FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner [2017] FCAFC 77

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| Appeal from: | *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 414  |
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| File numbers: | SAD 128 of 2016SAD 129 of 2016 |
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| Judges: | **NORTH, BESANKO, FLICK JJ** |
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| Date of judgment: | 17 May 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – right of entry to premises – whether failure to give occupier notice renders right “not in accordance” with Part 3-4 of the *Fair Work Act 2009* (Cth) **PRACTICE AND PROCEDURE** –leave to raise new arguments on appeal – arguments contrary to the manner in which the proceedings were conducted – potential for further evidence – leave refused  |
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| Legislation: | *Fair Work Act* *2009* (Cth) ss 478, 480, 484, 487, 500, 521D, 550, 793, Pts 3-4, 6-5*Federal Court of Australia Act* *1976* (Cth) s 37M  |
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| Cases cited: | *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586, (2009) 264 ALR 201*Australian Securities and Investments Commission v Rich* [2009]NSWSC 1229, (2009) 236 FLR 1*Bragdon v Director of the* *Fair Work Building Industry Inspectorate* [2016] FCAFC 64, (2016) 242 FCR 46*Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2016] HCA 41, (2016) 338 ALR 360*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 414*Jones v Dunkel* (1959) 101 CLR 298*Siegwerk Australia Pty Ltd v Nuplex Industries (Australia) Pty Ltd* [2013] FCAFC 130, (2013) 305 ALR 412*University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158, (2004) 238 FCR 588 *Water Board v Moustakas* (1988) 180 CLR 491  |
|  |  |
| Dates of hearing: | 2 and 3 March 2017 |
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| Registry: | South Australia |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 65 |
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| Counsel for the Appellants: | Mr M Abbott QC with Dr R Gray |
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| Solicitor for the Appellants: | Lieschke & Weatherill Lawyers |
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| Counsel for the Respondent: | Mr M Roder SC with Ms K Stewart |
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| Solicitor for the Respondent: | Piper Alderman |

ORDERS

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|  | SAD 128 of 2016 |
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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONFirst AppellantMUHAMMED KALEMSecond AppellantJOHN LOMAX (and others named in the Schedule)Third Appellant |
| AND: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERRespondent |

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|  | SAD 129 of 2016 |
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| BETWEEN: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONFirst AppellantDAVID KIRNERSecond Appellant |
| AND: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERRespondent |

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| JUDGES: | NORTH, BESANKO, FLICK JJ |
| DATE OF ORDER: | 17 MAY 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

REASONS FOR JUDGMENT

NORTH J:

1. I have had the benefit of reading the draft reasons for judgment in these appeals prepared by Flick J.
2. Those reasons identify at [14] four issues to be determined.
3. In relation to the first issue concerning the lack of a notice of entry and the third issue concerning the vicarious liability of the CFMEU, I agree with the orders proposed by Flick J and the reasons expressed by him for those orders.
4. In relation to the second issue concerning whether the entries were made pursuant to a power rather than a right, I agree with the orders proposed by Flick J that leave to argue that point should be refused. In my view leave should be refused because, if the argument had been raised by the primary judge, the Commissioner might have run a different case and have decided to call further evidence for that purpose.
5. In relation to the fourth issue concerning the application of *Jones v Dunkel* (1959) 101 CLR 298, I agree with the orders proposed by Flick J and the reasons expressed by him for those orders.

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| I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North. |

Associate:

Dated: 17 May 2017

REASONS FOR JUDGMENT

BESANKO J:

1. The appeals in these matters should be dismissed.
2. I have had the opportunity of reading the reasons for judgment of Flick J. I agree with his Honour that leave is required to advance the three arguments he identifies in paragraph 14 and I agree that leave should be refused for the reasons his Honour gives. I also agree that the argument that the primary judge misapplied *Jones v Dunkel* (1959) 101 CLR 298 must be rejected.

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| I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 17 May 2017

REASONS FOR JUDGMENT

# FLICK J:

1. Before the primary Judge there were conducted two sets of proceedings. Each involved access being sought to a number of building sites in Adelaide. Those seeking access were officials of the Construction, Forestry, Mining and Energy Union (the “CFMEU”).
2. The proceedings before the primary Judge were conducted upon the footing that each of the individual Respondents had sought access pursuant to s 484 of the *Fair Work Act* *2009* (Cth) (the “*Fair Work Act*”). The Director alleged that each of the individual Respondents in seeking entry had contravened s 500 of the *Fair Work Act*. In each of the proceedings, the CFMEU accepted that it was liable pursuant to s 793 of the *Fair Work Act* in respect to any contravention of s 500 by any of the individual Respondents.
3. The primary Judge made findings that there had been contraventions of s 500:  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293. Separate judgments were thereafter published in respect to the penalties to be imposed: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 414.
4. A number of the individual Respondents and the CFMEU appealed.
5. By *Orders* dated 1 February 2017, the name of the Respondents in the current appeals was changed from “*Director of the Fair Work Building Industry Inspectorate*” to “*Australian Building and Construction Commissioner*”.
6. The appeals are to be dismissed.

### The arguments on appeal

1. Before this Court, it was argued on behalf of the Appellants that:
* by reason of the fact that none of the individual Respondents had given the occupier of the premises a “*notice for the entry*” as required by s 487 of the *Fair Work Act*, the facts fell outside the reach of s 500 as each entry was not the exercise of a right “*in accordance with*” Pt 3-4;
* none of the entries to any of the premises was the exercise of a “*right*” of entry but rather the exercise of a “*power*” and, for that reason, the facts again fell outside the reach of s 500 as none of the individual Respondents was exercising any “*right*” – whether “*in accordance with*” Pt 3-4 or otherwise; and
* the CFMEU could not be held “*vicariously*” liable for the conduct of its individual members in any contravention of s 500 by reason of s 793.

It was also argued that:

* a number of findings of fact made by the primary Judge were vitiated by reason of the improper application of *Jones v Dunkel* (1959) 101 CLR 298.

It was accepted on behalf of the Appellants that leave was required to advance each of the first three arguments.

### The Fair Work Act

1. Those provisions of the *Fair Work Act* which assume central relevance to the resolution of the present appeal are the following.
2. Part 3-4 of the *Fair Work Act* deals with what the heading to that Part describes as “[*r*]*ight of entry*”. It commences with s 478 and concludes with s 521D. Within Pt 3-4 are relevantly to be found ss 480, 484 and 500.
3. Section 480 sets forth the objects of Pt 3-4 as follows:

**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.

1. Section 484 provides as follows:

**Entry to hold discussions**

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

(a) who perform work on the premises; and

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

(c) who wish to participate in those discussions.

Section 487 provides that, in the absence of an exemption issued by the Commission, a permit holder must give the occupier “*an entry notice for the entry*”.

1. Section 500 provides as follows:

**Permit holder must not hinder or obstruct**

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

1. Section 793 of the *Fair Work Act* is found with Pt 6-5, a Part headed “*Miscellaneous*”. That section provides as follows:

**Liability of bodies corporate**

*Conduct of a body corporate*

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

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

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

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

*State of mind of a body corporate*

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

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

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

*Meaning of* ***state of mind***

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

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

(b) the person’s reasons for the intention, opinion, belief or purpose.

*Disapplication of Part 2.5 of the Criminal Code*

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

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

1. Section 550 should also be noted. That section provides as follows:

**Involvement in contravention treated in same way as actual contravention**

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

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

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

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

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

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

### The failure to give a notice of entry – the refusal of leave

1. In concluding that each of the individual Respondents had contravened s 500 of the Act, the primary Judge found that each had sought to gain access to the building sites pursuant to s 484 of the *Fair Work Act*. The principal factual issue pursued at first instance was the “*purpose*” for which each Respondent had sought to gain access, the required “*purpose*” being an essential prerequisite to the lawful exercise of the right of entry conferred by s 484. Another focus of attention was whether the conduct of the individual Respondents could properly be characterised as “*improper*” for the purposes of s 500 of the *Fair Work Act*.
2. An argument not advanced before the primary Judge was that there could be no contravention of s 500 unless the “*right*” being exercised was being exercised “*in accordance with*” Pt 3-4. In the absence of a “*notice of entry*” being given to the occupier (in accordance with s 487 of the *Fair Work Act*), there could be – so the argument ran – no contravention of s 500.
3. Leave may be granted to advance on appeal an argument not advanced at first instance where it is expedient in the interests of justice to do so: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [46], (2004) 238 FCR 588 at 598 per Kiefel, Weinberg and Stone JJ.
4. The fact that the argument was presented to this Court as a discrete question of law and was within a limited factual compass certainly favoured the grant of leave: *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ.
5. In the circumstances of the present appeal, it is nevertheless concluded that leave should be refused. The principal reasons for so concluding are that:
* a party should normally be bound by the manner in which a case is advanced at first instance (*University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); and
* to now permit the present argument to be advanced on appeal would be contrary to the requirement now imposed by s 37M of the *Federal Court of Australia Act* *1976* (Cth) to conduct litigation in a manner which is both “*according to law*” and “*as quickly, inexpensively and efficiently as possible*”.

In proceedings such as the present, where both parties are well versed in litigation and well represented, to permit a party to raise a new argument would undermine the public interest in finality of litigation: cf. *Siegwerk Australia Pty Ltd v Nuplex Industries (Australia) Pty Ltd* [2013] FCAFC 130 at [105], (2013) 305 ALR 412 at 434 per Robertson J. A further factor supporting the refusal of leave is the fact that:

* the first argument cannot be so clinically divorced from the second argument as to be truly a separate and discrete point.

Although presented as a discrete question of law by Counsel for the Appellants, there nevertheless remained a disturbing overlap between whether the right sought to be invoked was that conferred by s 484 or some more broadly expressed “*power*” to enter building sites. The absence of a “*notice of entry*” and entry pursuant to the exercise of a “*power*” were questions inextricably linked one to the other.

1. In seeking the grant of leave, Counsel on behalf of the Appellants relied upon the fact that the decision of the Full Court in *Bragdon v Director of the* *Fair Work Building Industry Inspectorate* [2016] FCAFC 64, (2016) 242 FCR 46 (“*Bragdon*”) had not been handed down prior to the decisions of the primary Judge in the present proceeding. The decision of the Full Court, it was submitted, provided insight into the requirements imposed upon an exercise of the right conferred by s 484.
2. Reliance upon that decision of the Full Court, it is respectfully concluded, does not support the submission now advanced and provides no reason to now grant leave.
3. *Bragdon* was a case in which the two union persons involved (Messrs Bragdon and Kong) had arrived at the building site and “*did not assert that they were exercising any rights under the* [*Fair Work Act*] *or the* [*Work Health and Safety Act 2011 (NSW)*], *and they had not given notice that they would seek to do so*”: [2016] FCAFC 64 at [26], (2016) 242 FCR at 51. The case “*proceeded upon the premise that each of Mr Bragdon and Mr Kong had directed a cessation of work when they had no authority under the* [*Work Health and Safety Act 2011 (NSW)*] *to do so*”: [2016] FCAFC 64 at [56], (2016) 242 FCR at 57. In such circumstances the Full Court concluded that “*it was not established that Mr Bragdon and Mr Kong were exercising rights under Part 3-4 … they clearly were not*”: [2016] FCAFC 64 at [61], (2016) 242 FCR at 57. Each admitted they had no such authority. In a passage relied upon by the Appellants, the disagreement by the Full Court with the decision at first instance was further expressed as follows (at 57 to 58):

[63] In the present case it was not necessary for the primary judge to be concerned with whether Messrs Bragdon and Kong were “purporting” to exercise a State or Territory OHS power (at least not so far as s 500 is concerned) because s 500 states its own criteria for engagement (ie exercise or seeking to exercise). In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293, White J explained the second element of s 500 (in a way ultimately consistent with the underlying approach in [*Pine v Doyle* [2005] FCA 997, (2005) 222 FCR 291]) as follows:

[76] It is appropriate to keep in mind that the second element of a s 500 contravention requires proof that the permit holder was exercising, *or seeking to exercise*, rights in accordance with Pt 3-4 of the [*Fair Work Act*]. This means that the second element will be established if the permit holder was, as a matter of fact, exercising (relevantly) the s 484 right or *seeking to exercise* that right. Permit holders may seek to exercise the s 484 right even though they are mistaken in their belief that there are employees on the site at the time of the entry, or that there are on the site employees whose industrial interests the permit holder’s organisation is entitled to represent, or that persons answering that description do wish to participate in discussions with them. Proof that each of the elements listed in s 484 pertained at the time of the official’s entry is not required, at least in respect of an allegation that the permit holder was *seeking to exercise* rights under Pt 3-4.

(Emphasis in original.)

[64] Nevertheless, such a case must be proved. In our view, neither Mr Bragdon nor Mr Kong was exercising any State or Territory OHS right and nor were they “seeking to exercise” any such right. They did not have such a right and they did not proceed under any mistaken belief about their rights.

1. Unlike the facts present in *Bragdon*, however, the primary Judge in the present case has found as a fact that the individual Respondents were “*asserting an entitlement to enter for the s 484 purpose*”. The primary Judge, in the case of the Appellants Kalem and Lomax, thus concluded ([2015] FCA 1293):

[84] Exercising the restraint which s 140 of the Evidence Act makes appropriate, I consider that the evidence, taken as a whole, indicates that Mr Kalem and Mr Lomax, like the other CFMEU officials, were asserting an entitlement to enter for the s 484 purpose without having to give the notice of entry required by s 487. The alternatives, namely, that they were entering simply out of curiosity, or in the manner of persons committing a criminal trespass, are so improbable as to be able to be disregarded.

Given this finding, no question arises of persons “*purporting*” to exercise a right of entry; the finding of fact as made was that Messrs Kalem and Lomax were presenting themselves at the site and seeking entry pursuant to s 484.

1. The decision of the Full Court in *Bragdon*, whether handed down prior to or subsequent to the decisions of the primary Judge in the present proceedings, provides no reason of itself to grant leave to the Appellants in the present proceedings to raise this new argument on appeal. The decision of the Full Court, it is respectfully concluded, does not support a conclusion that a “*permit holder*” who fails to give a “*notice for the entry*” is not “*exercising, or seeking to exercise*” the right conferred by s 484 or a conclusion that entry in such circumstances is not “*in accordance with*” Pt 3-4.
2. Leave to raise the first argument is refused. On balance, it is concluded that it would not be “*expedient in the interests of justice*” to grant leave: cf. *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [46] to [48], (2004) 238 FCR 588 at 598 to 599 per Kiefel, Weinberg and Stone JJ.
3. Given the refusal of leave to now rely upon this new argument, it is unnecessary to resolve any question as to whether s 486 of the *Fair Work Act* lends support to a conclusion that the failure to give a “*notice for the entry*” has the consequence that a “*permit holder*” who is “*seeking to exercise*” the right conferred by s 484 is nevertheless not exercising that right “*in accordance with*” Pt 3-4.

### The exercise of a “power” as opposed to the exercise of a “right”

1. The second of the arguments advanced on behalf of the Appellants focussed attention upon the factual assertion that the entry to each of the building sites was not achieved by means of the exercise of a “*right*” but rather the exercise of a “*power*”.
2. When this argument was advanced by Senior Counsel on behalf of the Appellants there was some initial uncertainty as to the “*power*” sought to be exercised. The uncertainty arose by reason of the failure to identify with any precision the ultimate source of the “*power*” sought to be invoked. Any reliance upon any statutory source of “*power*” was quickly disabused when Senior Counsel on behalf of the Appellants, presumably on instructions, maintained that the “*power*” was not sourced in any statutory provision but rather was to be found in the “*power*” possessed by the CFMEU. Upon this basis, any statutory right to enter building sites pursuant to s 484 or any other provision of the *Fair Work Act* was completely placed to one side. Nor was the source of the “*power*” to enter sought to be found in any invitation by an occupier.
3. The CFMEU was asserting that it could enter building sites simply because – given its position as a prominent Union – it could.
4. Such a submission, if properly understood, is astounding. There could be no contravention of s 500 of the *Fair Work Act,* so the submission ran, because no “*right*” was being exercised but rather the exercise of industrial power and might and the exercise of industrial muscle.
5. Completely jettisoned on behalf of the CFMEU was any purported exercise of any statutory right and the “*balance*” sought to be achieved by Pt 3-4: cf. *Fair Work Act* s 480. That “*balance*” and the “*regime*” put in place by Pt 3-4 was referred to as follows by Bromberg J in *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287:

[84] … The fact that the rights the subject of Part 3-4 are those only exercised by union officials “for purposes related to their representative role … under State or Territory OHS laws” is expressly stated in s 6(5) of the [*Fair Work Act*]. The very same observation of what Part 3-4 “is about” is made by s 478. The right of entry regime or “framework” referred to by s 480 is a regime which seeks to balance “the rights of organisations to represent their members” (including by investigating suspected contraventions of State or Territory OHS laws) against other objects…

Part 3-4, of course, does not evince any legislative intent to regulate all of the ways that entry on to premises may be secured by union officials: [2016] FCA 1287 at [87].

1. A harmonious industrial regime should not discourage, of course, occupiers extending an invitation to those with a legitimate interest in entering premises; but a harmonious industrial context is not promoted where entry is secured simply by reason of industrial power leaving an occupier with little choice but to yield to such union action. The private property rights of an occupier must always yield to a proper and lawful exercise of statutory power; but private property rights should not be put at nought by those powerful enough to violate those rights. The prospect of an occupier seeking after the event to vindicate his rights, or the prospect of criminal proceedings being brought in respect to a criminal trespass, provide no reason why those with power may trample upon the rights of an occupier.
2. Whether any action should now be pursued by the Fair Work Commission or the Australian Building and Construction Commissioner given this shunning on the part of the CFMEU of any need to comply with the *Fair Work Act* is a matter for those authorities to separately pursue. It is a matter for those authorities to consider what consequences should follow (if any) from a union seeking to expressly place itself outside the constraints of the *Fair Work Act*.
3. The question of present relevance to this Court is the more confined question as to whether leave should be granted to the Appellants to now pursue this new argument on appeal that no “*right*” of access was being exercised but rather the exercise of a “*power*”.
4. No leave should be granted.
5. Irrespective of any legal merit that the second new argument may have, leave is refused principally because:
* had such a submission been advanced before the primary Judge and been rejected, the submission would unquestionably have been of relevance when assessing the penalty to be imposed. On the assumption that the submission met with no success, the primary Judge may well have approached the question of penalty and the need to consider the effect of any penalty by reference to the need to consider “*deterrence*” in a manifestly different manner; and
* there could be no certainty that the Commissioner would have conducted the proceedings at first instance in the same manner and no certainty that further evidence may not have been called.

### The vicarious liability of the CFMEU – s 550 v s793

1. Before the primary Judge, the *Defences* filed on behalf of the CFMEU, as amended, accepted liability pursuant to s 793 of the *Fair Work Act* in respect to such contraventions of s 500 by the individual Respondents as were established.
2. Senior Counsel on behalf of the Appellants sought the leave of this Court to:
* withdraw the admissions of liability that had been made in the *Defences* filed by the CFMEU before the primary Judge;
* file amended *Defences*; and
* advance argument as to why liability could not be imposed upon the CFMEU via s 793.
1. Again, leave is refused.
2. It is noted that *Constitutional* relief was recently refused in circumstances similar to the present proceedings in *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2016] HCA 41, (2016) 338 ALR 360 per Nettle J. But each application, of course, needs to be resolved by reference to their own peculiar facts and circumstances.
3. Supporting the grant of leave in the present proceedings were three factors, namely:
* the argument that the CFMEU could not have liability attributed to it pursuant to s 793 in respect to a contravention of s 500 in circumstances where it is only a “*permit holder*” who can contravene s 500 and where the CFMEU was not an entity that could hold such a permit;
* the fact that the question of statutory construction was unquestionably a question in need of resolution – indeed a question which would inevitably again arise for resolution between the very same parties to the present appeals; and
* the fact that there were a number of other proceedings pending in this Court in which the very same question of statutory interpretation would inevitably arise and the desirability of the question being resolved “*sooner rather than later*”.

It was, perhaps, a little surprising that Senior Counsel on behalf of the Commissioner opposed the grant of leave to raise what initially presented itself as a discrete question of law.

1. There are nevertheless two principal reasons for concluding that such factors should not prevail and that leave should be refused, namely:
* reliance upon s 793 was a forensic decision made at the outset of the proceedings when the *Defences* were filed, was a decision adhered to expressly before the primary Judge and was a decision the subject of submissions before the primary Judge; and
* there could be no certainty that the proceeding would not have been conducted differently by the Commissioner had reliance not been placed upon s 793.
1. Once again, the manner in which a hearing has been conducted is a persuasive reason – albeit not a conclusive reason – favouring the refusal of leave.
2. Whether the proceedings may well have been conducted differently and with different evidence is a question not easy of resolution. Had the CFMEU foreshadowed at the outset that it was disputing liability under s 793, the Commissioner may well have shifted reliance from s 793 to s 550 of the *Fair Work Act*. And had reliance been placed upon s 550, there is no certainty that further evidence may not have been called by the Commissioner: cf. *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [30] to [33], (2012) 246 CLR 379 at 397 to 398 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Even if the CFMEU could not be made liable pursuant to s 793 for the conduct of a “*permit holder*”, s 550 – so the argument for the Commissioner could run – was available against a “*person who is involved in a contravention*” and not confined to a “*permit holder*”. The CFMEU could be exposed to liability pursuant to s 550 if it was a “*person*” and was (for example) “*directly or indirectly, knowingly concerned in … the contravention*” (s 550(2)(b)). The prospect that a new argument if raised on appeal could possibly have been met with further evidence had it been raised at first instance is normally fatal to leave being granted: *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ.
3. Given that leave to raise this argument is refused, and given the opposition of the Commissioner to leave being granted, the more prudent course is not to express any view – no matter how tentative – in respect to the prospect that s 793 cannot found liability against the CFMEU for a contravention by a “*permit holder*” of s 500 of the *Fair Work Act*. Nor is it prudent to express any view as to whether the sole source of liability on the part of the CFMEU for a contravention of s 500 was to be found in s 550, namely a section specifically directed to liability for “*a contravention of a civil remedy provision*”.

### Jones v Dunkel

1. *Jones v Dunkel* (1959) 101 CLR 298 (“*Jones v Dunkel*”) provides for the prospect that inferences may be drawn where a party does not call a witness whose evidence may assist in the resolution of a factual dispute. In that case, Kitto J observed (at 308):

any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.

So much was not put in issue by the Appellants.

1. Nor did the Appellants put in issue the fact that *Jones v Dunkel* could be invoked in proceedings of the present kind, being proceedings of a quasi-criminal nature and where civil penalties may be imposed: *Australian Securities and Investments Commission v Rich* [2009]NSWSC 1229 at [459] to [463], (2009) 236 FLR 1 at 98 to 100 per Austin J (“*Rich*”). In subsequently applying this decision, Gilmour J in *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586, (2009) 264 ALR 201 at 225 observed:

[100] Finally, in *Rich*, Austin J concluded at [458] that, having considered the reasoning in [*Dyers v The Queen* [2002] HCA 45, (2002) 210 CLR 285]and[*Adler v Australian Securities and Investments Commission* [2003] NSWCA 131, (2003) 179 FLR 1]*,* the principle in [*Jones v Dunkel*] is applicable against either party to civil penalty proceedings.

[101] ASIC seeks to draw [*Jones v Dunkel*] inferences against FMG by reason of the failure of Forrest and the other executives to give evidence. ASIC does not seek to draw the inferences against Forrest himself. Forrest has relied on the privilege against self-incrimination and the privilege against exposure to penalty, privileges which are are not available to corporations … However, even if ASIC had sought to draw inferences against Forrest as well as the corporate entity, on my review of the authorities it would not have been precluded from doing so. There is no reason therefore, in these circumstances, why the inferences cannot, as a matter of law, be drawn against FMG in the present proceedings. The question which then arises is whether I should draw such an inference in the manner urged by ASIC.

[102] The authorities state that two inferences are involved in the rule in [*Jones v Dunkel*]. First, a court might infer that the evidence of the absent witness would not have assisted the party that failed to call that witness; second, a court might draw, with greater confidence, any inference unfavourable to the party that failed to call that witness, if that witness appears to be in a position to cast light on whether the inference should be drawn …

1. But what the Appellants did put in issue was the proposition that inferences could only be drawn where there was “*no sufficient explanation*” for not calling the witness.
2. None of the individual CFMEU persons gave evidence before the primary Judge. The adequate “*explanation*” for their absence was said to be found in the quite proper prospect that each of those persons had a privilege against self-incrimination.
3. Whatever prospect that argument may have, the argument should be rejected for the simple reason that such reliance as was placed by the primary Judge upon *Jones v Dunkel* was “*non-prejudicial*”. This argument was only an argument that arose in what was known as the *Lend Lease* proceeding (*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 and *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413) and only in respect to five individual Respondents, namely Messrs Kalem, Lomax, O’Connor, Beattie and McDermott.
4. In respect to Messrs Kalem and Lomax, the primary Judge relevantly concluded ([2015] FCA 1293) as follows:

[73] In my opinion, a number of matters indicate that Mr Kalem and Mr Lomax had entered the Flinders University site for the s 484 purpose:

(a) upon entering, the CFMEU officials did not just “look around”. All of them held discussions with workers on the site, at the least when walking around the site separately. Even if the CFMEU officials were making contact with the formworkers, introducing themselves and enquiring briefly as to any concerns which they had, their conversations constituted discussions of the requisite kind;

(b) further, all of the CFMEU officials followed the formwork workers into the lunchroom at the 9:30 smoko. Although there is no evidence as to what was said in the lunchroom, it is reasonable to suppose, and I find, that the CFMEU officials discussed matters with the formworkers at that time. I observe also that the lunchroom was a place in which discussions authorised by s 484 may take place ([*Fair Work Act*] s 492);

(c) following the smoko, the CFMEU officials (by one of their number) asked to meet Mr Crabb and requested Mr Wallace and Mr Grindle, two employees concerned with safety, to join them at that meeting. The CFMEU raised at the outset of the meeting aspects of safety on the site. It is reasonable to suppose that they had been informed of at least some of these during the smoko meeting and were, accordingly, making representations on behalf of their members;

(d) the impression that the CFMEU officials were acting in the manner of union officials exercising s 484 rights is confirmed by the similarity of their conduct with that of officials on previous occasions when entering after giving s 487 notices;

(e) Mr Gava’s explanation to Mr Crabb for refusing to comply with his direction that he leave the site is instructive. He said “this is the way it’s done now”, thereby impliedly referring to the way by which the CFMEU proposed exercising the right of entry and not to some new or different entitlement;

(f) the suggestion that the CFMEU organisers were present simply to look around, as though to satisfy their curiosity, is not plausible. The fact that they were there as a group during their own working hours, wearing clothing and hard hats with the CFMEU logos and insignia, suggests by itself that they were present as part of an organised activity, something seemingly not consistent with a wish to satisfy idle curiosity;

(g) the officials had no entitlement to be on site other than granted by ss 481 and 484 of the [*Fair Work Act*] and by the [*Work Health and Safety Act 2012* (SA)]. They were no more entitled to enter the site to satisfy their curiosity than any other member of the public. In fact, once Mr Crabb had requested them to leave, they were probably committing the criminal offence of trespass: *Summary Offences Act 1953* (SA) s 17A. There may be a question, as counsel for the respondents submitted, as to whether the officials other than Mr Gava knew of Mr Crabb’s request that they leave. But even if they did not, there is no basis upon which they could have thought, reasonably, that Mr Crabb had granted them permission to enter the site simply to look around or to satisfy their curiosity. The fact that they did not wait at the site office but entered the site without first speaking to Mr Crabb is also pertinent in this respect; and

(h) the CFMEU officials entered the site in the manner of persons entering as of right, and did not wait at the site office or otherwise seek approval to come onto the site. That is to say, the CFMEU officials behaved as though they were entitled to enter pursuant to s 484.

[74] These matters give rise to an inference that each of the CFMEU officials had entered for the s 484 purpose. That inference can be drawn with greater confidence given that neither Mr Kalem nor Mr Lomax gave evidence: *Jones v Dunkel* (1959) 101 CLR 298 at 308; *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11, (2011) 243 CLR 361 at [63]-[64].

…

[79] Counsel’s submission seemed to rest on the proposition that the possibility that Mr Kalem and Mr Lomax had remained mute during the lunchroom meeting could not be excluded. That may be so, but that would not mean, to my mind, that Mr Kalem and Mr Lomax were not, as part of the larger group, holding discussions of a relevant kind. It is common experience that discussions may take place involving three or more persons even if one of the participants remains silent. It is an ordinary incident of the holding of discussions that those present listen to what others have to say. It is also common experience that in group discussions some persons participate by allowing others to be their spokespersons. In my opinion, it is improbable, in the context of the lunchroom meeting, that Mr Kalem and Mr Lomax did not hold discussions with the formworkers who were present either by speaking themselves, or at least to listening to the statements of the other CFMEU officials made on behalf of the group and to those of the formworkers. The *Jones v Dunkel* principle adds to the confidence with which this conclusion may be drawn.

In the case of Messrs O’Connor and Beattie, the primary Judge found as follows:

[172] I find (after having regard to the *Briginshaw* principle), that in the circumstances, Mr O’Connor and Mr Beattie knew that Lend Lease was not waiving the requirement for a notice of entry, nor authorising their entry, but was merely seeking to exercise the same control available to it had the entry been made lawfully. Mr Beattie’s statement “good result” is an indication that he understood that that was so.

[173] This conclusion is supported by the failure of Mr O’Connor and Mr Beattie to give evidence in the trial.

In the case of Mr McDermott, the primary Judge found as follows:

[249] It is possible that Mr McDermott’s principal purpose on 12 November 2013 was simply to check that safety precautions with respect to cricket balls would be in force during the forthcoming cricket match. It may also be the case that he spoke to the group of Laser Linings’ employees only incidentally to the principal purpose of his visit, taking advantage of the opportunity to do so arising from Mr Stephenson’s meeting with them.

[250] However, I infer that at least one of Mr McDermott’s purposes was to hold discussions with the employees. If his concern had been only to check on safety precautions with respect to cricket balls, he could have done so by a simple telephone call to Mr Jackson. I infer that part of his reasons for attending and speaking to the workers was to demonstrate to the workers his, and the CFMEU’s, concern for their welfare.

[251] The inferences in this respect can be drawn more confidently having regard to Mr McDermott’s failure to give evidence in the trial.

[252] Accordingly, I am satisfied, having due regard to the *Briginshaw* principle, that Mr McDermott’s contravention of s 500 at the Adelaide Oval site on 12 November 2013 has been established.

1. As is readily apparent from these reasons, it is clear that the primary Judge would have made the same findings of fact irrespective of any reliance upon *Jones v Dunkel*.
2. In the case of Messrs Kalem and Lomax, the “*inference*” referred to at para [74] was an “*inference*” founded upon the eight “*matters*” detailed at para [73]. It was an “*inference*” already drawn by the primary Judge and the “*confidence*” with which that “*inference*” had been drawn was only “*add*[*ed*]” to by reliance upon *Jones v Dunkel*. Similarly, in the case of Messrs O’Connor and Beattie, the finding was only “*supported*” by their failure to give evidence. So too with Mr McDermott.
3. Notwithstanding the submission being advanced by Senior Counsel on behalf of these individual Appellants, it was accepted that the submission was weaker as against Mr McDermott, for example, because the finding of fact was made at para [250] whereas reliance upon the failure to give evidence at para [251] came after the finding having been made. In the case of Messrs Kalem and Lomax, the order in which the reasons were expressed was the other way around. But nothing turns, with respect, upon the order in which the primary Judge expressed his findings.
4. This *Ground of Appeal* is thus rejected.

# CONCLUSIONS

1. Leave to raise each of the three new arguments sought to be canvassed in this appeal has been refused.
2. The only *Ground of Appeal* not requiring leave, namely the reliance by the Appellants upon *Jones v Dunkel*, has also been rejected.
3. It is concluded that the appeal in each of the two proceedings now before this Court should be dismissed.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 17 May 2017

SCHEDULE OF PARTIES

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| --- | --- |
|  | SAD 128 of 2016 |
| Appellants |  |
| Fourth Appellant: | JAMES O'CONNOR |
| Fifth Appellant: | BILL BEATTIE |
| Sixth Appellant: | MICAHEL MCDERMOTT |
| Seventh Appellant: | STEPHEN LONG |
| Eighth Appellant: | BRETT HARRISON |