DECISION

Fair Work Act 2009
s.510—Upon referral, revoke or suspend an entry permit

In the matter of the Entry Permit of Kevin Brian Harkins
(RE2020/1111)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 5 AUGUST 2021

In the matter of the Entry Permit of Kevin Brian Harkins – penalties imposed for contraventions of the FW Act – whether to suspend or revoke entry permit – whether suspension in the circumstances harsh or unreasonable – permit suspended for 3 months – ban period for 3 months.

[1] This proceeding is commenced on the Commission's initiative to consider what action, if any, should be taken under s 510 of the *Fair Work Act 2019* (FW Act) in relation to an entry permit currently held by Kevin Brian Harkins. As the proceeding involves a building industry participant within the meaning of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), the Australian Building and Construction Commissioner (Commissioner) gave written notice on 10 December 2020 that he intervenes in the proceeding pursuant to s 110 of that Act.

[2] Mr Harkins holds an entry permit issued on 18 February 2020 under s 512 of the FW Act.[1] He was also the holder of an earlier issued entry permit which expired on 6 February 2020.[2] He commenced employment with the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) on or about 25 July 2016 as a Safety Officer and Organiser. Mr Harkins' current entry permit will expiry on 18 February 2023.

[3] In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Elizabeth Street Hobart Case)*[3] the Federal Court relevantly declared that Mr Harkin contravened:

- s 494 of the FW Act on 28 May 2019 by being knowingly involved in the contravention of s 494 of the FW Act by Mr Hasset, an official of the CFMMEU;

- s 500 of the FW Act on 28 May 2019 when he acted in an improper manner while exercising rights in accordance with Part 3-4 of the FW Act by being knowingly involved in the contravention of s.494 of the FW Act at the site;

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[1] RE2019/1274

[2] RE2016/1725

[3] [2020] FCA 1742

- s 500 of the FW Act on 28 May 2019 when he acted in an improper manner while exercising rights in accordance with Part 3-4 of the FW Act by:

  (a) acting in a loud and intimidating manner toward the Site foreman when asked what safety equipment was unsafe, and saying words to the effect of "don't get smart with me, arsehole. I'm nearly at the end of my career. I don't give a fuck about what happens to me, but that bloke over there will be onto you [pointing to Mr Hassett]";

  (b) responding to a request to identify safety breaches with "you don't fucking pay me, so I'm not going to tell you"; and

  (c) responding to the Site project manager asking the Third Respondent to leave by telling him to "get fucked".

[4] The Court ordered that Mr Harkins pay a penalty:

- in the sum of $8,000 in respect to his contraventions of ss 494 and 500 on 28 May 2019 by reason of his knowing involvement in Mr Hassett's contravention of s 494;

- in the sum of $8,000 respect of his contravention of s 500 on 28 May 2019 as principal.[4]

[5] As to the CFMMEU, the Court declared that in the respect of Mr Harkins' contravention of ss 494 and 500 of the FW Act on 28 May 2019, the CFMMEU contravened:

- s 494 of the FW Act on 28 May 2019 by reason of Mr Harkins' conduct described in the first dot point of [3] above;

- s 500 of the FW Act on 28 May 2019 by reason of Mr Harkins' conduct described in the second dot point of [3] above;

- s 500 of the FW Act on 28 May 2019 by reason of Mr Harkins' conduct described in the third dot point of [3] above.

[6] In connection with the declared contraventions by reason of Mr Harkins' conduct, the Court ordered that the CFMMEU pay a penalty:

- in the sum of $45,000 in respect to the contraventions of ss 494 and 500 described in the first and second dot points of [5] above; and

- $45,000 in respect of the contravention of s 500 described in the third dot point of [5] above.[5]

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[4] [2020] FCA 1742 at [76(b)]

[5] [2020] FCA 1742 at [76(c)]

Legislative Framework

[7] As I have observed, the Federal Court imposed a penalty on Mr Harkins and on the CFMMEU because Mr Harkins contravened ss 494 and 500 of the FW Act. Section 494(1) provides that an official must not exercise a State or Territory OHS right unless the official is a permit holder. Section 500 provides that a person "must not intentionally hinder or obstruct any person, or otherwise act in an improper manner" while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act.

[8] Section 510 relevantly provides:

> **510 When the FWC must revoke or suspend entry permits**
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> *When the FWC must revoke or suspend entry permits*
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> (1) The FWC must, under this subsection, revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the following has happened since the first of those permits was issued:
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> ....
>
> (d) the permit holder, or another person, was ordered to pay a pecuniary penalty under this Act in relation to a contravention of this Part by the permit holder;
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> ...
>
> (2) Despite subsection (1), the FWC is not required to suspend or revoke an entry permit under paragraph (1)(d) or (f) if the FWC is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.
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> (3) Subsection (1) does not apply in relation to a circumstance referred to in a paragraph of that subsection if the FWC took the circumstance into account when taking action under that subsection on a previous occasion.
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> *Minimum suspension period*
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> (4) A suspension under subsection (1) must be for a period that is at least as long as the period (the ***minimum suspension period***) specified in whichever of the following paragraphs applies:
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> (a) if the FWC has not previously taken action under subsection (1) against the permit holder—3 months;
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> (b) if the FWC has taken action under subsection (1) against the permit holder on only one occasion—12 months;
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> (c) if the FWC has taken action under subsection (1) against the permit holder on more than one occasion—5 years.

Banning issue of future entry permits

(5) If the FWC takes action under subsection (1), it must also ban the issue of any further entry permit to the permit holder for a specified period (the ***ban period***).

(6) The ban period must:

(a) begin when the action is taken under subsection (1); and

(b) be no shorter than the minimum suspension period.

[9] Sections 494, 500 and 510 of the FW Act are part of a right of entry scheme established by Part 3-4 of the FW Act. The object of Part 3–4 of the FW Act is to be found in s 480:

480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:

(i) this Act and fair work instruments; and

(ii) State or Territory OHS laws; and

(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

[10] In *Maritime Union of Australia v Fair Work Commission*[6] a Full Court of the Federal Court made the following observations about Part 3-4 of the FW Act:

Although the questions for resolution may be stated simply, it is important to recognise at the outset that Part 3-4 of the *Fair Work Act* fundamentally modifies common law rights.

A person granted an entry permit is conferred extensive power. Entry permits confer rights which significantly erode the common law right of occupiers to exclude those to whom they do not wish to grant entry. The Commonwealth legislature has nevertheless long concluded that conferring such powers is necessary in the context of industrial law. But it has also long sought to strike a balance between common law

[6] [2015] FCAFC 56

rights and otherwise untrammelled power. When construing a provision of an award and s 42A of the *Conciliation and Arbitration Act 1904* (Cth), Keely, Gray and Ryan JJ in *Meneling Station Pty Ltd v Australasian Meat Industry Employees' Union* (1987) 18 FCR 51 at 61 to 62 thus observed:

> The right of entry contemplated by s 42A of the FW Act is available at any time during working hours, and for other purposes than the inspection of roster, time and wages records. It is also subject to conditions. Clause 23 has been framed, in our view, to strike a balance between the interest of a union party to an award in monitoring its observance and detecting breaches of it by an employer, and the interest, on the other hand, of an employer in carrying on business without interruption or harassment. A construction of the clause which favours one of those interests to a point where the other can be given scarcely any recognition is, therefore, to be avoided unless the language of the clause compels its adoption. Accordingly, since cl 23 of the Award provides a right to inspect records, it is reasonable to construe it as incidentally conferring a specific, preliminary, right to enter premises for that purpose.

See also: *Lane v Arrowcrest Group Pty Ltd* (1990) 27 FCR 427 at 439 to 440 per von Doussa J.

Section 480, extracted at [8] above, sets out that the object of Part 3-4 is to establish a framework that *balances* the right of organisations to represent their members, 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. The rights conferred by Part 3-4, including to enter premises and interview persons about suspected contraventions and to hold discussions with employees, have thus been assessed by the legislature as an appropriate balance between the rights of organisations, employees and occupiers. The rights conferred, however, are not "*untrammelled*" and are subject to both express and implied constraints: *Australasian Meat Industry Employees' Union v Fair Work Australia* [2012] FCAFC 85 at [56], [2012] FCAFC 85; (2012) 203 FCR 389 at 405 per Flick J (Tracey J agreeing). The exercise of rights conferred upon a "*permit holder*" renders lawful that which would otherwise be unlawful: cf. *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Limited* [1979] HCA 67; (1979) 143 CLR 499 at 540 per Mason J.

It is thus not surprising that the legislature has confined the category of persons who may be clothed with such powers to those persons who are "*fit and proper*".[7]

[11] As should be evident from the terms of s 510 of the FW Act the occurrence of an event identified in ss 510(1)(a) to (f) since the date on which the first of any entry permits held by a permit holder was issued, results in a suspension or revocation of the relevant permit or permits, unless s 510(1) does not apply by reason of s 510(3) or the Commission exercises a discretion under s 510(2) not to suspend or revoke an entry permit because of the happening

[7] Ibid at [13]-[16]

of an event in s 510(1)(d) or (f) once it is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.

[12] As I have observed previously, the exercise of the Commission's powers and functions under ss 510(1) and 510(2) is to be informed, not by the need to punish a permit holder, but rather by the need to establish or maintain a balancing of rights and obligations between employees, registered organisations, occupiers of premises and employers. The power in s 510 is protective and corrective, not penal.[8]

[13] Moreover in deciding whether a suspension or revocation of an entry permit would be harsh or unreasonable; whether to revoke rather than suspend an entry permit; and the duration of any suspension and/or ban period, it will be relevant to have regard to the extent to which the Commission can have confidence that the permit holder would exercise her or his rights as a permit holder under the FW Act in a manner which achieves the necessary balance between the rights mentioned in s 480 of the FW Act.[9]

Consideration

[14] It is uncontroversial that the circumstance in s 510(1)(d) of the FW Act is relevantly engaged by the imposition of the penalties described earlier on both Mr Harkins and the CFMMEU in the *Elizabeth Street Hobart Case* in relation to Mr Harkins' permit and that these matters have not previously been taken into account in relation to an entry permit held by him. No action has previously been taken by the Commission under s 510(1)(d) taking into account these circumstances. The exception in s 510(3) is therefore not engaged. Accordingly, the Commission must revoke or suspend Mr Harkins' entry permit unless it is not required to do so because is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.

[15] The matters that are relevant in assessing whether suspension or revocation of Mr Harkins' entry permit would be harsh or unreasonable in the circumstances are also uncontroversial. These include the objects of Part 3-4; the nature and gravity of the underlying contravention of Part 3-4; the impact that the revocation or suspension of the entry permit might have on the organisation, its members, and the permit holder; whether training has been undertaken by the entry permit holder since the events; and general character evidence. This is not an exhaustive list of matters which may be relevant to the assessment.

[16] Mr Harkins and the CFMMEU contend that it would be unreasonable to suspend or revoke Mr Harkins' permit having regard to the following:

- the nature and gravity of the underlying contravention;[10]
- Mr Harkins' good character and the low likelihood of him contravening Part 3–4 of the FW Act again;[11]

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[8] *In the matter of the Entry Permit of Blake Patrick Hynes* [2020] FWC 97 at [16]

[9] *Fair Work Commission v Stephen Long* [2017] FWC 6867 at [25]

[10] Submissions of Mr Harkins and the CFMMEU at [11]-[14]

[11] Ibid at [15]-[17]

- the training undertaken subsequent to his actions;[12] and

- the impact that revocation or suspension would have on Mr Harkins and the CFMMEU.[13]

[17] In the alternative, Mr Harkins and the CFMMEU submit the Commission should suspend rather than revoke Mr Harkins' entry permit and that any suspension, revocation or ban should not exceed the minimum three-month period. They argue that the matters raised in consideration of whether the suspension or revocation of Mr Harkins' permit would be harsh or unreasonable are also relevant to the determination of whether to revoke or suspend Mr Harkins' entry permit and the length of the suspension or revocation and ban.[14]

[18] The Commissioner contends that it would not be harsh or unreasonable to suspend or revoke Mr Harkins' permit in the circumstances and submits that the entry permit should be suspended for nine months and (pursuant to s 510(5)) the Commission should ban the issue of any further entry permit for that same period.[15]

[19] While Mr Harkins and the CFMMEU acknowledge that Mr Harkins' contravening conduct was inconsistent with his obligations as a permit holder, they submit that the following factors should be considered in assessing its nature and gravity:

- Mr Harkins and the CFMMEU made admissions at an early stage in the court proceedings;

- Mr Harkins entered the site for the legitimate purpose of inquiring into suspected contraventions of the WHS Act;

- Mr Hassett and Mr Harkins relied on incorrect advice that the legal position on whether Mr Hassett was permitted to use his entry permit issued under the *Work Health and Safety Act 2012* was uncertain and Mr Hassett should continue to use it;[16]

- Mr Harkins' conduct was out of character and he has expressed regret for the way he spoke to the Site foreman and project manager; and

- There was no demonstrable financial loss or other damage caused by the conduct.

[20] The Commissioner submits that the findings made by the Court and the penalties it imposed weigh strongly in favour of the conclusion that revocation or suspension of Mr Harkins' entry permit would not be harsh or unreasonable, having regard to:

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[12] Ibid at [16]

[13] Ibid at [18]-[21]

[14] Submissions of Mr Harkins and the CFMMEU at [22]

[15] Submission of the Australian Building and Construction Commissioner at [8]

[16] Exhibit 2 at [23]-[24]

(a) the 'deliberate', 'serious' and 'flagrant' nature of Mr Harkins' contraventions as found by the Federal Court;

(b) the offensive language used by Mr Harkins;

(c) the 'loud and intimidating manner' in which Mr Harkins acted towards the Site foreman; and

(d) the involvement of Mr Harkins in the unlawful conduct of another CFMMEU official.

[21] The Commissioner further submits that the contextual matters raised by the CFMMEU as mitigating the seriousness of the contravention were before the Federal Court when it assessed Mr Harkins' conduct as 'serious', 'deliberate' and 'flagrant'.

[22] In the *Elizabeth Street Hobart Case*, O'Callaghan J said:

> . . . I do not accept the respondents' submission that their conduct falls within the low or medium range. Nor do I accept the proposition that any contravention warrants the imposition of a maximum penalty. That would not accord with the principle of proportionality, because although the conduct of Messrs Hassett and Harkins was serious and deliberate, and flagrant, it is not realistically to be regarded as being of the worst kind. But in my view the penalties must be fixed towards the higher end of the range.[17]

[23] As to the contention that Mr Harkins' relied on incorrect legal advice, the Commissioner submits that this was not advanced by the CFMMEU or Mr Harkins in the *Elizabeth Street Hobart Case* and should be disregarded.

[24] Dealing first, with the erroneous legal advice contention. That contention is based on the following evidence given by Mr Harkins before me:

> [22] At this time, Hassett and I had been advised by a CFMMEU lawyer that he should continue to enter worksites with his WHS Act entry permit, even though he did not hold a FW Act entry perm it.
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> [23] In or around late January or early February 2019, I was with Hassett driving in his car on Elizabeth Street in Hobart. Hassett called Amanda Swayn (Swayn) from the car. Swayn was then the manager of the CFMMEU legal department and senior legal officer for the CFMMEU. The call was on loudspeaker, so I could hear and participate in the conversation.
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> [24] Hassett asked Swayn whether his WHS Act entry permit was still valid to enter worksites. Swayn responded with words to the effect of 'It hasn't been tested yet, no one really knows. You've got your WHS permit, just keep doing what you're doing'.

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[17] [2020] FCA 1742 at [75]

> [25] It was this conversation that led me to tell the police who were called to the VOS Construction site on 28 May 2019 '*There's an argument about whether it [Hassett's WHS Act entry permit] still exists or not. But that's ... lawyer's that are way above our heads, way up here somewhere, you know QCs and Barristers and all that shit. They'll spend the next two years arguing about that and while they're arguing he's still got a permit*.'[18]

[25] I do not consider that this contention, nor the evidence which underpins it, operates as an ameliorating or mitigating factor in assessing the nature and gravity of the contravening conduct in which Mr Harkins was found to have engaged. *First*, the evidence was not adduced before the Court by way of mitigation. In so far as this evidence is said to be relevant to the nature and gravity of the contravening conduct, the appropriate time for the evidence to be adduced was during the hearing before the Court and to do so in an admissible form enabling it to be tested. Although in some circumstances, evidence of this kind might carry some weight in respect of the assessment under s 510(3), for example, where at the time of the contravening conduct the state of the law was uncertain, the advice given was in that context and evidence of this kind was not permitted by the Court to be adduced,[19] here there was no uncertainty about the operation of s 494 of the FW Act, no real explanation is proffered for the failure to adduce this evidence in an admissible form before the Court and no suggestion is made that the CFMMEU or Mr Harkins was precluded from doing so.

[26] *Second*, the evidence is hearsay in nature and is about purported advice given to Mr Hassett about the validity of an entry permit held by him under a state OHS law. On Mr Harkins' account, although he says he could participate in the discussion, it is not evident that he did, and the advice is directed to Mr Hassett's rights, not Mr Harkins' rights.

[27] *Third*, neither Mr Hassett nor Ms Swayn, the lawyer said to have given the advice was called to give evidence. It would be unfair to conclude that erroneous advice was given without affording the lawyer an opportunity to comment on the contention and the evidence which underpins it.

[28] *Fourth*, it is not at all clear from Mr Harkins' account of the conversation what advice was sought. On one view, all that was being asked was whether Mr Hassett's OHS entry permit "was still valid" to enter worksites. There is no indication in the evidence that either Mr Hassett or Mr Harkins told Ms Swayn that Mr Hassett did not have an entry permit under the FW Act. Output is only as good as the input. Thus, even if the advice was erroneous, the absence of any instruction given to Ms Swayn about this important fact about which both Mr Hassett and Mr Harkins were aware, means that Mr Hassett and perhaps also Mr Harkins (since he was able to participate in the conversation) likely contributed to the quality of the advice said to have been given.

[29] *Fifth*, whatever else might be said about the purported advice, Mr Harkins knew at the time that he engaged in the contravening conduct, that Mr Hassett did not hold an entry permit under the FW Act. Mr Harkins was himself an entry permit holder and declared at the time he applied for that permit that he had received appropriate training about the rights and

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[18] Exhibit 2 at [22]-[25]

[19] See for example *Nigel Davies* [2019] FWC 2022

responsibilities of a permit holder. Section 494(1) of the FW Act could not be clearer. It provides that an official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder under the FW Act. Mr Hassett was not. No further advice was required. As a permit holder who had undertaken relevant training, Mr Harkins ought reasonably to have known that a person cannot exercise a State or Territory OHS right unless the person also holds a valid right of entry permit issued under the FW Act.

[30] As to the nature and gravity of the contravening conduct more generally, the Court in the *Elizabeth Street Hobart Case* said that Mr Harkins' contravention of s 494 of the FW Act was "deliberate and therefore serious".[20] This was because:

> It is obvious from what Mr Harkins said in his exchanges with Sergeant Lang that he knew that Mr Hassett was not a permit holder. For example, when Sergeant Lang said that Mr Hassett did not have a permit under the "other legislation", and Mr Hassett responded that he did not "need one", Mr Harkins explained that this was because "we entered under – for health and safety" and that "irrespective of whether he's got a permit or not, we've got an unsafe project up here". Further, in another discussion with Sergeant Lang, Mr Harkins said "he hasn't got a Right of Entry Notice under the industrial laws, but he's got a Work Health and Safety Permit to come on these jobs. So that's end of story".[21]

[31] As to Mr Harkins' conduct which constituted the second of the s 500 contraventions the Court said:

> Permit holders act in an improper manner for the purposes of s 500 when they fail to conform to the standards of conduct to be expected of them by reasonable persons having knowledge of their duties, powers and authority, and of the circumstances of the case. The characterisation of conduct as improper is an objective one and it does not depend on the permit holder's intention. See, eg, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15; (2018) 258 FCR 158 at 165-166 [39] (Dowsett, Tracey and Charlesworth JJ).
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> Mr Harkins self-evidently acted in an improper way within the meaning of s 500. It is obviously improper for a person holding an entry permit and entering a site under the guise of health and safety concerns to behave as follows:
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> > (a) acting in a loud and intimidating manner toward Mr Brown, the Site foreman, when asked what safety equipment was unsafe, and saying to him words to the effect of "don't get smart with me, arsehole. I'm nearly at the end of my career. I don't give a fuck about what happens to me, but that bloke over there will be onto you [pointing to Mr Hassett]";
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> > (b) responding to a request to identify safety breaches with "you don't fucking pay me, so I'm not going to tell you"; and

[20] [2020] FCA 1742 at [57]

[21] Ibid at [56]

(c) responding to Mr Baynes asking him (Mr Harkins) to leave by telling Mr Baynes to "get fucked".[22]

[32] Overall, the Court assessed the conduct as "serious and deliberate, and flagrant" but not "of the worst kind" and determined to fix the penalties "towards the higher end of the range".[23]

[33] Plainly the gravity of the conduct was at the serious end. I accept that Mr Harkins made admissions at an early stage in the court proceedings and although I accept that Mr Harkins entered the site for the legitimate purpose of inquiring into suspected contraventions of the WHS Act, his contravening conduct can in no manner be considered legitimate or appropriate or for the gravity of the conduct as assessed by the Court to be diminished by the purpose of entry. That Mr Harkins' entry was directed to "a set of safety issues" was a matter taken into account by the Court by way of mitigation[24] before the contravening conduct was assessed as "serious and deliberate, and flagrant".

[34] While Mr Harkins' conduct may have been out of character and he has expressed regret for the way he spoke to the Site foreman and project manager, there is an element in the contravening conduct which suggests that Mr Harkins acted in a cavalier manner not concerned about the consequences of his conduct. It is to be remembered that part of Mr Harkins' contravening conduct involves him saying in a loud and intimidating manner toward the Site foreman "I'm nearly at the end of my career. I don't give a fuck about what happens to me".

[35] As to the contention that there was no demonstrable financial loss or other damage caused by the conduct, while this may be so, I do not consider that fact now ameliorates the conduct in which Mr Harkins engaged that was assessed by the Court as serious. As with the safety purpose of entry, this matter was also taken into account by way of mitigation by the Court[25] after which the Court nonetheless assessed the conduct as "serious and deliberate, and flagrant" warranting the imposition of penalties towards the higher end of the range.

[36] Overall considering each of the matters raised by the CFMMEU and Mr Harkins, I am not persuaded for the reasons given that the nature and gravity of the contravening conduct weighs in favour of a conclusion that suspension or revocation would be harsh or unreasonable. None of the matters raised suggest that the Court's conclusions as to the gravity of the conduct should be discounted.

[37] Mr Harkins and the CFMMEU submit that the Commission can be satisfied that there is very little likelihood of Mr Harkins contravening Part 3-4 again, having regard to a number of factors, including:

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[22] Ibid at [61]-[62]

[23] Ibid at [75]

[24] Ibid at [69]

[25] Ibid at [69]

- Mr Harkins' has been a union official for some 25 years and has only contravened an industrial law once previously, 13 years earlier, and has not engaged in any inappropriate or unlawful conduct since the contraventions which occurred almost two years ago;

- Mr Harkins' remorse and express intention to comply with the law in the future;

- the training undertaken by Mr Harkins since the events, provided by Mr Brian Lacy AO;[26]

- the observations of Mr Lacy who states he is satisfied that Mr Harkins 'will take steps to ensure he does not contravene ss 494(1) and 500 of the FW Act, and industrial and work health and safety legislation more generally';[27]

- the deterrent penalty of the Court to which Harkins has already been subject; and

- Mr Harkins' good character evidenced by his extensive experience as a board member and the experience and opinions of Mr Ben Young Workplace Relations Director, Hutchinson Builders, who provided a character reference in which he states he has always found Mr Harkins' be respectful of the relevant legislation and understanding of the compliance requirements of Builders and Subcontractors'.

[38] In light of these circumstances, Mr Harkins and the CFMMEU submit that no corrective or protective purpose would be served by a suspension or revocation of Mr Harkins' permit and that such action would be excessive, disproportionate and punitive, and thereby unreasonable within the meaning of s 510(2) of the FW Act.

[39] The Commissioner submits that while Mr Harkins has indicated he regrets the inappropriate way he spoke to Messrs Baynes and Brown on 28 May 2019, this statement is tempered by blaming Mr Baynes for instigating the conduct.[28] The Commissioner further submits that Mr Harkins raising fresh allegations not ventilated in the Federal Court proceedings suggests that Mr Harkins still seeks to provide some justification for his conduct and is inconsistent with genuine remorse that acknowledges full wrongdoing.[29]

[40] I agree with the Commissioner's contention about the nature of the regret expressed by Mr Harkins and about the erroneous legal advice contention which for reasons earlier given I find particularly unpersuasive. Moreover, there is nothing in the judgement in the *Elizabeth Street Hobart Case* which suggests, as Mr Harkins now asserts, that Mr Baynes was "very aggressive" and that he "swore and raised his voice".[30] As to the character reference from Mr Young, whilst I accept that Mr Young has in his dealings with Mr Harkins found Mr Harkins to be decent and fair, there is no indication in the written reference that Mr Harkins has disclosed to Mr Young the particulars of the conduct in which he has engaged and the

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[26] Submissions of Mr Harkins and the CFMMEU at [16]

[27] Exhibit 2 at [28]

[28] Submission of the Australian Building and Construction Commissioner at [34]

[29] Ibid at [53]

[30] Exhibit 2 at [28]

language that he used in the exchanges the subject of the contravening conduct. Nor is there any apparent disclosure of the fact the Court assessed the conduct as "serious and deliberate, and flagrant". All that is disclosed is a benign description of the outcome of the *Elizabeth Street Hobart Case*. The weight attaching the character reference is thus accorded appropriately little weight having regard to the extent of the disclosure about what was involved in the contravening conduct. In the circumstances I do not consider these matters materially weigh in favour of a conclusion that revocation or suspension of Mr Harkins' entry permit would be harsh or unreasonable. Conversely, that training has been undertaken by Mr Harkins' since the contravening conduct is a matter which relevantly weighs in his favour. Nonetheless I am not persuaded taking into account the object in s 480 of the FW Act that no corrective or protective purpose would be served by taking action under s 510 in relation to Mr Harkins' permit.

[41] As to the impact that a suspension or revocation of Mr Harkins' entry permit might have on the CFMMEU, its members and the permit holder as a factor relevant in determining whether a suspension or revocation would be harsh or unreasonable, the CFMMEU contends that a suspension or revocation would have a deleterious impact on each of the CFMMEU, its members and Mr Harkins for the following reasons:

- the bulk of Mr Harkins' work as an organiser and safety officer is carried out on site and while his permit is suspended he would be unable to perform a substantial part of his duties and his employment or income would potentially be at risk;[31]

- the Tasmanian branch of the CFMMEU would incur "operational difficulties and increased costs" for sending other CFMMEU permit holders to Tasmania during the suspension period;[32] and

- it would disadvantage CFMMEU members in Tasmania as these workers would be without the assistance and representation of an experienced union organiser and safety officer who is familiar to and with employers, employees and other stakeholders in the Tasmanian building and construction industry.[33]

[42] The Commissioner submits that Mr Harkins' evidence on the potential impact of a suspension, if accepted, rises to no more than the ordinary consequences of the application of s 510 and cannot itself render revocation or suspension harsh or unreasonable.[34] The Commissioner further submits that Mr Harkins' evidence consists of unsupported assertions, in circumstances where others within the CFMMEU could have given such evidence. The Commissioner also asserts that no evidence was adduced to explain why the CFMMEU would incur further costs and inconvenience in order to replace or fill in for Mr Harkins.

[43] The CFMMEU and Mr Harkins could have but did not lead evidence in support of its contention that a suspension or revocation would negatively impact the CFMMEU, its members and Mr Harkins. It must also be accepted that the CFMMEU is a well-resourced

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[31] Submissions of Mr Harkins and the CFMMEU at [18] and Exhibit 2 at [16]-[17]

[32] Submissions of Mr Harkins and the CFMMEU at [19]

[33] Submissions of Mr Harkins and the CFMMEU at [20]

[34] Submission of the Australian Building and Construction Commissioner at [40]

organisation with an existing capacity to ameliorate the inconvenience that will follow, for example, by deploying other permit holders of the organisation to construction sites usually serviced by Mr Harkins. Doubtless a period without an entry permit may cause some inconvenience to Mr Harkins and the CFMMEU but it is not harsh or unreasonable to take action merely because self-inflicted inconvenience is caused by action taken under s 510 of the FW Act because of penalties imposed consequent on Mr Harkins having engaged in unlawful conduct. It follows that this matter does not weigh in favour of a conclusion that suspension or revocation would be harsh or unreasonable.

[44] Taking these circumstances into account and weighing them as indicated above, both separately and collectively, I am not persuaded that taking action under s 510(1) in relation to Mr Harkins' entry permit would be harsh or unreasonable.

[45] As to the action that should be taken, the Commissioner contends for a suspension and ban period of nine months in light of the matters discussed earlier and in particular having regard to the seriousness of the conduct.[35] The Commissioner also contends that this period of suspension is appropriate because the Commission "must send a message to all permit holders, and the community more broadly, that Mr Harkins' involvement in contraventions by another official exercising entry rights when he had no statutory authority to do so and intimidatory behaviour and foul language when exercising entry rights; will not be tolerated. Such behaviour is unacceptable in any workplace."[36] The Commissioner does not contend for revocation, properly in my view.

[46] I do not accept the latter contention as an appropriate consideration. The Court's judgment in the *Elizabeth Street Hobart Case* serves this purpose. I also consider that the period of suspension proposed by the Commissioner would in the circumstances be excessive. As earlier noted, the CFMMEU and Mr Harkins contended that if I did not accept that suspension or revocation of Mr Harkins' entry permit would be harsh or unreasonable, I should suspend the permit for three months taking into account the circumstances discussed earlier.

[47] I consider the appropriate action is to suspend Mr Harkins' entry permit for a period of three months for the following reasons. This is the first occasion on which the Commission has had to take action against Mr Harkins in relation to an entry permit under s 510 of the FW Act. Mr Harkins has been a union official for over 25 years and apart from the contravening conduct the subject of these proceedings has only contravened an industrial law on one other occasion more than 13 years ago. Unlike Mr Hassett, Mr Harkins was not described by the Court as a recidivist. He has undertaken training in relation to the particular conduct in which he engaged and has before me expressed regret for his conduct and has given evidence that he intends to conduct himself in accordance with the law in the future. Although the conduct in which he engaged was serious, taken together, all of the circumstances do not warrant a suspension for a period greater than three months.

[48] I therefore propose to suspend Mr Harkins' entry permit for a period of three months from the date of this decision and to fix a ban period under ss 510(5) and (6) of the FW Act

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[35] Submission of the Australian Building and Construction Commissioner at [48]

[36] Submission of the Australian Building and Construction Commissioner at [51]

beginning on the date of this decision and ending at the end of a period of three months. Mr Harkins is reminded of his obligation under s 517(1) to return the suspended permit to the Commission within 7 days of the date of this decision. At the end of the suspension period, the permit will be returned to Mr Harkins on application by him or the CFMMEU.[37]

Orders

[49] I order:

1. Pursuant to s 510(1) the entry permit held by Kevin Brian Harkins is suspended for a period of 3 months commencing on the 5 August 2021;

2. Pursuant to s 510(5) I ban the issue of any further entry permit to Kevin Brian Harkins for a period of 3 months commencing on the 5 August 2021.

DEPUTY PRESIDENT

Appearances:

E. Palmer on behalf of the CFMMEU
A. Denton of counsel on behalf of the ABCC

Hearing details:

2021
Melbourne (via video link)
10 June

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[37] *Fair Work Act 2019*, s 517(2)