contrary to a reasonable direction, Mr Smith was in breach of s.499 of the FW Act. On a site where there is significant construction underway, which may reasonably be inferred here, not least because of there being a storied deck together with open and cordoned off excavations, a distance of perhaps 10 metres or so (as suggested here) is sufficient to warrant the direction/request from Mr Northey.

321. In relation to the contravention alleged against Mr Smith regarding a breach of s.500 of the FW Act, in addition to what has already been said, for the following reasons, the evidence relevantly satisfies me that Mr Smith contravened that section. In the light of the authorities, to which I have earlier referred (*e.g. Setka v Gregor (No.2)* and the *Castlemaine Police Station Case*), on the evidence he did so because of the following:

(a) The weight of evidence of Mr Northey, Mr Rogic and Mr Sibley, all point to the aggression, swearing and close, personal encounter between the two men (again, Mr Northey's contemporaneous records are especially relevant, while Mr Smith – and Mr Hall - had no such records). Even if viewed in a relatively benign manner, and giving every allowance for robust discussion on a building site, Mr Smith's conduct, exhibited towards the much more senior and experienced Mr Northey,

amounted to a degree of disrespectful braggadocio, which had no place on a building site;

(b) I prefer and accept the evidence of the Applicant's witnesses rather than the significantly nuanced evidence of Mr Smith. This is not to say that Mr Northey did not engage in robust language towards Mr Smith at times on this occasion. Plainly he did; but the contravention is levelled at Mr Smith, and I find it to be established on the facts, and in the light of the authorities to which I have referred;

(c) The focus, under s.500, is upon the conduct of the permit holder, as opposed to anyone else, including the management officials on a particular site;

(d) The relief sought by the Applicant in relation to Mr Smith, under ss.499 and 500, should be granted." [references omitted]

"*Commissioner of the Australian Building and Construction Commission v Hall & Ors (the 3 Site Canberra Case)* [2020] FCCA 2352 (penalty judgment)

128. The first issue to address here is the submission by the Respondents (par.132) that Mr Smith's respective breaches of ss.499 and 500 on 30th October 2013 at the Nexus site should be treated as a single "course of conduct." The Applicant does not accept this proposition.

129. Applying the detailed principles set out in the *Children's Hospital Case*, and having regard to the two incidents in question having taken place on the same site, on the same date, with the same protagonists involved (Mr Smith and Mr Northey), I will treat the two incidents as a "course of conduct."

130. Summarised, the first contravention deals with Mr Smith wandering off on the site contrary to the direction of Mr Northey. There was a degree of "attitude" on both sides on this occasion. Mr Smith conceded that he walked off towards a cordoned-off excavation area. Mr Smith's evidence confirmed he knew that it was common practice to be accompanied on building sites. He also confirmed that this was his first visit to this site. The Court accepted that the request/direction by employees of Village was reasonable and that Mr Smith had contravened s.499 of the FW Act.

131. In relation to the breach of s.500, at [321] of the liability judgment the Court said:

- *[321] In relation to the contravention alleged against Mr Smith regarding a breach of s.500 of the FW Act, in addition to what has already been said, for the following reasons, the evidence relevantly satisfies me that Mr Smith contravened that section. In the light of the authorities, to which I have earlier referred (e.g. Setka v Gregor (No.2) and the Castlemaine Police Station Case), on the evidence he did so because of the following:*

  a. *The weight of evidence of Mr Northey, Mr Rogic and Mr Sibley, all point to the aggression, swearing and close, personal encounter between*

> *the two men (again, Mr Northey's contemporaneous records are especially relevant, while Mr Smith – and Mr Hall - had no such records). Even if viewed in a relatively benign manner, and giving every allowance for robust discussion on a building site, Mr Smith's conduct, exhibited towards the much more senior and experienced Mr Northey, amounted to a degree of disrespectful braggadocio, which had no place on a building site;*
>
> b. *I prefer and accept the evidence of the Applicant's witnesses rather than the significantly nuanced evidence of Mr Smith. This is not to say that Mr Northey did not engage in robust language towards Mr Smith at times on this occasion. Plainly he did; but the contravention is levelled at Mr Smith, and I find it to be established on the facts, and in the light of the authorities to which I have referred;*
>
> c. *The focus, under s.500, is upon the conduct of the permit holder, as opposed to anyone else, including the management officials on a particular site; ...*
>
> 132. The Applicant submitted that the contraventions here, viewed objectively, warranted penalties at the higher end of the relevant permissible range ($14,280 – $20,400). The Respondents submitted that the circumstances where there was some "attitude" on both sides, and also viewed objectively, Mr Smith's conduct tended to ameliorate rather than exacerbate the tense situations. Accordingly, the relevant penalty range was said to be $3,060 – $4,080.
>
> 133. Given the findings of the Court, in my view it cannot be said that Mr Smith's actions ameliorated anything. Regrettably, like a few of his colleagues, he has yet to learn (or at least to take on board and apply) the wisdom of the old adage that "one catches more ... with honey than with vinegar." Properly, the Respondents' eschewed their original submission in this regard.
>
> 134. Viewed objectively, the contraventions in all of the circumstances warrant a penalty around what might be called the mid-range. This would, in my view, lead to a single penalty - for both contraventions - fixed in the sum of $6,000.00. In my view, this penalty properly takes account of the circumstances that gave rise to the contraventions, and is proportionate to the contravening conduct in question." [references omitted]

[20] Secondly, on 28 July 2020 Mr Smith was ordered by the Federal Court to pay a penalty of $12,600, representing 30% of the applicable maximum of $42,000, under the *Building and Construction Industry (Improving Productivity) Act 2016* (***BCII Act***). There is no dispute that the BCII Act is an 'industrial law' within the meaning of s 513(1)(d) of the Act. Justice Katzmann found that on 14 May 2018 entry to a building site was obstructed (***Picket***). Mr Smith admitted that he participated in the Picket and admitted liability for a contravention of s 47 of the BCII Act. The Federal Court also ordered the CFMMEU to pay a penalty of $126,000 in respect of its contravention of s 47 of the BCII Act. This penalty was imposed because, by the operation of s 94 of the BCII Act, the CFMMEU was taken to have engaged in the unlawful conduct of its employees and officials, including Mr Smith.

[21] The conduct on the part of Mr Smith which led to the penalties being imposed on him and the CFMMEU is described in the following parts of the judgment of Justice Katzmann:

> "*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Constitution Place Case)* [2020] FCA 1070
>
> …
>
> 3 Unlawful picketing is a form of unlawful action addressed in chapter 5 of the BCIIP Act. This chapter applies to action taken by a constitutionally-covered entity; that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of such an entity; and/or consists of advising, encouraging or inciting, or action taken with intent to coerce such an entity to take or not take (or to threaten to take or not take) particular action in relation to another person: BCIIP Act, s 45. A "constitutionally-covered entity" includes "a constitutional corporation", BCIIP Act, s 5. "Constitutional corporation" means a corporation to which para 51(xx) of the *Constitution* applies. Paragraph 51(xx) of the *Constitution* includes trading corporations formed within the limits of the Commonwealth of Australia. It is common ground that the Union is such an entity.
>
> 4 Unlawful picketing is prohibited by s 47 of the BCIIP Act. Section 47 is a novel provision in that there was no equivalent section in any of the predecessor legislation. It provides that:
>
> (1) A person must not organise or engage in an unlawful picket.
>
> Note: Grade A civil penalty.
>
> (2) An unlawful picket is action:
>
> (a) that:
>
> (i) has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site; or
>
> (ii) directly prevents or restricts a person accessing or leaving a building site or an ancillary site; or
>
> (iii) would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site; and
>
> (b) that:
>
> (i) is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant; or
>
> (ii) is motivated for the purpose of advancing industrial objectives of a building association; or

(iii) is unlawful (apart from this section).

Note: See also Division 2 of Part 2 of Chapter 6 (reason for action and coercion).

…

18 At all relevant times, Hitchcock Civil Engineering and Landscapes (**Dale & Hitchcock**) was carrying out building work on a project known as "Constitution Place". The project was undertaken by **Capital** Airport Group Pty Ltd. It involved the construction of two buildings between the boundaries of Constitution Avenue, London Circuit, the ACT Legislative Assembly building and Theatre Lane. Dale & Hitchcock had been engaged by **Construction Control** Australia Pty Ltd, the principal contractor, on 8 December 2017 to perform bulk excavation earthworks. Dale & Hitchcock had no employees. All workers it used on the project were employed by **Kardad** Pty Ltd and supplied to Dale & Hitchcock under a labour hire arrangement. The directors of Kardad were Robert Hitchcock and Charles Dale, two of the four partners of Dale & Hitchcock.

19 The project site was a building site within the meaning of the BCIIP Act and both Capital and Construction Control were in the business of engaging in building work within the meaning of s 6 of the BCIIP Act.

The Enterprise Agreement

20 Clause 9 of the enterprise agreement between Dale & Hitchcock and the Union — D.A DALE & D.A DALE & R.1 HITCHCOCK & MCKENNA t/a Dale & Hitchcock Civil Engineering & Landscaping/CFMEU Collective Agreement (ACT) 2012-2016 **(Enterprise Agreement)** — reads:

> **9. Employment Security, Staffing Levels, Mode of Recruitment and Replacement Labour**
>
> 9.1 The Company recognises that in certain circumstances the use of contractors and labour hire may affect the job security of Employees covered by this agreement.
>
> 9.2 If the Company wishes to engage contractors to perform work that might be performed by current or future Employees under this agreement, the Company must first consult in good faith with potentially affected Employees and their Union.
>
> 9.3 If, after consultation, the Company decides to engage bona fide contractors, these contractors must be afforded the same terms and conditions of engagement (or terms no less favorable) as they would receive if they were engaged as Employees under this agreement performing the same work. The use of sham sub-contracting arrangements would constitute a breach of this agreement.
>
> Supplementary Labour Hire

> 9.4 Where there is need for supplementary labour to meet temporary/peak work requirements, such labour may be accessed from bona fide labour hire companies following consultation with the Company Consultative Committee and/or workplace delegate. If labour hire is to be used the company shall ensure that any workers engaged through a supplementary/labour hire arrangement and who are under the direction and control of the company performing work that, had it been done by direct employees of the Company would have been covered by this Agreement, shall receive wages, allowances and conditions not less than those contained in this Agreement.

21 The "Company" was a defined term in the Enterprise Agreement and referred to Dale & Hitchcock, although the business was not incorporated.

22 Clause 12 of the Enterprise Agreement contained an acknowledgment by Dale & Hitchcock of their legal obligation to comply with ACT and Federal workplace laws and regulations and their agreement to an audit by an approved auditor when requested by the Union.

Events leading up to the picket

23 On 7 March 2018 the second respondent, Jason **O'Mara**, an employee of the Union and the Secretary of the Branch, wrote to Mr Hitchcock. Mr O'Mara stated that the Union had become aware that Dale & Hitchcock were employing workers on terms and conditions derived solely from the Building and Construction General On-Site Award 2010, when they were covered by the Enterprise Agreement. Mr O'Mara asserted that the workers were entitled to be paid amounts equivalent to the difference between the amounts to which they were allegedly entitled to under the Enterprise Agreement and the amounts they received under the award. He said that Kenneth Miller, an organiser with the Union, was available to discuss and agree on a plan to assess and repay any liabilities owed to Union members. In the event that repayments were not made, Mr O'Mara indicated that the Union reserved its rights to take further legal action to effect recovery on behalf of its members.

24 It appears that shortly thereafter Mr Hitchcock indicated to Mr Miller that no action would be taken to address the Union's concerns. Consequently, on 29 March 2018, the third respondent, Zachary **Smith**, another Union employee and the Assistant Secretary of the ACT Branch, wrote to Mr Hitchcock on behalf of the Union to request that Dale & Hitchcock agree to an audit by an approved auditor of its payments to workers in accordance with cl 12.3 of the Enterprise Agreement. On 9 April 2018 Mr Hitchcock replied, saying that Dale & Hitchcock was "happy to comply" with Mr Fischer's request to engage an independent auditor and indicated that they would "begin the process" as soon as possible.

25 Between 9 and 30 April 2018 representatives of Dale & Hitchcock and the Union exchanged correspondence in which the terms of reference of the proposed audit were discussed but no agreement was reached.

26 On 7 May 2018 the Union instituted proceedings in the Fair Work Commission under s 739 of the FW Act, seeking that the Commission deal with the dispute about the alleged underpayments under the dispute settlement procedure

contained in the Enterprise Agreement. The application to the Commission is annexure TF-6 to Mr Fischer's affidavit.

31 At or around 5:30am on Monday, 14 May 2018, a group of between 12 and 20 people including Mr O'Mara, Mr Smith, and another respondent, Joshua Bolitho (who was employed by the Union as an organiser of the ACT Branch) (**the picketing group**), engaged in obstructive picketing, which consisted of the following conduct:

- hanging signs and flags on fences bordering Constitution Avenue bearing logos and other Union insignia;
- parking two cars immediately in front of the main entrance gate to the project site located on Constitution Avenue near the westernmost corner of the site in such a way as to block vehicle access and partially block pedestrian access to the main entrance gate; and partially block access to the padlock which secured the main entrance gate overnight;
- congregating in a group at the main entrance to the project site and linking arms in such a way so as to block pedestrian and vehicle access to the main entrance and access to that padlock;
- wearing clothing bearing logos and other insignia of the Union;
- placing and securing chains and locks on various gates at the project site without the authorisation of its occupiers, such that they were unable to open the gates;
- parking a car registered to the Union in front of the pedestrian access gate on Theatre Lane in such a way as to block pedestrian access to that gate;
- parking a variable message sign opposite the project site and operating the sign in such a way as to electronically display at various times these messages:
    - "Alto Scaffold = wage theft";
    - "Dale & Hitchcock cheats workers";
    - "Stop wage theft on ACT government projects";
    - "Danger! Wage theft occurs on this site";
    - "Bad bosses and ACT Gov partners in crime"; and
    - Other words to the effect of alleging "wage theft".

32 At around 5:30am that day, Carlo Bisa, the Dale & Hitchcock Site Supervisor, attended the project site to open it and saw that it was subject to the obstructive picketing described above. He called Mr Hitchcock and told him that "[Dale & Hitchcock] has no access to the site as all the gates are blocked". He also called Mick

Muir, the person responsible for organising Dale & Hitchcock's trucks, and directed him to put all the tracks on standby until "this blockade issue is resolved".

33 At about the same time Mr Hitchcock attended the project site and approached Mr O'Mara. He asked: "*Mate, what are you doing?*" Mr O'Mara replied: "*Youse are engaged in wage theft*.". Mr Hitchcock directed him to "*move your cars or I'll call the cops*". Mr O'Mara replied: "*It's not your job to call the police. It's not your site*.". Mr Hitchcock then telephoned the ACT police.

34 At or around 6am, First Constable Mukhin of the ACT Police attended the project site and spoke to Mr O'Mara and Mr Smith. During the course of that conversation, Mr O'Mara and Mr Smith told Constable Mukhin that the site was blocked by the Union because of unfair pay conditions and they were "*trying to contact Construction Control to discuss*".

35 Around that time Mr O'Mara telephoned Peter Payten, the Managing Director of Construction Control. During the course of that conversation, Mr O'Mara asked Mr Payten to come to the site, saying that the Union had an issue with Dale & Hitchcock.

36 At or around 6.30am, Nathan **Geppert**, the Construction Control Site Manager, approached Mr O'Mara and Mr Smith. The following conversation took place:

Geppert: *"What is going on? We want to get into work and time is restricted. We want you to get in the car and move the car."*

O'Mara: *"Look, the best thing you can do is go into your shed and have a coffee and wait this out. The duration of the job doesn't concern you, you're just a labourer."*

Geppert: *"I am the Site Manager and basically the program does fall on my shoulders."*

O'Mara: *"You shouldn't be employing sham contractors [Dale & Hitchcock] and Alto Scaffolding."*

Geppert: *"It is not my decision personally."*

Smith: *"Go inside the shed and wait for this to get resolved."*

O'Mara: *"You can try and make a name for yourself. Try and be a hero but we are here to make a stand from [sic] sham contracting."*

37 Mr Hitchcock arranged for a group of truck drivers, who had been engaged to perform work at the project site that day, to arrive together by bus to attempt to gain access to the site.

38 At or around 7am, a group of workers engaged by Dale & Hitchcock attempted to enter the project site via the front gate. At about the same time Mr Payten and Mr O'Mara exchanged words:

O'Mara: *"There is an issue with the agreement with [Dale & Hitchcock] and their guys and that they're not being looked after or paid appropriately."*

Payten: *"This isn't the forum. This is not appropriate to come onto this project to stop work."*

O'Mara: *"We need to sort it out. We've been talking to them for a while and they are not sorting it out."*

Payten: *"Let's get this sorted out by moving this vehicle and get rid of your guys. I am happy to facilitate a meeting between yourself and Dale [&] Hitchcock for a reasonable result. It is not right to bring it onto the construction site."*

39 Between 7:15 and 7:45 am, the bus carrying the group of truck drivers arrived at the project site. The picketing group, including Mr O'Mara, Mr Smith and Mr Bolitho, linked arms in such a way as to obstruct the bus from entering the site. Mr Dale used a pair of bolt cutters to cut a padlock, which had been securing the front gate, and attempted to open the gate. The picketing group, including Mr O'Mara, Mr Smith and Mr Bolitho, blocked entry to the site so as to delay workers engaged by Dale & Hitchcock from entering the site. Mr Payten directed Mr O'Mara and Mr Smith to move the cars which were obstructing access to the entrances to the site. Mr O'Mara and Mr Smith both refused, saying that they could not find the keys to the cars. Mr Payten met with Mr Smith, Mr Hitchcock, Mr Dale and Asher Trounce, the Dale & Hitchcock Project Manager. During that meeting, Mr Smith said: "*I believe [Dale & Hitchcock] is not complying with their obligations to employees in regards for wages [sic]*". Mr O'Mara said: "*We have to do this now because you will be off[-]site soon in a month or two and we won't be able to stop you*". The representatives of the Union and Dale & Hitchcock then agreed on an audit process.

40 By about 8:30 am, the picketing group had dispersed and left the site, the variable message sign had been removed, and work had resumed on the project.

41 As a result of the unlawful picket, the commencement of work at the site was delayed by approximately two hours. Both Dale & Hitchcock and Construction Control suffered loss and damage which took the following form:

(1) loss of productivity (from labour and plant and equipment); and

(2) the consequential impact on the performance of later scheduled works which were delayed by the picket.

42 The value of the lost productivity incurred by Dale & Hitchcock was $15,195. The agreed facts did not particularise the value of the lost productivity for Construction Control.

43 For the reasons set out in the following two paragraphs, the picket was an unlawful picket within the meaning of s 47(2) of the BCIIP Act.

44 First, the picket:

(1) was action that was taken for the purpose of preventing and restricting a person from accessing or leaving the project site and directly prevented and restricted a number of persons including Messrs Bisa, Hitchock, Geppert, Payten, and Trounce from accessing the site;

(2) was motivated for the purpose of:

(a) supporting and advancing claims:

(i) against Dale & Hitchcock in respect of the employment of employees of Kardad under a labour hire arrangement and the engagement of Kardad to supply contract labour; and

(ii) against Construction Control in respect of the engagement of Dale & Hitchcock;

(b) advancing the industrial objectives of the Union, namely, the industrial objective of a challenging alleged underpayments in contravention of Part 2-1 of the FW Act, which the Union colloquially refers to as "wage theft";

(3) was unlawful at common law, too, because it constituted:

(a) a substantial and unreasonable interference with the enjoyment by Dale & Hitchcock and Construction Control of the project site when each was a contractual licensee at the site and therefore amounted to the tort of private nuisance; and

(b) direct interference with the contracts Dale & Hitchcock had with both Construction Control and Kardad in circumstances where:

(i) each of Mr O'Mara, Mr Smith and Mr Bolitho was aware of those contracts;

(ii) each of Mr O'Mara, Mr Smith and Mr Bolitho knew that the picket would induce or procure Construction Control to breach its contract with Dale & Hitchcock and Dale & Hitchcock to breach its contract with Kardad;

(iii) each of Mr O'Mara, Mr Smith and Mr Bolitho intended that the picket would induce or procure those contractual breaches; and

(iv) the picket caused loss and damage to each of Construction Control and Dale & Hitchcock,

and therefore amounted to the tort of interference with contractual relations.

45 Second, the picket affected, was capable of affecting, and was taken with intent to affect the activities, functions, relationships, and business of Construction Control, "a constitutionally-covered entity".

Liability of O'Mara, Smith and Bolitho

46 Each of Mr O'Mara, Mr Smith, and Mr Bolitho engaged in the unlawful picket and committed one contravention of s 47 of the BCIIP Act.

Liability of the Union

47 The conduct of Mr O'Mara, Mr Smith, and Mr Bolitho in engaging in the unlawful picket was authorised by the Union and the Branch. Each of the men engaged in the unlawful picket in the capacity of the role and position he held in the Union and the Branch and within the actual and apparent scope of his authority.

48 For these reasons, and in view of s 94 of the BCIIP Act, the conduct of the three men is taken to be the conduct of the Union and the Union is liable for their conduct.

…

57 In the present case, the contraventions by the union officials and the consequent contravention by the Union consisted of obstructing the entry to a building site over a period of up to three hours, resulting in a delay of two hours in the commencement of work that day. Two businesses were affected by the conduct. By its very nature a picket is a deliberate act. This picket was not spontaneous. The Commissioner submitted that it bore "all the hallmarks of a well-planned and sophisticated CFMMEU blockade". In oral argument, his counsel, Mr Bourke QC, referred to "the backgrounding of journalists" and the timing, contending that the picket occurred "during peak hour on a Monday morning in Canberra's CBD". He argued that the Court could infer from those matters that the respondents intended to extract maximum publicity from their unlawful conduct, to cause maximum harm, and exert maximum pressure on the two affected businesses. The evidence does not enable me to come to any view on the extent of the planning but I accept that some planning was necessarily involved. Mr O'Mara and Mr Smith refused to remove their cars when asked to do so and, despite a number of requests to discontinue, the picket did not cease until Dale & Hitchcock came to an agreement with the Union about an audit process. But the evidence does not support the inferences I was invited to draw. First, the agreed facts do not indicate that the respondents initiated any contact with journalists and there is no evidence to indicate that any of the respondents tipped off the media or issued a media release. Second, no foundation was laid for a finding that peak "hour" in Canberra on a Monday begins at 5.30am, which was the time the picket commenced.

58 The picket arose from a dispute between the Union and Dale & Hitchcock concerning the alleged underpayment of workers at the building site, which the parties had been unable to resolve and where no agreement had been reached about an audit process.

59 The picket occurred a week after the Union had commenced proceedings in the Fair Work Commission seeking that it deal with the dispute under the dispute settlement procedure in the Enterprise Agreement. It was plainly intended to put pressure on both that business and Construction Control to agree to the Union's demands or, at least, to accelerate the dispute resolution process. Adopting and adapting the observations of Tracey J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* (2015) 234 FCR 451 at [103], a not entirely dissimilar case, "[i]n seeking to achieve [their] desired outcomes", there were lawful processes available to the union officials. They must, or at least should, have known that the means they chose were unlawful. Their approach was "one of entitlement".

The nature and extent of any loss or damage caused by the contraventions

60 The picket caused financial loss to Dale & Hitchcock in the amount of $15,195 and had an impact on the performance of later scheduled works which were delayed by the picket. Similarly, Construction Control suffered a loss of productivity during the two hours in which work was unable to proceed and "consequential impacts" on the performance of later scheduled works which were delayed by the picket.

The seriousness of the contraventions

61 The Commissioner submitted that the conduct of the union officials was serious, involving "an array of highly obstructive and otherwise unlawful actions which risked both the safety of the [picketing group] and those seeking to enter the [project site], and public inconvenience from the significant inner-city congestion that would have been created had [Dale & Hitchcock] sent its trucks to the [project site] that morning". I accept that the conduct of the union officials was serious. The combination of the deliberate obstruction of entry to the project site, the refusal to remove vehicles when asked, and the use of chains and locks without authorisation from the site's occupiers puts the contraventions in the serious category. I also accept that there was at least a theoretical risk to the safety of the picketers. The evidence is insufficient to enable me to gauge the extent, if any, of any inconvenience to the public.

Cooperation with the regulator and admissions of wrongdoing

62 The respondents have cooperated with the regulator in the disposition of this proceeding, by agreeing on the facts and making admissions. Their conduct in this respect saved the costs and inconvenience of a trial. Despite their utilitarian value, it is not a sufficient basis for a discount that admissions have saved the cost of a contested hearing. Nevertheless, a discount may be justified if the admission of liability indicates an acceptance of wrongdoing and "a suitable and credible expression of regret" and/or "a willingness to facilitate the course of justice". See *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [76] (Stone and Buchanan JJ).

63 The respondents eschewed any notion that they were entitled to any leniency because their admissions represented an acceptance of wrongdoing, let alone a "suitable and credible expression of regret". Indeed, none of the respondents offered an apology or exhibited any contrition and in their original defence they all denied

liability. That said, I accept that the admissions of liability indicate "a willingness to facilitate the course of justice". The respondents agreed to participate in a mediation. A series of admissions were made at the mediation following which both the amended statement of claim and the amended defence were filed. That occurred at an early stage of the proceeding, before any evidence was filed and before any orders for the filing of evidence were made. For this reason, as senior counsel for the respondents put it in argument, "there is a basis for some mitigation". As the Full Court observed in *The Queensland Infrastructure Case* at [163], "[f]rom a public policy perspective, it is important to encourage such cooperation by reflecting it in the penalties imposed". In the absence, however, of any contrition or any evidence to demonstrate that the respondents have accepted their wrongdoing, no more than a modest discount is justifiable.

The question of motivation

64 In their written submissions the respondents argued that the agreed facts demonstrate that the picket was not motivated by arbitrary or base motives but by a desire to advance the Union's industrial objective of challenging the alleged underpayments and a desire to stop the alleged exploitation of workers engaged by Dale & Hitchcock. They accepted that this was no defence to the contraventions and does not excuse them but submitted that it was a matter that should be taken into account as a mitigating factor.

65 As I said earlier, the circumstances giving rise to the picket are plainly relevant, but I reject the respondents' submission that they mitigate the respondents' culpability.

66 The fact that the motive for taking action falling within para 47(2)(a) of the BCIIP Act is to support or advance claims against a building employer or contractor in respect of the employment of employees or the engagement of contractors by that participant or to advance the Union's industrial objectives cannot be a mitigating factor since it is an element of the contravention: see para 47(2)(b). As the Full Court (Goldberg, Jacobson and Tracey JJ) put it in ***Draffin*** *v Construction, Forestry, Mining and Energy Union* [2009] FCAFC 120; 189 IR 145 at [85], "[t]he end does not justify the means".

68 I accept that engaging in an unlawful picket for some arbitrary or capricious reason would be an aggravating factor but I do not consider that the industrial motivations of the union officials in the present case mitigate their culpability. The motivations for the contraventions with which *The Bay Street Case (No 2)* and the other cases to which Bromberg J referred were not elements of those contraventions. None of the officials in this case expressed remorse. Rehabilitation is irrelevant: *The Non-Indemnification Personal Payment Case* at [19]. And I cannot see how, in the present context, it bears upon the need for specific deterrence. In any case, in *The Bay Street Case (No 2),* while accepting that "the perceptions" of the union officials were relevant to the need for specific deterrence, his Honour went on to say at [33] that "those perceptions only slightly diminish the need for specific deterrence in circumstances where the respondents have not demonstrated that their unlawful conduct was the only realistic means available to them to address the concerns which motivated that conduct". Here, it is common ground that the respondents' concerns

could have been addressed by lawful means. Even if I were to accept that the respondents' motivations were mitigating factors, I would accord them little weight.

69 It will be recalled that clause 12 of the Enterprise Agreement contained an acknowledgement by Dale & Hitchcock of its legal obligation to comply, amongst other things, with federal workplace laws, and its agreement to an audit by an approved auditor when requested by the Union. The impetus for the picket was the failure of Dale & Hitchcock to agree to an audit by an approved auditor at the Union's request. The Union invoked the dispute resolution clause in the Enterprise Agreement to deal with Dale & Hitchcock, but it seems that its officials were impatient. They were not prepared to wait to allow the agreed procedure to run its course. It is troubling that the Union saw fit to insist on Dale & Hitchcock's compliance with federal workplace laws when its officials behaved as though they were above the law. Notwithstanding their motivations, their participation in an unlawful picket tends to undermine the Union's moral authority in its campaign for wage justice. In this respect, their actions may well have been counterproductive.

…

117 Senior officers of the Union were involved in the contravention. Two of the three union officials were senior officers of its ACT Divisional Branch. Mr O'Mara was the Secretary, Mr Smith the Assistant Secretary. Mr O'Mara was also a member of the National Executive of the Construction and General Division and one of its trustees.

…

165 But I cannot accept that the Commissioner's submission that the contravention in this case calls for the maximum penalty or a penalty at the top, let alone the very top, of the high range.

166 First, the picket occurred on one day at one site over three hours, resulting in a delay of only two hours' work with relatively modest financial costs to the two affected businesses. Since, without explanation the Commissioner did not seek an order for compensation, although it was open to him to do so, it may be inferred that the damage to the businesses was not considered significant.

167 Second, in contrast, for example, to the blockades in *The Perth Airport Project Case,* which involved around 100 people, and *The Perth Childrens' Hospital Contraventions* Case, which involved around 400, the picket in the present case was relatively small, involving only 12 to 20 people. It is true, as the Commissioner submitted, that there is strength in numbers. After all, as Ralph Chaplin put it in the ballad, *Solidarity Forever*: "[W]hat force on earth is weaker than the feeble strength of one?" There is no doubt that the company of others gave the individual picketers courage. But there is no evidence that anyone felt intimidated by their actions. This was a peaceful protest. While it was obstructive, it was non-violent. No-one was hurt and no property was damaged. Nor were any threats made. Indeed, there is nothing in the evidence to indicate that the union officials conducted themselves in an aggressive or intemperate manner. Given the range of unlawful conduct that can occur on a picket

line, including criminal conduct, and the extent of the loss and damage sustained, the contraventions was by no means in the worst category.

…

178 The respondents submitted that the appropriate range is 30% to 50% of the maximum ($63,000 to $105,000). In my opinion, taking all relevant matters into account and viewed through the prism of the Union's record, the contravention warrants a penalty in the mid, not the high, range. Taking all relevant matters into account including the heightened need for deterrence, I would impose on the Union a penalty of $126,000, which is 60% of the maximum. Anything higher would be disproportionate to the gravity of the contravention, give no credit to the Union for its cooperation with the regulator and its admissions, and effectively penalise it, not merely for the conduct the subject of the present contravention, but also for previous conduct for which it has already been penalised.

179 If I am wrong in the view I take on the number of contraventions committed by the Union and the correct view is that there were three, not one, I would still make a single civil penalty order against the Union, as the contraventions are founded on the same facts: see BCIIP Act, s 84(1). In these circumstances it would be open to the Court to impose a higher penalty, since the effect of s 84(2) is that the maximum penalty is three times the maximum for a single contravention. But I would not be inclined to impose a penalty of that order in this case. In my opinion, the conduct involved in the picket, even when viewed through the prism of the Union's record, does not warrant it. To do so would involve penalising the Union three times for the same conduct. Rather, I would still impose a penalty of $126,000.

The union officials

180 Mr O'Mara has been an officer and employee of the CFMMEU since February 2007. Mr Smith has been an officer and employee of the CFMMEU since April 2007. Mr Bolitho has been an officer and employee of the CFMMEU since July 2016.

181 This is Mr Bolitho's first contravention. The same cannot be said of either Mr O'Mara or Mr Smith. Both were found by the Federal Circuit Court to have contravened the FW Act: *Commissioner of the Australian Building and Construction Commission v* ***Hall*** [2018] FCCA 3532, Mr O'Mara on two occasions at two building sites, on 21 August 2013 and on 11 March 2014, and Mr Smith on one occasion at one building site, on 30 October 2013. Furthermore, unlike Mr O'Mara or Mr Smith, Mr Bolitho is not a senior office-holder.

182 No evidence was adduced concerning the financial position of any of the three men to suggest that a penalty at the high end was necessary in order for it to operate as an effective deterrent or that they could not afford to pay any penalty it was open to the Court to impose.

183 In *Hall*, Mr O'Mara was found to have contravened s 497 of the Act by failing to comply with a request of the occupier of the site to produce his entry permit for inspection; s 499 by failing to comply with a reasonable request of the occupier of the other site to comply with an occupational health and safety requirement (that he had to

be accompanied by another person on the site); and s 503(1) by taking action at the second site (by asserting that he could enter the site unaccompanied) reckless as to whether the impression was given that he was authorised to do so.

184 Mr Smith's contraventions were of ss 499 and 500 of the FW Act. He was found to have contravened s 499 by "wandering off" on his own in contravention of a request made by the site manager that they "stay together". The contravention of s 500 involved acting in an improper manner as the holder of an entry permit by swearing and acting aggressively towards the site manager, which amounted to "a degree of disrespectful braggadocio, which had no place on a building site".

185 No determination has yet been made on the question of penalties, the Court reserving its decision on 30 January this year.

186 With respect to both Messrs O'Mara and Smith, the Commissioner argued that the contraventions warrant penalties "in the high range". He submitted that each engaged in premeditated, deliberate and sustained contraventions of the BCIIP Act which "involved arguably the most serious and disruptive form of actions an industrial participant can take or organise". He contended that they "assumed coordination roles in respect of those actions". He pointed to the fact that each has previously contravened the FW Act. The Commissioner submitted that Mr Bolitho's contravention should attract a penalty in the mid-range, pointing to the fact that his contravention was confined to the physical acts of obstructive picketing and to an absence of prior contraventions.

187 While I accept that the penalty for Mr Bolitho's contravention should be less than the penalties for the contraventions of the other two union officials, I do not accept that their contraventions justify the imposition of penalties in the high range. For the reasons given earlier, the proposition that the conduct of Messrs O'Mara and Smith "involved arguably the most serious and disruptive form of actions an industrial participant can take or organise" is hyperbolic and must be rejected.

188 In determining the appropriate penalties for the union officials, in addition to their conduct in the picket I take into account the following matters.

189 In contrast to the Union, none of the union officials has a prior contravention in respect of similar previous conduct or, indeed, any prior contravention of the BCIIP Act, the FW Act or their predecessors. As the respondents pointed out, the Commissioner's contention that Messrs O'Mara and Smith have relevant prior contraventions is incorrect. Putting to one side the dissimilarities between the conduct in which they engaged on the respective occasions, they were not found to have contravened any industrial legislation before the picket took place. The judgment in *Hall* was not published until 7 December 2018 — seven months after the contravening conduct in the present case. Nevertheless, the respondents acknowledged that that conduct may be taken into account, at the same time pointing out that it occurred four years earlier. As Jessup J observed in *Williams (No 2)* at [27], the governing principle here is the same as it is in criminal sentencing. King CJ summarised the relevant principles in *R v McInerney* (1986) 42 SASR 111 at 111–3:

> [T]here is no rule of law which precludes a sentencing court from taking into account in an appropriate way and for appropriate purposes offences in respect of which there has been a conviction between the time of the offence for which the sentence is being imposed and the time of sentence, whether those offences have been committed before or after the current offence.
>
> …
>
> Where the other offences have been committed before the commission of the immediate offence, their relevance is clear in the generality of cases. The offender has committed the offence not as a first offender but as a person whose character is affected by previous offending. He must be sentenced against the background of his record: *Director of Public Prosecutions v Ottewell* (1968) 52 Cr. App. R. 679.
>
> The effect of the prior offences is more cogent if they have been the subject of conviction before the immediate offence. In such cases, the offender has committed the immediate offence notwithstanding the formal judgment and condemnation of the law in respect of the earlier offences and notwithstanding the warning as to the future which the conviction experience implies.

190 Having taken all relevant factors into account and weighed them in the balance, giving due weight to the need for deterrence, I consider that Mr Bolitho should pay a penalty of $8,400, being 20% of the maximum, and Mr O'Mara and Mr Smith $12,600 each, being 30% of the maximum.

…

210 On the other hand, all the other factors to which the Full Court referred in *The Non-Indemnification Personal Payment Case* are present here. None of the men expressed contrition or gave any indication that he would not reoffend if the opportunity arose again. Unless the burden is imposed on them, they will not feel any sting of the Court's orders. As long as the union officials can look to the Union to pay the penalties or reimburse them, they have little incentive not to reoffend. Requiring them to pay the penalties personally serves as a deterrent, not only to them but also to others in similar positions. It will bring home to them that they cannot act in contravention of the Act secure in the knowledge or belief that the Union will pick up the tab.

211 Consequently, I propose to make the orders the Commissioner seeks. They are in the same form as those made in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) (No 2)* [2018] FCAFC 117."

[22] The penalties imposed on Mr Smith and the CFMMEU in these two proceedings weigh against the contention that Mr Smith is a fit and proper person to hold a right of entry permit. In determining the amount of weight to give these matters, I accept the CFMMEU's submissions that it is relevant to have regard to the following:

- in relation to the *3 Site Canberra Case*, it was found that Mr Smith's contravening conduct was in the mid-range of the scale of seriousness, this was Mr Smith's first instance of offending conduct, and seven years have passed since the contravening conduct occurred in October 2013; and

- in relation to the *Constitution Place Case*, it was found that Mr Smith's contravening conduct was on the lower end of the scale of seriousness, this was Mr Smith's second instance of offending conduct, more than two years and five months have passed since the contravening conduct occurred in May 2018 without any further contravening conduct, and Mr Smith admitted his wrongdoing to the Federal Court, which Justice Katzmann found indicated a willingness to facilitate the course of justice, albeit the fact that Mr Smith did not give any evidence of contrition or an acceptance of his wrongdoing led Justice Katzmann to conclude that "no more than a modest discount is justifiable".[11]

Permit qualification matter – s 513(1)(g)

[23] Pursuant to s 513(1)(g) of the Act, in deciding whether Mr Smith is a fit and proper person I must take into account any other matters that the Commission considers relevant. Any such matters must be relevant to whether Mr Smith is a fit and proper person to hold a right of entry permit.

[24] I do not accept the ABCC's submission that there has been an unexplained failure to call Mr Smith to give evidence in support of the application for a right of entry permit for him. Mr Smith made two declarations in support of the application and was available for cross examination. The ABCC elected not to cross examine Mr Smith. I do, however, accept that Mr Smith has not given evidence in these proceedings to the effect that he is sorry or remorseful for his conduct in contravening industrial laws in 2013 and 2018, nor has he given evidence that he understands the need to comply with industrial laws and undertakes to comply with his obligations under Part 3-4 of the Act in the future. The absence of such evidence contributes to my concern about whether Mr Smith will comply with his obligations under Part 3-4 of the Act if he is granted a right of entry permit.

[25] It is relevant to have regard to the fact that Mr Smith has been an officer and employee of the CFMMEU since April 2007 and, aside from the findings made against him by Justice Katzmann and Judge Neville, no other findings of contraventions of any industrial law have been made against Mr Smith. It is appropriate to assess Mr Smith's entire record. During a 13 year career as a union official, Mr Smith has committed two contraventions of industrial laws. Save for these two contraventions, through his conduct over this 13 year period and since his participation in the unlawful Picket on 14 May 2018, Mr Smith has apparently exercised his rights and discharged his obligations as a permit holder without adverse incident. This speaks to his fitness and propriety to be a permit holder.[12]

[26] Further, it is evident from the documents attached to Mr Vallence's witness statement that, at some stage after Justice Katzmann made orders in the Constitution Place Case on 28 July 2020, a 'crowdfunding webpage' was established by or on behalf of "Unions ACT" for

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[11] *Constitution Place Case* at [63]

[12] *Construction, Forestry, Maritime, Mining and Energy Union* [2020] FWC 1053 at [15]

the purpose of raising money to assist Mr Smith, Mr O'Mara and Mr Bolitho to pay for the penalties imposed on them for their participation in the unlawful Picket. The funding 'goal' was $33,600, which amount corresponds to the total of the penalties imposed on Messrs Smith, O'Mara and Bolitho. The evidence establishes that funding of $33,470 ($130 less than the 'goal' of $33,600) was raised by 22 September 2020. I infer that this funding was used to pay the whole, or almost all, of Mr Smith's penalty of $12,600.

[27] There is no evidence to suggest that Mr Smith was involved in the establishment of the 'crowdfunding webpage', the representations contained on that webpage, or the raising of funds to pay his penalty of $12,600. Because there is no evidence to suggest that Mr Smith had any involvement in these matters, I am satisfied that they do not have any bearing on his fitness or propriety to be a right of entry permit holder. However, the fact that Mr Smith has been able to use funds provided by third parties to pay the $12,600 penalty imposed on him by the Federal Court is relevant to whether I should exercise my discretion under s 512 of the Act to issue a right of entry permit for Mr Smith. In particular, although Mr Smith is personally responsible for paying the $12,600 penalty, he has not felt the full 'sting' of the order made by Justice Katzmann because he has been able to use funds donated by third parties to pay the penalty. This contributes to my concern about whether Mr Smith will comply with his obligations under Part 3-4 of the Act if he is granted a right of entry permit.

Conclusion

[28] After taking into account and weighing each of the permit qualification matters set out in s 513(1)(a) to (g) of the Act, I am satisfied, on balance, that Mr Smith is a fit and proper person to hold a right of entry permit.

[29] The findings made by Justice Katzmann and Judge Neville of contraventions of the industrial laws by Mr Smith, together with the matters I have identified above under s 513(1)(g), are matters which, in my view, ought be given appropriate weight because of the questions they raise in relation to whether there is a basis for confidence that Mr Smith would make proper and lawful use of a right of entry permit if he were issued with one. Balanced against these matters are the factors in s 513(1)(a), (b), (c), (e) and (f) of the Act, which weigh in favour of a finding that Mr Smith is a fit and proper person to hold a right of entry permit. In addition, it is relevant to have regard to the fact that Mr Smith has been an officer and employee of the CFMMEU for 13 years and, save for the findings made against him by Justice Katzmann and Judge Neville, no other findings of contraventions of any industrial law have been made against Mr Smith. The matters which weigh in favour of a finding that Mr Smith is a fit and proper person to hold a right of entry permit outweigh those that weigh against such a conclusion. However, if Mr Smith were to engage in any further contravention of an industrial law, I would find it difficult to have the necessary degree of confidence that Mr Smith would make proper and lawful use of a right of entry permit.

[30] I have considered whether any conditions should be imposed on any entry permit issued to Mr Smith conjointly with my consideration of whether he is a fit and proper person to hold an entry permit. My conclusion on that score is that no conditions should be imposed.

[31] In the circumstances, I am satisfied that it is appropriate to exercise the discretion conferred on me by s 512 of the Act in favour of issuing Mr Smith with an entry permit.

DEPUTY PRESIDENT

Representation:

Mr C Dowling SC and Mr Y Bakri, of counsel, for the CFMMEU.
Mr A Denton, of counsel, and *Mr B Vallence*, Legal Manager – Southern Region, on behalf of the ABCC.

Submissions:

Final submissions received from the CFMMEU on 26 October 2020.
Final submission received from the ABCC on 16 October 2020.

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