FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The North Queensland Stadium Case) [2020] FCA 947

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| File number: |  |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 10 July 2020 |
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| Catchwords: | **INDUSTRIAL RELATIONS** – application for declarations of contraventions of ss 46 and 54 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCI Act**) – whether casual employees cannot engage in industrial action – whether casual employees were obliged to accept or perform work – whether employees placed a ban on the performance or acceptance of building work – whether employees failed or refused to accept or perform building work – whether employees engaged in unlawful industrial action in breach of s 46 of the BCI Act – whether Union organised unlawful industrial action with intent to coerce in breach of s 54 of the BCI Act – declarations made |
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| Legislation: | *Acts Interpretation Act* *1901* (Cth) s 23  *Building and* *Construction Industry (Improving Productivity) Act 2016* (Cth) ss 5, 6, 7, 8, 45, 46, 54 and 81  *Evidence Act 1995* (Cth) s 140  *Fair Work Act 2009* (Cth) ss 13, 19, 45, 50, 55, 61, 86, 95, 102, 114,123, 133, 172, 408, 409, 410, 411 and 417  *Workplace Relations Act 1996* (Cth) s 4 |
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| Cases cited: | *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* (2019) 269 FCR 262  *Australian Building and Construction Commissioner v Parker* (2017) 266 IR 340  *Brodie v Singleton Shire Council* (2001) 206 CLR 512  *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410  *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719  *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Laing* (1998) 89 FCR 17  *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200  *Damevski v Giudice* (2003) 133 FCR 438  *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545  *Empirnall Holdings v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523  *Fair Work Ombudsman v National Jet Systems Pty Ltd* (2012) 218 IR 436  *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16  *Hoh v Ying Mui Pty Ltd* [2019] VSCA 203  *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (New South Wales Branch)* (2009) 178 FCR 461  *P’Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42  *Reed v Blue Line Cruises Limited* (1996) 73 IR 420  *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378  *Shop, Distributive & Allied Employees’ Association v Harris Scarfe Australia Pty Ltd* [2014] FCA 283  *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172  *Williams v Construction, Forestry, Mining and Energy Union* (2009) 179 IR 441  *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84  *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 |
|  |  |
| Date of hearing: | 9, 11 and 12 March 2020 |
|  |  |
| Date of last submissions: | 20 March 2020 (Applicant)  20 March 2020 (Respondent) |
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| Registry: | Queensland |
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| Division: | Fair Wok Division |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 168 |
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ORDERS

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|  | | QUD 228 of 2019 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Applicant | |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  First Respondent  GRANT HARRADINE  Second Respondent  WALTER BENEDITO (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 10 JULY 2020 |

THE COURT DECLARES THAT:

1. On 11 March 2019, the third, fourth, sixth, ninth to fourteenth, seventeenth and eighteenth respondents engaged in unlawful industrial action in contravention of s 46 of the *Building and* *Construction Industry (Improving Productivity) Act 2016* (Cth) (the **BCI Act**) by imposing a ban upon performing and accepting building work offered by PJ Walsh Constructions Pty Ltd in respect of the construction of North Queensland Stadium in Townsville, Queensland.
2. On 12 March 2019, the third to thirteenth and fifteenth to eighteenth respondents engaged in unlawful industrial action in contravention of s 46 of the BCI Act by imposing a ban upon performing and accepting building work offered by PJ Walsh Constructions Pty Ltd in respect of the construction of the North Queensland Stadium.
3. On 11 and 12 March 2019, the first and second respondents contravened s 46 of the BCI Act by organising the unlawful industrial action engaged in by the third to eighteenth respondents.
4. On 11 and 12 March 2019, the first and second respondents organised the unlawful industrial action engaged in by the third to eighteenth respondents with intent to coerce PJ Walsh Constructions Pty Ltd into making a building enterprise agreement with the first respondent in contravention of s 54(1) of the BCI Act.

**THE COURT ORDERS THAT:**

1. The questions of penalties and costs be heard on a date to be fixed.

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

REASONS FOR JUDGMENT

RANGIAH J:

1. In 2019, PJ Walsh Constructions Pty Ltd (**PJ Walsh Constructions**) employed the third to eighteenth respondents (the **Employees)** at the site of the North Queensland Stadium (**NQS**) under construction in Townsville, Queensland.
2. At the same time, the first respondent, the Construction, Forestry, Maritime, Mining and Energy Union (the **Union**), was engaged in a campaign to persuade PJ Walsh Constructions to make an enterprise agreement with the Union. In the context of that campaign, the Employees refused to work between 11 and 14 March 2019.
3. The applicant, the Australian Building and Construction Commissioner (the **Commissioner**), alleges that the Employees engaged in unlawful industrial action against PJ Walsh Constructions in contravention of s 46 of the *Building and* *Construction Industry (Improving Productivity) Act 2016* (Cth) (the **BCI Act**).
4. The Commissioner alleges that the second respondent, Grant Harradine, a Union official, also contravened s 46 of the BCI Act by organising the unlawful industrial action engaged in by the Employees.
5. The Commissioner alleges that Mr Harradine also contravened s 54 of the BCI Act by organising the action taken by the Employees with the intent to coerce, or apply undue pressure to, PJ Walsh Constructions to make an enterprise agreement with the Union.
6. The Commissioner further alleges that, by reason of Mr Harradine’s conduct, the Union contravened ss 46 and 54 of the BCI Act.
7. The Commissioner seeks declaratory relief and the imposition of pecuniary penalties.
8. The respondents deny that they contravened s 46, on the basis that they did not take “industrial action” within the meaning of s 7(1) of the BCI Act, since they were casual employees and were not obliged to perform or accept work. Further, Mr Harradine and the Union deny that they contravened s 54(1) of the BCI Act, on the basis that the conduct of the Employees was not unlawful, illegitimate or unconscionable and did not apply undue pressure.

# THE FACTS

1. There is no substantial dispute about the facts. There is in evidence an affidavit of Patrick Walsh, the director of PJ Walsh Constructions. Mr Walsh was not required for cross-examination. I accept his evidence.
2. The description of the facts that follows is largely taken from Mr Walsh’s affidavit and from facts alleged and admitted in the pleadings.
3. Watpac Construction Pty Ltd (**Watpac**) was the head contractor for the construction of the NQS. PJ Walsh Constructions signed a contract with Watpac on 7 August 2018 to provide concreting works at the NQS project, and started performing that work in June 2018.
4. PJ Walsh Constructions employed about 22 to 30 employees to perform work at the NQS site, depending upon work demands. Mr Walsh deposes that “almost all” of PJ Walsh Constructions’ employees at the NQS site were engaged as casuals because they were engaged solely for that project and there would be no further work available for them after the NQS project was completed.
5. The PJ Walsh Constructions employees undertaking construction work at the NQS site were covered by the *PJ Walsh Constructions Pty Ltd and Advanced Concrete Cutting and Drilling, Multi-Enterprise Agreement 2014 — 2018* (the **Enterprise Agreement**).
6. Mr Walsh’s evidence is that the ordinary hours of work for PJ Walsh Constructions’ employees at the NQS site were 6 am to 2.30 pm on weekdays.
7. In August 2018, the Queensland Government released a document entitled, “Best Practice Principles: Quality, Safe Workplaces” (the **BPP**). Watpac advised Mr Walsh that the Queensland Government had issued a direction that the BPP was to be implemented on the NQS project. The consequence was that employees covered by the BPP would receive increased rates of pay. At that time, Mr Walsh understood that the BPP did not apply to subcontractors who had signed their contracts prior to the announcement of the policy.
8. On 21 November 2018, Mr Walsh met with a Union official, Michael Robinson. Mr Robinson handed Mr Walsh a copy of a document described as a “Template Agreement”, which was a draft enterprise agreement. Mr Robinson said that the Union wanted PJ Walsh Constructions to sign up to that agreement. Mr Robinson also provided Mr Walsh with an “Expression of Interest” in signing up to the Template Agreement. Mr Robinson said that it would cost PJ Walsh Constructions $500 to sign up to the Expression of Interest. Mr Walsh said he would not sign without seeking legal advice.
9. On 22 November 2018, Mr Robinson sent Mr Walsh a text message to the effect, “Are we good to go?”. Mr Walsh understood the message to refer to signing up to the Template Agreement. In the following few days, Mr Robinson contacted Mr Walsh several times by telephone saying words to the effect, “We need to get the agreement through”. Mr Walsh was unwilling to sign.
10. On 26 November 2018, the Union arranged a meeting with all the subcontractors for the NQS project who had commenced since May 2018. The Union announced that the BPP, and the increased rates, applied retrospectively from that time. Mr Harradine and Mr Robinson said that subcontractors needed to sign the Template Agreement. Mr Walsh continued to refuse to sign.
11. In November 2018, four Union officials attended the NQS site. Mr Harradine addressed the PJ Walsh Constructions employees, waving the Template Agreement in the air and saying, “You need to make your bosses sign this”. The Union officials began verbally abusing Mr Walsh saying, he was a “fucking dog” and was “not paying workers properly — you’re a piece of shit”. One of the Union officials said that, “This bloke here is holding back, stopping you getting paid”.
12. On 29 November 2018, Mr Walsh received a letter from Watpac formally requesting a Deed of Variation to incorporate the increased rates necessitated by the BPP. Mr Walsh completed the Deed of Variation and returned it to Watpac.
13. In December 2018, Mr Robinson and another Union official spoke to employees at the NQS site. One of the officials said words to the effect, “We’ve done our bit for you, but if you don’t back us we can’t do anything. You need to make your bosses sign this agreement. Make them”. Shortly after this, all the PJ Walsh Constructions employees left the area and failed to return to work and complete their shift.
14. On 6 March 2019, Mr Harradine sent an email to a Union regional organiser saying, “CFMEU — Has never changed no agreement no money, but I’ve got PJ Walsh…ready to walk if no results friday 8/3/19”.
15. The events of 11 to 14 March 2019 involved the third to eighteenth respondents, whom I have referred to collectively as “the Employees”. The Employees were:

* Walter Benedito (third respondent);
* Shane Bryant (fourth respondent);
* Grant Cooke (fifth respondent);
* Craig Crannaford (sixth respondent);
* Matt Daniels (seventh respondent);
* Dwayne Desatge (eighth respondent);
* Joseph Duck (ninth respondent);
* John Eastaughffe (tenth respondent);
* Damien Haydon (eleventh respondent);
* Lawrence Henaway (twelfth respondent);
* Peter Lewis (thirteenth respondent);
* Vincent Marello (fourteenth respondent);
* Troy Renwick (fifteenth respondent);
* Michael Roach (sixteenth respondent);
* Shannon Tambo (seventeenth respondent); and
* Alfio Tornabene (eighteenth respondent).

1. On 11 March 2019, Mr Harradine entered the NQS site area at about 6 am. The PJ Walsh Constructions employees appear to have taken their break at 10.30 am, and gathered in the lunch room (also called the smoko room). They were addressed by Mr Harradine.
2. Mr Walsh was informed that morning by PJ Walsh Constructions’ site manager, Nathan Smith, that the employees were refusing to work unless they were paid the higher rates under the Union’s Template Agreement. Mr Walsh told the employees that PJ Walsh Constructions was close to signing a Deed of Variation with Watpac which would result in higher rates being paid, and that the difference would be back-paid. The employees were not receptive to his explanation. Mr Smith instructed the employees to go back to work. Four returned to work, but fifteen refused.
3. That afternoon, Brian Hayes, Watpac’s project manager, told Mr Harradine that he needed some workers to finish working on a concrete slab that had been poured that morning. Mr Harradine said that he would allow four workers to complete the work. Four of the fifteen employees left the lunch room and helped to finish the slab. The eleven who remained in the lunch room were the third, fourth, sixth, ninth to fourteenth, seventeenth and eighteenth respondents. They remained in the lunch room and did not perform any further work from 11 am that day. They left the site at 2 pm. I will describe the eleven as the “**11 March Employees**”.
4. Mr Walsh deposes that PJ Walsh Constructions uses a program called “ZenShifts” to roster employees and to send them details of the work to be performed, including time and location, by text message. On the Friday before, or sometimes over the weekend before, the employees are notified of their rosters for the week ahead.
5. A copy of the ZenShifts roster for the period from 11 to 14 March 2019 is in evidence. The document lists, inter alia, the date, the names of employees, the job site, the start and finish times and hours. The document is not appropriately described as a “roster”, since it records the hours actually worked by employees each day, rather than the hours for which they were scheduled to work.
6. PJ Walsh Constructions also uses sign-in sheets to check the hours worked against the roster to ensure that employees are paid correctly. The sign-in sheets are contained in a document entitled the “Foreman’s Weekly Report”.
7. The “Foreman’s Weekly Report” for the period from 11 to 14 March 2019 is in evidence. A part of that document is headed “Daily Attendance Record”, and contains the notation, “By signing you acknowledge you are drug and alcohol free and fit for work”. The document has spaces for the insertion of a date, client, site, name, signature, start time and finish time. The document shows that the 11 March Employees each signed in at the NQS site at 6 am and signed out at 2 pm on that date.
8. On 12 March 2019, fifteen of the Employees attended the NQS Project site and went straight to the lunch room and remained there. Those employees were the 11 March Employees, other than the fourteenth respondent, as well as the fifth, seventh, eighth, fifteenth and sixteenth respondents. I will refer to these employees as the “**12 March Employees**”.
9. Mr Harradine remained with the 12 March Employees throughout the day. Mr Walsh told the employees that the Deed of Variation was close to being signed off and that he would pay them the increased rate, including back pay, once the variation had been approved. Mr Harradine said, “I’ve got my people in State Parliament telling me different, that it won’t be paid until this project agreement is signed”. Mr Walsh understood that agreement to be the Template Agreement.
10. The Foreman’s Weekly Report shows that the 12 March Employees all signed in at the NQS site at 6 am and that most signed out at 1.30 pm, although some did not sign out at all.
11. In the evening of 12 March 2019, Mr Walsh sent a message by SMS to PJ Walsh Constructions’ employees engaged on the NQS project directing them to attend a meeting at the PJ Walsh Constructions yard at 6.30 am the following day, prior to commencing work at the NQS project. The PJ Walsh Constructions yard was at a different location to the NQS project.
12. On 13 March 2019, fourteen of the Employees did not attend the PJ Walsh Constructions yard, but instead attended the NQS site. Those employees were the 11 March Employees, other than the fourteenth and eighteenth respondents, as well as the fifth, seventh, eighth, fifteenth and sixteenth respondents. I will refer to these fourteen employees as the “**13 March Employees**”. They did not sign in or out. At about 9.30 or 10 am, they left the NQS site and went to the Union’s office. They did not perform any work that day.
13. On 14 March 2019, thirteen of the Employees did not attend the NQS site and did not perform any work that day. Those employees were the 11 March Employees, other than the thirteenth, fourteenth and eighteenth respondents, as well as the fifth, seventh, eighth, fifteenth and sixteenth respondents. I will refer to these employees as the “**14 March Employees**”.
14. On 14 March 2019, the Fair Work Commission made an order that all employees employed by PJ Walsh Constructions pursuant to the Enterprise Agreement at the NQS site stop, not engage in and/or not organise industrial action while the order remained in place. On 15 March 2019, the PJ Walsh Constructions’ employees returned to work.
15. Mr Walsh deposes that he did not authorise or agree to any employees performing work at the NQS project in a manner different from that which they were employed to do.
16. Mr Walsh states that it was the expectation of PJ Walsh Constructions that employees would notify the company if there were any concerns with rostered shifts that had been offered, or if there was any reason why they were unable to work as rostered. Employees would usually notify the company as soon as possible if they could not work a rostered shift. Employees were asked to let the company know as soon as possible if they were unable to come into work for any reason, such as illness.
17. Mr Walsh states that once a shift has been commenced by employees, it was the company’s expectation, and the practice, that an employee would complete the shift they commenced unless, for health reasons, they were unable to do so.
18. Aaron Parton, who was employed by Watpac as the site manager for the NQS project gave evidence. He produced an aerial photograph of the NQS site area. It shows that the area where work was actually carried out was fenced off and that the amenities area (including the lunch room) was outside the fenced area. There was also a perimeter fence which surrounded both the whole site area, including both the amenities area and the work area. There was a gate that could be closed across an access road leading to the amenities area and the work area.

# THE LEGISLATION

1. Section 45 of the BCI Act provides:

**45 Action to which this Chapter applies**

This Chapter applies to the following action:

(a) action taken by a constitutionally-covered entity;

(b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person.

1. Section 46 of the BCI Act provides:

**46 Unlawful industrial action prohibited**

A person must not organise or engage in unlawful industrial action.

1. Under s 5 of the BCI Act, action is “unlawful industrial action” if the action is “industrial action” and is not “protected industrial action”.
2. The term, “industrial action” is defined in s 7 of the BCI Act as follows:

**7 Meaning of *industrial action***

(1) ***Industrial action*** is action of any of the following kinds:

(a) the performance of building work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of building work by an employee or on the acceptance of or offering for building work by an employee;

(c) a failure or refusal:

(i) by employees to attend work, where that work is building work; or

(ii) to perform any building work at all by employees who attend work, where that work is building work;

(d) the lockout of employees from their work by their employer, where that work is building work.

Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

(2) However, ***industrial action*** does not include the following:

(a) action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees;

(b) action by an employer that is authorised or agreed to, in advance and in writing, by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

*When there is a lockout*

(3) There is a ***lockout*** of employees from their work by an employer if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

1. Section 6(1) of the BCI Act defines “building work” to mean, relevantly, the construction of structures that form, or are to form, part of land, and any operation that is part of, or preparatory to, such work. It is not in dispute that the work done, or to be done, by the Employees at the NQS site was “building work”.
2. Section 54 of the BCI Act provides, relevantly:

**54 Coercion of persons to make, vary, terminate etc. enterprise agreements etc.**

(1) A person must not:

(a) organise or take, or threaten to organise or take, any action; or

(b) refrain, or threaten to refrain, from taking any action;

with intent to coerce another person, or with intent to apply undue pressure to another person, to agree, or not to agree:

(c) to make, vary or terminate a building enterprise agreement; or

(d) to approve any of the things mentioned in paragraph (c).

…

1. Section 140 of the *Evidence Act 1995* (Cth) provides:

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

1. In this case, the relevant matters to be taken into account include the gravity of the allegations made, particularly that ss 46 and 54 of the BCI Act are “Grade A civil remedy provisions”, contravention of which exposes the respondents to pecuniary penalties under ss 81(1) and (2).

# CONSIDERATION

## Alleged contraventions of s 46 of the BCI Act — unlawful industrial action

1. The issue for determination is whether the Employees engaged in “industrial action” within the meaning of ss 7(1) and 46 of the BCI Act on 11, 12, 13 and 14 March 2019.
2. The respondents submit that the Commissioner has not established that the Employees engaged in “industrial action” because:
3. The evidence does not demonstrate that the Employees were offered work for the relevant times or days.
4. In any event, the Employees were casual employees who were not obliged to accept any work offered to them.
5. In circumstances where the Employees were not offered work, or were not obliged to accept any work that was offered, their failure or refusal to work does not fall within the definition of “industrial action” in s 7(1) of the BCI Act.
6. The failure or refusal of the Employees to work was, under s 7(2) of the BCI Act, authorised or agreed to by PJ Walsh Constructions under the Enterprise Agreement.
7. I will consider each of these issues in turn.

### Whether the evidence demonstrates that the Employees were offered work on 11, 12, 13 and 14 March 2019 which the employees refused

1. I find that the 11 March Employees attended the NQS site and signed on for work at 6 am on that day. They worked until 10.30 am. From 11 am they refused to work, remaining in the lunchroom until 2 pm, when they signed out.
2. The Commissioner uses the word “rostered” to refer to the allocation of hours (or shifts) of work to employees, whereas the respondents use that word to refer to the offer of hours of work. The difference stems from the parties’ opposing submissions as to whether the Employees were obliged to perform work. I will use the word to denote offers of hours of work.
3. The respondents submit that the evidence is inadequate to demonstrate that the 11 March Employees were rostered to work from 6 am to 2 pm.
4. PJ Walsh Constructions’ practice was to use the ZenShifts program to send SMS messages to employees showing their rostered shifts. However, the SMS messages have not been put into evidence. The document purporting to be the ZenShifts roster is in evidence, but is of little use since it does not show any hours the Employees were rostered for, but only their hours of actual work. I accept that the evidence does not directly demonstrate any hours or shifts for which the Employees were rostered to work.
5. However, the evidence allows an inference to be drawn that the 11 March Employees were offered work from 6 am to 2 pm on that date. Mr Walsh deposes that the ordinary hours of work for PJ Walsh Constructions’ employees at the NQS site, which I understand to refer to the hours during which they ordinarily carried out work, were from 6 am to 2.30 pm on weekdays. The 11 March Employees signed in for work in the Foreman’s Weekly Report at 6 am. I infer that they had been offered work by SMS message in accordance with the usual practice — otherwise they would not have attended the site and signed in. They signed off at 2 pm. If they were not rostered until 2 pm, it is improbable that they would have remained at the site until that time. I infer that the 11 March Employees had been offered work from 6 am to 2 pm that day. I find that they refused to work from 11 am to 2 pm.
6. The 12 March Employees attended the NQS project site and signed in at 6 am. I infer that they did so because they had been offered work for that day. They did not perform any work, but remained in the lunch room until 2 pm. Messrs Bryant, Crannaford, Duck, Renwick and Roach signed in at 6 am, but did not sign out. I infer, having regard to cl 6.2.3 of the Enterprise Agreement, that they had been offered at least four hours’ work from 6 am. The remainder of the 12 March Employees signed in at 6 am and signed out at 1.30 pm. I infer that they had been offered work from 6 am to 1.30 pm. I find that they refused to perform that work.
7. The 13 March Employees were sent an SMS message on 12 March 2019, directing them to attend a meeting at the PJ Walsh Constructions’ yard at 6.30 am the following day, prior to commencing work at the NQS project. The 13 March Employees went straight to the NQS site, arriving at 6.30 am. They remained in the lunchroom at the NQS site until 9.30 or 10 am before leaving for the Union’s office. As the 13 March Employees did not sign in or sign out, and as they were directed to attend the PJ Walsh Constructions’ yard at 6.30 am, I am unable to determine precisely what hours they were rostered for. However, the respondents admit on the pleadings that an SMS message was sent directing the 13 March Employees to attend at the PJ Walsh Constructions’ yard “prior to commencing work at the NQS Project”, so it is apparent that they must have been offered at least four hours’ work at the NQS project that day. The 13 March Employees did not perform any work that day, and I find that they refused to work.
8. The 14 March Employees did not attend the NQS site at all and did not perform any work that day. The ZenShifts roster in evidence does not establish that the employees were offered work. However, Mr Walsh directly deposes that they were rostered to work on that day. I accept that the 14 March Employees were offered work for at least four hours’ work that day. I find that they refused to work.
9. I reject the respondents’ submission that the evidence fails to demonstrate that the Employees were offered work from 11 to 14 March 2019.

### Whether, under the terms of the Enterprise Agreement, the employees were not obliged to accept offers of work

1. The respondents submit that, upon the proper construction of the Enterprise Agreement, the Employees were not obliged to accept any offers of work. They also submit they were only engaged for one hour at a time and were not obliged to accept any offer of further work after the conclusion of each hour. That leads to a submission that a failure or refusal to perform work they were not obliged to accept was incapable of being “industrial action” within the meaning of s 7(1) of the BCI Act.
2. Before considering these submissions, it is necessary to say something about the nature of enterprise agreements and their construction.
3. Section 172(1) of the *Fair Work Act 2009* (Cth) (the **FW Act**) provides that an enterprise agreement may be made about matters pertaining to the relationship between an employer and that employer’s employees who will be covered by the agreement. Section 50 provides that a person must not contravene a term of an enterprise agreement.
4. There is a distinction between a contract of employment, on one hand, and a workplace instrument such as an award or enterprise agreement, on the other. The provisions of the latter will rarely constitute implied terms of the former: see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421–422 and 452–453. However, they exist in a symbiotic relationship: cf *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31] (per Gleeson CJ). The parties’ arguments as to whether the Employees were obliged to accept work have been advanced by reference to analysis of the Enterprise Agreement, rather than the contracts of employment. Further, there is little evidence that would shed light on the contractual terms — there is no evidence, for example, about any patterns of work actually performed.
5. In *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197], the Full Court considered the principles relevant to the interpretation of an enterprise agreement:

The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation “turns on the language of the particular agreement, understood in the light of its industrial context and purpose”. The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a “practical bent of mind” and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.

(Citations omitted.)

1. The Enterprise Agreement covers employees of PJ Walsh Constructions undertaking on-site construction work in Townsville and surrounding areas. Its coverage encompasses the Employees at the NQS site.
2. In support of their submission that the Employees were not obliged to accept any work, the respondents rely upon cl 6 of the Enterprise Agreement. That clause provides:

**6.1 Engagement of Employees**

6.1.1 At the commencement of employment, all employees will be employed as a casual employee. An employee absent without contacting the company office for 3 successive working days is deemed to have abandoned their employment.

**6.2 Casual Employment**

6.2.1 Casual employment shall mean an employee engaged by the hour and who may terminate employment or be discharged with one hour notice. A casual employee may be engaged indefinitely.

6.2.2 Casual employees shall be paid an hourly rate no less than that listed in Appendix A to compensate for daily fares and travel allowances in clause 10.1.1, tool allowances, work related allowances, disability allowances, annual leave, paid sick leave, paid personal leave, RDOs, paid public holidays, redundancy, inclement weather, meal & crib allowances, and all other penalties or premiums except as provided by this agreement. The hourly rate includes a loading for hours worked outside of the stated normal working hours including any penalty rates that would normally apply and a casual loading.

6.2.3 A casual employee shall be provided with a minimum of 4 hours’ work or pay per engagement Sunday to Friday and a minimum of 3 hours on a Saturday. An employee may choose not to remain at work for the minimum engagement period by signing off early and will only be paid for the time worked.

1. The starting point is the stipulation in cl 6.1.1 that, “all employees will be employed as a casual employee”. There is no definition of “casual employee” in the Enterprise Agreement. In *Skene*, the Full Court observed at [159] that although the term “casual employee” has a legal meaning, it has no precise meaning: see also *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545 at 551, 555 and 565. The Full Court held [159] that whether any particular employee fits within the description of a “casual employee” depends upon an objective characterisation of the nature of the particular employment as a matter of fact and law and having regard to all the circumstances.
2. In *Skene*, the Full Court observed at [177] that, in their ordinary conceptions, permanent and casual employment are mutually exclusive categories of employment. At [171]–[172], the Full Court contrasted indefinite (or “permanent”) employment with casual employment:

171 …[Permanent employment] is characterised by a commitment by the employer, subject to rights of termination, to provide the employee with continuous and indefinite employment according to an agreed pattern of ordinary time (as distinct from overtime) work. A corresponding commitment to provide service is given by the employee…

172 In contrast, a casual employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer. That characteristic, drawn from *Hamzy*, is what White J referred to in more general terms in *South Jin* at [71] as “any commitment by the employer or the worker to ongoing employment”. In our view, what is referred to in *Hamzy* as the “essence of casualness”, captures well what typifies casual employment and distinguishes it from either full-time or part-time employment.

(Citations removed.)

1. Similarly, in *Shop, Distributive & Allied Employees’ Association v Harris Scarfe Australia Pty Ltd* [2014] FCA 283, Buchanan J observed at [26]:

There is a significant difference between a roster for full-time or part-time employees, which involves an allocation of work which they have agreed to undertake, and an offer of casual engagements, which a casual employee is usually free to accept or decline. The consequence for a casual employee of declining a “rostered” shift may be that no more are offered but the consequence for a full-time or part-time employee is that they have refused to work and have breached their contract of employment.

1. Further, in *Reed v Blue Line Cruises Limited* (1996) 73 IR 420 at 425, Moore J observed:

A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work.

1. Accordingly, indefinite or permanent employment is ordinarily characterised by an obligation on an employer to offer work and a corresponding obligation on the employee to accept work offered. In contrast, casual employment is ordinarily characterised by the absence of any obligation by an employer to offer work and any reciprocal obligation by an employee to accept work. Nevertheless, it seems possible that particular employment falling outside this ordinary characterisation might be regarded as “casual employment” when consideration is given to the whole of the circumstances. While the identification of employees as “casual” in cl 6.1.1 suggests that they are not obliged to accept offers of employment, it is necessary to examine the Enterprise Agreement as a whole to determine the issue.
2. The respondents rely on the first sentence of cl 6.2.1 which states, “Casual employment shall mean an employee engaged by the hour and who may terminate employment or be discharged with one hour notice”. However, the Commissioner submits that if a casual employee is entitled to simply refuse any further work after an hour, the notice part of the provision would have no purpose and that, read as a whole, cl 6.2.1 is merely a notice provision.
3. In *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, White J considered the concept of daily or hourly hire:

[410] In former times, it was thought that, unlike permanent employees, the predecessors of the employees now described as casual entered into a new contract of employment with each new engagement and that the contract concluded on the cessation of the engagement: *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978; (2007) 168 IR 309 at [58].

[411] Provision was made in industrial awards for work of this kind by the recognition of daily or hourly hire: *Re Metal* at 253-4. With respect to this type of employment, the Full Bench said:

[54] In relation to “employed by the hour”, it seems generally to have been accepted, although the reasons for doing so may now be obsolete, that the essence of weekly hire, daily hire, and hourly hire engagements was that each be terminable by the corresponding period of notice on either side. In some earlier awards that condition was explicit. In practice, that construction of an hourly hire employment resulted in the employment being considered to expire on the end of a shift unless renewed, or being terminated on either an hour’s notice prior to completion of shift, or effectively by the employer not offering further work at the conclusion of a shift.

(Citation omitted)

[412] Employment of this kind was the predecessor of casual employment. However, it is now recognised that a person may be engaged as a casual employee under a single continuing contract: *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385 at 399, *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175; (2008) 175 IR 455 at [110]. The actual performance of work under that contract may be intermittent or irregular…

1. Viewed in this context, the first sentence of cl 6.2.1 indicates that each engagement is for one hour at a time, but that the engagement may be terminated by the employer or employee with an hour’s notice. The sentence operates such that, for example, if an employee commences work at 6 am and gives notice at 6.15 am, the employee is entitled to cease work after an hour at 7.15 am. The effect of the sentence is that the employee, having provided an hour’s notice, is under no obligation to accept any further work. The absence of any obligation to accept further work suggests the absence of any obligation to have accepted any work that was offered in the first place. That is consistent with the description of the employment as “casual employment”.
2. The respondents also rely upon cl 6.2.3, which provides that, “A casual employee shall be provided with a minimum of 4 hours’ work or pay per engagement”, and, “An employee may choose not to remain at work for the minimum engagement period by signing off early and will only be paid for the time worked”. However, the Commissioner submits that the clause indicates that the employer is obliged to offer work, suggesting a corresponding obligation in the employee to accept work.
3. In my opinion, cl 6.2.3 does not create any obligation in the employer to offer work. The words “per engagement” confirm that casual employees may be engaged to work from time to time. The clause means that if and when the employer offers an engagement of work, it must be for a minimum of four hours. If the employee accepts the offer, he or she is not required to remain at work for the full hours offered and is only paid for the time worked. If an employee, having accepted an offer of work, is not obliged to remain at work for the full hours offered, it is difficult to see how there could have been any obligation to accept any of the hours offered in the first place.
4. Nothing in the Enterprise Agreement obliges PJ Walsh Constructions to offer its employees work. The absence of any obligation in the employer to offer work is consistent with the absence of any obligation in employees to accept work.
5. In addition, under cl 6.2.2, casual employees are paid an hourly rate, “to compensate for…annual leave, paid sick leave, paid personal leave…paid public holidays, redundancy…”. The rate compensates for the absence or exclusion of entitlement to such benefits. Under the FW Act, full-time and part-time employees are entitled to, and casual employees are excluded from, annual leave (s 86), personal/carer’s leave (s 95) and redundancy pay (s 123). These entitlements can only be excluded from the Enterprise Agreement (see s 61(1)) if the employees are “casual employees”, within the meaning of the FW Act. Further, the hourly rate includes a “casual loading” to compensate for the absence of such leave and other entitlements: cf *Skene* at [182]. In these respects, cl 6.2.2 is consistent with the employees being casual employees in the ordinary sense; and, as has been discussed, one of the ordinary characteristics of casual employment is the absence of any obligation on employees to accept work.
6. However, the Commissioner submits that a number of clauses in the Enterprise Agreement are inconsistent with the propositions that employees are not obliged to accept work and are only engaged for one hour at a time.
7. The Commissioner relies on the second sentence, “A casual employee may be engaged indefinitely”, of cl 6.2.1. The Commissioner submits that this provision envisages the employment relationship as being one of indefinite duration, rather than the hour-by-hour relationship contended for by the respondents. However, as White J observed in *Rossato* at [412], a person may be engaged as a casual employee under a single continuing contract where engagements to perform work are intermittent or irregular. Further, the Commissioner’s submission proceeds on the basis that cl 6.2.1 indicates that the employees *are* engaged indefinitely, when, in fact, the words used are, “*may be* engaged indefinitely”. The clause recognises that the engagements of an employee may continue over an indefinite period, but indicates that such an employee is still a casual. Its purpose may be to attempt to avoid the transformation of casual employment into permanent employment when the employment relationship continues over a lengthy time, a process described in *Skene* at [178] as follows:

What is agreed to at the commencement of an employment is relevant to the characterisation process, but an employment which commences as casual employment may become full-time or part-time because its characteristics have come to reflect those of an ongoing part-time or full-time employment.

1. I do not accept the Commissioner’ submission that cl 6.2.1 indicates that the employment is permanent employment involving corresponding obligations to provide and accept work.
2. The Commissioner relies upon the second sentence of cl 6.1.1 which states that, “An employee absent without contacting the company office for 3 successive working days is deemed to have abandoned their employment”. The Commissioner submits that the phrase “working days” is inconsistent with the argument that employees are only engaged by the hour. The Commissioner also submits that the requirement for employees to “contact the company office” is inconsistent with an argument attributed to the respondents that there is no obligation on employees to notify PJ Walsh Constructions if they are not going to attend a shift. The Commissioner may also be arguing that the purpose of the clause is to facilitate termination of the contract of employment, whereas that would be unnecessary if the employer is entitled to decline to offer work.
3. It may be observed that the second sentence of cl 6.1.1 applies only where the employee is absent *without* contacting the PJ Walsh Constructions office, not where the employee is absent *after* contacting the office. I accept that the clause reflects an expectation that if an employee does not intend to take up an offer of employment for a particular day, the employee will contact the office to let the employer know. Seen in that light, “a working day” is a simply a day for which the employee is offered employment, rather than providing any indication that employees are engaged by the day. The Enterprise Agreement contemplates an ongoing relationship between engagements involving some obligations and rights between the employer and employees. That is consistent with the definition of “employee” in ss 13 and 133 of the FW Act as including employees who are “usually employed”. So for example, under cl 19 of the Enterprise Agreement, the employer commits to providing employees with structured training and skill development, including through appropriate structured training based on nationally accredited competencies and curriculum. When the employee is deemed to abandon his or her employment, the employer is entitled to terminate the employment relationship for renunciation, and otherwise ongoing obligations like providing training courses come to an end. I do not accept that the clause is inconsistent with the right of casual employees to refuse employment.
4. Clause 14 provides:

**14 HOURS OF WORK**

14.1 Ordinary Hours

The normal working hours for a casual employee shall be up to 38 hours per week Monday to Saturday.

14.2 The parties agree, that normal working hours will be 5.30 am to 5.30 pm however, that having Regard for the nature of construction works, starting and finishing times may be set by the employer on a day to day basis. Early starts are common in the Industry and employees may be Asked to start early due to the particular project requirements and associated travelling time.

…

14.4 Rostered days offs are not applicable to Casual Employees.

1. The Commissioner submits that the reference in cl 14.1 to “normal working hours” is to a normal pattern of hours, and that is inconsistent with the concept of casual employment, let alone an hour-by-hour engagement. However, the clause states only that the normal working hours shall be, “up to 38 hours per week”. It indicates that normally there will be no more than 38 hours of work per week. It does not, contrary to the Commissioner’s submission, indicate that any particular number or pattern of hours within that maximum number is normal. It does not oblige the employer to offer any number of hours, nor oblige employees to work any number of hours.
2. The Commissioner submits that cl 14.2 is consistent with employees being rostered and required to work for the hours for which they are rostered. The clause is concerned with the times of the day within which work is carried out. It indicates that work will usually be carried out between 5.30 am and 5.30 pm, but that employees may be asked to start early. The language does not suggest any obligation on the employees to accept work.
3. There is greater merit in the Commissioner’s submissions concerning a number of later clauses. Before considering those clauses, it should be foreshadowed that they fall to be considered in the context that the Enterprise Agreement covers both casual and indefinite or permanent employees. While the evidence indicates that there was no ongoing employment envisaged for the PJ Walsh Constructions’ employees working on the NQS project, the Enterprise Agreement also covered PJ Walsh Constructions’ employees at other construction sites in Townsville and surrounding areas. That leaves it open to conclude that the Enterprise Agreement contemplates permanent employment for some employees of PJ Walsh Constructions. Clause 6.1.1 states that, “At the commencement of employment, all employees will be employed as a casual employee”. That clause contemplates that while all employees will be causal employees at the commencement of their employment, they may not necessarily remain so. It contemplates that casual employment may become permanent employment, whether because of a deliberate decision by the employer and an employee, or because the characteristics of the employment have changed over time: cf *Skene* at [178]. One possible construction of several clauses to be discussed is that they apply only to permanent employees, and not to casual employees. That said, it must be recognised that the clauses are expressed to apply to “an employee”, and are not specifically limited to permanent employees. I will return to these issues after discussing the remainder of the Commissioner’s submissions.
4. The Commissioner relies upon cl 14.4. That clause may suggest that in its absence, employees could be entitled to rostered days off under the *Building and Construction General On-Site Award 2010*. The inclusion of an entitlement to a rostered day off seems inconsistent with the existence of a general entitlement to refuse to accept work, since a rostered day off would be unnecessary.
5. The Commissioner relies upon cl 15, which provides:

15.1 The employer may require an employee…to work in Excess of 8 hours in any day Monday to Friday paid as per Appendix A. Provided that no employee will be required to work in excess of 58 hours in any one week except where the Employer and employee agree, for example, but not limited to, where employees are living away from home.

15.2 An employee may refuse to work additional hours if they are unreasonable.

1. The words “require” and “required” in cl 15.1 appear inconsistent with employees being entitled to refuse to accept work. Further, cl 15.2 is inconsistent with the idea that employees may generally refuse any work offered to them.
2. Clause 17.1.2 provides that:

The employee may request unpaid leave with the consideration to the flow of general works. Approval of the request is at the discretion of the Employer.

1. This clause may indicate that unpaid leave cannot be taken without making a request to the employer and the employer approving such leave. The clause appears inconsistent with casual employees being entitled to refuse work offered to them.
2. Clause 17.3 provides:

17.3 Personal/Carers/Sick Leave

17.3.1 All leave shall be taken in accordance with the provisions outlined below.

17.3.2 the leave will be granted subject to the following:

(i) You must notify the Employer of the reason and likely duration of the absence before 6.00am on the first day of the absence.

(ii) Where circumstances permit, you must endeavour to arrange your leave to minimise the impact on operational needs.

If the Employer requires, the provision of appropriate documentary evidence must be supplied as follows:

* For sick leave, a medical certificate or if not reasonably practicable to provide a medical certificate - a statutory declaration made by the employee is agreed to be reasonable evidence.
* For carers leave, a medical certificate in respect to the family or household member or a statutory declaration by the employee is agreed to be reasonable evidence. ·
* For compassionate leave, any evidence that the employer reasonably requires.

17.3.3 All Casual employees are entitled to a period of up to 2 days unpaid carer’s leave for each occasion when a member of the employee’s immediate family or a member of the employee’s household requires care or support because of illness, injury, or unexpected emergency affecting the member. The leave will be granted subject to the provision of reasonable evidence as illustrated above.

1. The Commissioner submits that the provisions for personal/carers/sick leave are inconsistent with the employees in fact being casual employees. However, cll 17.3.1 and 17.3.2 are not expressed to apply to casual employees. That the clause does not apply to casual employees is consistent with cl 6.2.2, which states that casual employees shall be paid an hourly rate to compensate for, amongst other things, the absence of paid sick or personal leave. It appears that cll 17.3.1 and 17.3.2 are intended to apply only to permanent employees.
2. Clause 17.3.3 applies expressly to casual employees. Section 102 of the FW Act, which is part of the National Employment Standards, allows employees, including casual employees, to take unpaid carer’s leave. The purpose of the cl 17.3.3 provision seems to be to reflect, reiterate or highlight the effect of s 102, consistently with s 55(5) of the FW Act which allows an enterprise agreement to include terms that have substantially the same effect as the National Employment Standards. Seen in that context, I do not accept that the clause is inconsistent with casual employees being entitled to refuse work.
3. Clause 17.4.2 provides, “All employees are entitled to a day off on a public holiday”. The clause seems to reflect s 114(1) of the FW Act, also part of the National Employment Standards, which indicates that employees, including casual employees, are entitled to be absent from their employment on public holidays. Clause 17.4.3 provides, “If the employer requests an employee to work on a public holiday and they choose to do so…then the agreed fixed rate as per Appendix A applies”. This clause indicates that if employees choose to work on public holidays, they will be paid their usual fixed rate, rather than any penalty rates. I do not accept that these clauses are inconsistent with casual employees having an entitlement to refuse work.
4. Clause 19 provides:

**19 TRAINING AND RELATED MATTER**

The parties recognise that in order to increase the efficiency and productivity of the employer a significant commitment to structured training and skill development is required. Accordingly, the employer commits itself to:

— Developing a more highly skilled and flexible workforce; and

— Providing employees with career opportunities through appropriate structured training based on nationally accredited competencies and curriculum.

1. The Commissioner submits that the development and training of the workforce is inconsistent with the notion of casual employment and an hour-by-hour engagement. However, cl 6.2.1 recognises that casual employment may continue indefinitely. It contemplates that some employees may become long-term casuals. In addition, the clause applies to the workforce as a whole and cannot be understood to require the employer to provide every employee, no matter how itinerant, with structured training and skill development. In my view, this clause is not inconsistent with the entitlement of casual employees to refuse to accept work.
2. Clause 20 provides:

**20 QUALIFICATIONS, TICKETS, INDUCTIONS & RESTRAINT GUARANTEE**

The parties recognise that the employer invests substantial time and money in training employees. Employees attend detailed training including but not limited to mine induction courses, site/project specific induction courses and medical reports at high cost to the employer in time, fees and lost opportunity. The parties agree that employees will warrant and guarantee these qualifications, tickets, inductions, results and access authorities for the exclusive benefit of the employer for a period of nine weeks from the date of obtainment. Excluding the General Safety Induction course being the ‘Work Safely in the Construction Industry’ CPCCOHS1001A.

…

1. The Commissioner submits that the requirement for employees to warrant and guarantee qualifications, etc, “for the exclusive benefit of the employer for a period of nine weeks”, is inconsistent with employees being entitled to refuse to accept work. That may be inconsistent with the ordinary characteristic of casual employment that an employee is free to accept work with other employers, but I cannot see any inconsistency with the notion that the employee is free to refuse to accept work offered by PJ Walsh Constructions.
2. Finally, the Commissioner points out that in Appendix A, every position from “junior admin” to “supervisor” is listed as “casual”. The submission seems to be that it could not be intended that all such employees could be entitled to refuse to accept work. I cannot see why this must be so. The business model used by the employer is to engage every employee as a casual at the start of their employment. If the employees refuse offers of work, they take the risk that they will not be offered further work. That is likely to result in work generally being accepted. Further, the Enterprise Agreement does not prevent the employer and employee from converting the casual employment to permanent employment (noting that the inclusive, flat rate could not overcome any inconsistent provisions of the National Employment Standards).
3. If cll 14.4, 15.1, 15.2 and 17.1.2 apply to casual employees, I would accept that they are consistent with the existence of an obligation on casual employees to accept the work they are offered. These clauses, on their face, appear to apply to casual, as well as permanent, employees. However, an alternative, and, in my opinion, preferable, construction is that they apply only to permanent employees.
4. There are clear and compelling indications in the Enterprise Agreement that the employees described as “casual employees” are casual employees in the ordinary sense, such that they are entitled to refuse offers of work. These indications include cl 6.2.1 (which states, “Casual employment shall mean an employee engaged by the hour”), cl 6.2.3 (which provides that, “An employee may choose not to remain at work for the minimum engagement period”) and a flat rate of pay (which includes a casual loading and compensates for the absence of annual leave, sick leave and redundancy pay). Further, the Enterprise Agreement does not impose any obligation on the employer to provide work, and that is inconsistent with any obligation on casual employees to accept such work as is offered. The passages from *Skene* at [172]–[173] emphasise that ordinarily there is no obligation on employers to provide work to casual employees, and no corresponding obligation on casual employees to accept work.
5. Clauses 15.1 and 15.2 are perhaps the high point of the Commissioner’s argument, since they may suggest that the employer can *require* casual employees to work. If those clauses apply to casual employees, they do so without the Enterprise Agreement imposing any corresponding obligation on the employer to offer work. Such an imbalance seems unlikely to have been intended, for reasons including that if such casual employees took up employment with another employer and refused a subsequent offer of work from PJ Walsh Constructions for the same day, they may be in contravention of the Enterprise Agreement and s 50 of FW Act.
6. The Enterprise Agreement may aptly be described as, “couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament”: *Skene* at [197]. The apparently conflicting clauses must be reconciled if possible, so that the Enterprise Agreement can be understood as a coherent whole. That can be done by taking into account that the Enterprise Agreement covers both casual and permanent employees. In my opinion, cll 15.1 and 15.2 should be construed as applying only to permanent employees, and not casuals. While these clauses are not expressed to be limited to permanent employees, that construction fits best with the overall scheme of the Enterprise Agreement. Clauses 14.4 and 17.1.2 should be construed in the same way.
7. In my opinion, under the Enterprise Agreement, casual employees are not obliged to accept work offered to them by the employer. Further, even if they accept an offer of employment, they are not obliged to remain at work for the minimum four hours that must be offered.

### Whether the action taken does not, upon the proper construction of paras (a), (b) and (c) of s 7(1) of the BCI Act, fall within the definition of “industrial action”

1. The Commissioner alleges that on 11, 12, 13 and 14 March 2019, the Employees engaged in “industrial action” within s 7(1) of the BCI Act by:

(1) performing building work in a manner different from that in which it is customarily performed: s 7(1)(a);

(2) placing a ban on the performance of building work, or on the acceptance of, or offering for, building work: s 7(1)(b);

(3) failing or refusing to attend work or perform any building work at all: s 7(1)(c).

1. The respondents submit that, properly construed, none of these provisions apply in the circumstances of the case.

#### Section 7(1)(a) of the BCI Act

1. The respondents submit that s 7(1)(a) of the BCI Act has no operation in circumstances where no work is performed at all. I accept that submission. That paragraph relevantly refers to, “the performance of building work by an employee in a manner different from that in which it is customarily performed”. That phrase applies to a situation such as “work to rule” where some work is performed but the manner of performance of the work is different. In my opinion, that phrase does not apply to the situation where no work was performed at all between 11 am and 2 pm on 11 March and no work was performed at all on 12, 13 and 14 March 2019.
2. The position might have been different in respect of 11 March 2019 if, for example, the evidence demonstrated that it was customary for work to be performed between 6 am and 2 pm, but I do not consider that the evidence goes that far.

#### Section 7(1)(b) of the BCI Act

1. The respondents submit that s 7(1)(b) of the FW Act, which refers to, “a ban, limitation or restriction on the performance of building work by an employee or on the acceptance of or offering for building work by an employee”, does not apply to a failure or refusal to perform any work at all. The respondents submit that a complete failure or refusal to perform any building work at all can only fall within s 7(1)(c). They submit that unless 7(1)(b) is read narrowly, there would be no material difference between a “ban” and “a failure or refusal…to perform any building work at all” within s 7(1)(c), so that the latter would have no work to do. The respondents also submit that s 7(1)(b) should also be construed as only applying in circumstances where the person concerned has a lawful obligation to perform the work or accept an offer of work. They submit that it has no application where a person is on an hourly engagement and is not obliged to accept further work after completion of an hour’s work.
2. The respondents rely upon the judgment in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200, which considered the definition of “industrial action” in s 4 of the *Workplace Relations Act 1996* (Cth) (the **WR Act**), in particular, para (c) which referred to “a ban limitation or restriction on the …acceptance of or offering for work”. The question was whether a picket placed a “restriction” on the performance of work. The Full Court held at 213:

…Having regard to the context in which that expression appears, it is more likely to relate to restrictions imposed by an employee or a group of employees on the work they do so as to limit the scope of that work or the time or the circumstances in which it is done. While the expression “a ... restriction ... on acceptance of or offering for work” in par (c) might comprehend picketing of the latter type which prevented employees who were continuing to work from attending the workplace, it is unlikely to have such a wide meaning if the other elements in par (c) relate to circumstances of the type just discussed. It is likely that par (c) in its entirety is directed to the conduct of employees who engage in conduct limiting the work they do or the circumstances in which they offer to do it...

1. The Full Court went on to say that it was unnecessary to express a concluded view about the scope of the definition of industrial action as it might apply to picketing. The statutory context there was different, since the definition was more detailed, nuanced and specific than it is in s 7(1) of the BCI Act. The focus of the Full Court was upon the situation where some employees prevent others from doing work and upon the words “restriction”, and perhaps “limitation”, but not on “ban”. Even so, the Full Court considered that the provision extended to employees engaging in conduct, “limiting…the circumstances in which they offer to do [work]”, which would presumably include refusing to offer any work unless the employer complies with particular conditions. I cannot see anything in the judgment of the Full Court that is inconsistent with the word “ban” applying to a refusal by employees to perform any building work at all unless their employer agrees to enter an enterprise agreement with a union.
2. In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* (2019) 269 FCR 262, the Full Court held at [197] that in s 19(1) of the FW Act, the definition of “industrial action” is “cast in wide terms”. Similarly, in *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257, the Full Court could, “see no basis in the Fair Work Act for adopting a narrow approach to s 19 as it applies to s 417”. In Adams, the Full Court observed at [55] that it is not appropriate to treat a court’s observations concerning the construction of one statute as necessarily controlling the construction of another, even if the sections are expressed in identical words. However, s 7(1) of the BCI Act does not appear relevantly distinguishable in its language or context from s 19(1) of the FW Act, and is cast in similarly wide terms. These cases are against the proposition that s 7(1)(b) of the BCI Act should be construed narrowly.
3. In *Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Laing* (1998) 89 FCR 17, French J (as his Honour was then) considered s 4(c) of the WR Act. His Honour held:

The central meaning of the term “ban” in the industrial, as in its ordinary usage, is to “prohibit or interdict”: the *Macquarie Dictionary*. Communication between persons or an organisation and persons is essential to a “ban”.

1. Under this construction, a “ban” must be imposed by more than one person. In contrast to s 4(c) of the WR Act, s 7(1)(b) specifically refers to a ban, limitation or restriction by “an employee”. The use of the singular may suggest that under s 7(1)(b), a ban, limitation or restriction can be imposed by a single employee. The concept of an employee imposing a ban, restriction or limitation on himself or herself performing work is, at least, awkward. However, that issue can be left aside in the present circumstances where it is apparent, as will be discussed, that collective action was taken by the Employees. Since s 23(b) of the *Acts Interpretation Act* *1901* (Cth) provides that a reference to the singular includes a reference to the plural, s 7(1)(b) must encompass a ban imposed by a group of employees on the performance of any building work, or upon the acceptance of, or offering for, any building work.
2. I do not accept the respondents’ submission that unless s 7(1)(b) is construed narrowly, there would be no difference between a “ban” and “a failure or refusal to perform any building work at all”, such that s 7(1)(c) would be left with no work to do. Section 7(1)(b) does not operate where an employee merely fails or refuses to perform or accept or offer for building work on a particular occasion. Something more is needed. That something is the imposition or placing of a “ban, limitation or restriction” on performing, or accepting, or offering building work. The provision contemplates a ban, limitation or restriction which operates with some level of generality. For example, it would apply to a blanket ban, or prohibition, by a group of casual employees on any of them accepting any work from a particular employer until their demands are met. I do not accept the respondents’ submission that on this construction, s 7(1)(c) would have no work to do. It would apply at least where there is a failure or refusal to attend or perform work which falls short of a ban.
3. Further, s 7(1)(b) is capable of applying to a ban, limitation or restriction on the performance, acceptance of, or offering for, building work even where there is no legal obligation on an employee to perform, accept or offer work. The words “acceptance of or offering for” clearly contemplate the application of the provision to casual employees who have no obligation to accept or offer for work.
4. The 11 March Employees were offered work from 11 am on that date but refused to work. The 12 March Employees, the 13 March Employees and the 14 March Employees were offered work on those respective dates but refused to work. It is apparent that the relevant employees took collective action on each occasion. They remained together in the lunch room on 11 and 12 March 2019. On 13 March 2019, they remained together in the lunch room and then left for the Union’s office together. On 14 March 2019, none of them attended the NQS site at all, and that non-attendance must be seen in light of the collective action taken on the previous days.
5. The refusal to work arose against the background that, since November 2018, Union officials had applied pressure upon PJ Walsh Constructions to make an enterprise agreement with the Union. Evidence was admitted without objection that on 11 March 2019, PJ Walsh Constructions’ site manager, Mr Smith, was told that the employees were refusing to work unless they were paid the higher rates under the Union’s Template Agreement. That is consistent with evidence that the 12 March Employees were unreceptive to Mr Walsh’s assurances that the higher rates would be paid without the need for a new enterprise agreement, and Mr Harradine’s statement to the effect that his information was that the higher rates would not be paid until the Template Agreement was signed. There was no work performed by any of the Employees from 11 am on 11 March until they recommenced on 15 March 2019 following the orders of the Fair Work Commission.
6. It is apparent from these matters that the Employees refused to work from 11 am on 11 March 2019 because PJ Walsh Constructions was refusing to make an enterprise agreement with the Union. I infer that the Employees made a collective decision that none of them would work for PJ Walsh Constructions until it agreed to do so. This was a “ban” within s 7(1)(b).
7. I find that the 11 March Employees placed a collective, “ban…on the performance of building work by an employee” within s 7(1)(b) of the BCI Act from 11 am on that day. At the same time, they placed a collective, “ban…on the acceptance of …building work”.
8. The way the Commissioner has pleaded the case is that there was a ban imposed on each of 11, 12, 13 and 14 March 2019. That would require evidence that a separate collective decision to impose a ban was made each day. The evidence demonstrates that the ban was imposed by the 11 March Employees, which was joined in by an additional five employees (the fifth, seventh, eighth, fifteenth and sixteenth respondents) on 12 March 2019. I infer that those five employees made a collective decision to join in the ban on the performance or acceptance of work until PJ Walsh Constructions agreed to make a building enterprise agreement with the Union. I do not accept that the evidence establishes that any further decisions to impose a ban were made on 13 or 14 March 2019. Rather, the ban already imposed continued in force.
9. I find that the relevant employees took “industrial action” within the meaning of s 7(1)(b) on 11 and 12 March 2019.

#### Section 7(1)(c) of the BCI Act

1. It may be strictly unnecessary for me to consider whether the Employees took “industrial action” within s 7(1)(c) of the BCI Act, since I have found that their conduct fell within s 7(1)(b). However, I will consider s 7(1)(c) in case I am wrong in that conclusion.
2. The respondents submit that s 7(1)(c) has no application where there is no obligation to work. They rely upon *Australian Building and Construction Commissioner v Parker* (2017) 266 IR 340 at [376], where Flick J held that employees’ attendance at a meeting before they were required to commence work did not fall within s 19(1)(c) of the FW Act.
3. I accept that there is no “failure or refusal” to “attend work” or “perform any building work at all” within s 7(1)(c)(ii) of the BCI Act where there is no legal obligation on employees to attend or perform work. There are many circumstances in which employees may have no legal obligation to attend or perform work, and indeed have legal authorisation to so refuse. For example, under the National Employment Standards, employees may be entitled to take annual leave, personal/carer’s leave, parental leave, community service leave and long-service leave. Under an award or an enterprise agreement, employees may be entitled to be absent on certain days of the week, or to take certain breaks between, or within, periods of work. They are entitled to refuse to attend work and perform work during such periods. It may be noted that in *Adams*, it was held at [91] that s 19(1)(c) of the FW Act (the equivalent of s 7(1)(c)) applies only to action taken by more than one employee (as it refers to “employees”). Section 7(1)(c) cannot be sensibly interpreted such that employees are taken to have engaged in “industrial action” if they refuse to attend work during periods of leave or breaks they are entitled to take under statute, awards or enterprise agreements, even if they engage with each other in so refusing (I leave aside any potential application of paras (a) or (b) of s 7(1)) in particular circumstances.
4. That is not to construe the provision as requiring that the employees’ conduct must occur within the area of disputation or bargaining, such an approach having been rejected in *Adams* at [59]. It is a matter of construing s 7(1)(c) of the BCI Act in light of the FW Act, particularly s 45 (a person must not contravene a term of a modern award), s 50 (a person must not contravene a term of an enterprise agreement) and s 61(1) (the National Employment Standards cannot be displaced). In *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719, Kirby P (as his Honour was then) held at 722 that, “it is proper for courts to endeavour to so construe inter related statutes as to produce a sensible, efficient and just operation of them in preference to an inefficient, conflicting or unjust operation”. In my opinion, that principle applies to the statutes under consideration. There is substantial interaction and overlap between the subject matter and drafting of the BCI Act and the FW Act. In particular, in s 8(1) of the BCI Act, “protected industrial action” expressly takes its meaning from the FW Act, subject to the modifications described in ss 8(2) and (3). The term “protected industrial action” takes its meaning in ss 408 to 411 of the FW Act by reference to the definition of “industrial action” in s 19 of the FW Act. Section 19(1) of the FW Act and s 7(1) of the BCI Act should be regarded as cognate provisions. Just as the definition of “industrial action” in s 19 of the FW Act must be read in light of ss 45, 50 and 61(1) of the FW Act, so too must it be intended that the definition of “industrial action” in the BCI Act be read in light of those provisions.
5. It may be noted that s 7(1)(c)(ii) applies to a failure or refusal to perform any building work at all by employees who “attend work”. There is an issue raised on the evidence as to whether the amenities area and lunch room, where the Employees remained when not performing work on 11, 12 and 13 March 2019, was within the part of the NQS site where building work was actually carried out. However, the respondents have not pleaded or argued that they did not “attend work” when they attended the amenities area and lunch room.
6. It is convenient to start by considering whether the Employees took industrial action within s 7(1)(c) of the BCI Act on 12, 13 and 14 March 2019. They were offered work for those days, but were under no legal obligation to accept those offers. However, it must be examined whether they in fact accepted the offers of work, but then refused to perform the work.
7. It should be noted that the following analysis of the issue has an artificial basis. If I am correct that the Employees placed a ban on the performance and acceptance of work, then they cannot be considered to have accepted work from 11 to 14 March 2019 which they then refused to perform. The Employees’ conduct can fall within either s 7(1)(b) or s 7(1)(c), but not both.
8. There are circumstances where acceptance of an offer can be inferred. Acceptance of an offer may be implied based on what the parties said and did: *Damevski v Giudice* (2003) 133 FCR 438 at [82]. This will be so if an objective bystander would conclude from the offeree’s conduct, including their silence, that the offeree has accepted the offer: *Hoh v Ying Mui Pty Ltd* [2019] VSCA 203 at [196]; *P’Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42 at [9]–[13]; *Empirnall Holdings v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 at 535.
9. The 12 March Employees attended the lunch room on that day and signed in for work at 6 am. There is no evidence that they, or Mr Harradine, said anything at the time they signed in to indicate that they were not accepting the work that had been offered. A reasonable bystander would conclude that by signing in for work, they were accepting the offers of work (leaving aside the issue of the ban). A contract was formed when they signed in, and they were then legally obligated to perform at least an hours’ work. Having attended work and accepted the offer of work, they failed to perform any work. I would find that they took industrial action, within the meaning of s 7(1)(c), by failing to perform any building work at all on 12 March 2019.
10. The 13 March Employees attended the lunch room on that day but did not sign in. In my opinion, their mere attendance at the site is insufficient to demonstrate that they accepted the offers of work. Some further act was required to indicate such acceptance. I would find that they did not take industrial action within the meaning of s 7(1)(c).
11. The 14 March Employees did not attend the lunch room or the NQS site at all and did not sign in. The evidence does not establish that they accepted the offers of work. I would find that they did not take industrial action within the meaning of s 7(1)(c).
12. The position is more complex in respect of 11 March 2019. I have inferred that the 11 March Employees were offered work from 6 am to 2 pm. They refused to perform any building work at all from 11 am to 2 pm. Clause 6.2.1 of the Enterprise Agreement states that they were, “engaged by the hour”. The effect of the clause is that there is a separate engagement for each hour of work the employee performs.
13. Clause 6.2.3 indicates that employees are provided (ie offered) a minimum of four hours work per engagement. The clause goes on to provide that employees may, “choose not to remain at work for the minimum engagement period by signing off early”. The evidence demonstrates that PJ Walsh Constructions employed a system where employees signed in and signed off work using the attendance sheets in the Foreman’s Weekly Notes. In my opinion, the reference to “signing off” in cl 6.2.3 refers to physically signing the timesheet provided by the employer. Although cl 6.2.3 suggests that employees only need to sign off when they choose not to remain at work for the minimum engagement period of four hours, that provides what is likely to be an example of loose drafting. I consider that cl 6.2.3 is intended to mean that an employee who chooses not to remain at work at any time, even after working for four hours, must sign off. The reason for the requirement to sign off is that employees are paid for each hour they work, so it is important for both the employer and employee to have an accurate record of when work is commenced and finished. It is unlikely that the requirement of signing off was intended to apply only where the employee works for less than four hours.
14. The 11 March Employees did not give the one hour’s notice required under cl 6.2.1 of the Enterprise Agreement. In addition, an aspect of indicating their choice not to remain at work was physically signing the Foreman’s Weekly Notes, but that was not done. They were required to work for one further hour, but failed to do so.
15. In summary, if I had not found that the Employees imposed a ban on the performance and acceptance of building work within s 7(1)(b), I would have found that there was a, “refusal…to perform any building work at all by employees who attend work”, on 11 and 12 March 2019 within s 7(1)(c) of the BCI Act.

### Whether PJ Walsh Constructions authorised or agreed to the failure or refusal of the Employees to perform work under the terms of the Enterprise Agreement

1. The respondents submit that even if their refusal to perform work falls within s 7(1) of the BCI Act, PJ Walsh Constructions authorised or agreed to the failure or refusal of the Employees to perform work under the terms of the Enterprise Agreement. Section 7(2) of the BCI Act excludes from the definition of “industrial action” any conduct which was agreed to in advance and in writing by the employer. The respondents submit that by virtue of PJ Walsh Constructions employing the Employees as causal employees under the Enterprise Agreement, they agreed to the Employees being entitled to refuse to accept or perform any work.
2. I accept that under the Enterprise Agreement, PJ Walsh Constructions agreed that its casual employees were not obliged to accept work that was offered to them. I also accept that PJ Walsh Constructions agreed that if casual employees accepted offers of work, they were entitled to choose not to remain at work for the minimum engagement period by signing off early, subject to giving an hour’s notice.
3. However, PJ Walsh Constructions did not agree to the Employees placing a *ban* on the performance of work or on the acceptance of work. A ban has a more general nature than a mere refusal of an offer of work on a particular occasion.
4. Further, PJ Walsh Constructions did not agree to the Employees contravening the Enterprise Agreement. For the reasons I have given in relation to s 7(1)(c), the 11 March Employees (from 11 am) and the 12 March Employees accepted offers of employment. They were then obliged to perform at least some work, but they refused to perform any work. I reject the respondents’ submission that PJ Walsh Constructions agreed to the non-performance of work they were obliged to perform.

### Whether the respondents contravened s 46 of the BCI Act

1. Section 46 of the BCI Act provides that, “A person must not organise or engage in unlawful industrial action”.
2. For the reasons I have given, the 11 March Employees and the 12 March Employees engaged in “industrial action”, within s 7(1)(b) of the BCI Act, on those respective dates. Alternatively, the 11 March Employees (from 11 am) and the 12 March Employees engaged in “industrial action” on those dates, within s 7(1)(c) of the BCI Act.
3. Under s 5 of the BCI Act, action is “unlawful industrial action” if the action is “industrial action” and is not “protected industrial action”. There is no suggestion in this case that the action taken was protected industrial action. Therefore the industrial action was unlawful industrial action.
4. In *Adams*, in relation to s 417(1) of the FW Act, a provision that is not relevantly distinguishable from s 46 of the BCI Act, the Full Court said at [92]:

A relevant appellant would, we think, have to know that another employee was, or employees were engaging in industrial action in order that he might be said to have, himself, engaged in it. If, knowing that another or others would probably be failing or refusing to attend for, or to perform work, a relevant appellant might engage in such industrial action simply by, himself, failing or refusing to attend for, or to perform work. His motive for doing so would be irrelevant, as would be the way in which he spent the time during which he should have been at work. Section 417 strikes at engagement, not motive or purpose…

1. I am satisfied that the 11 March and 12 March Employees collectively imposed a ban on the performance and acceptance of work on those dates, which continued in force until 14 March 2019. I am satisfied that the 11 March Employees collectively refused to perform any building work at all from 11 am to 2 pm on that date. I am also satisfied that the 12 March Employees collectively refused to perform any building work at all on that date. Accordingly, they each knew that the others were engaging in industrial action and they themselves engaged in industrial action.
2. Therefore, I am satisfied that each of the Employees engaged in industrial action in contravention of s 46 of the BCI Act.
3. Mr Harradine concedes that if the Employees are found to have taken industrial action, he organised such action. Therefore, I find that Mr Harradine organised industrial action in contravention of s 46 of the BCI Act on 11 and 12 March 2019.
4. The Union concedes that if Mr Harradine is found to have contravened s 46 of the BCI Act, the Union will also have contravened that provision. Therefore, I find that the Union organised industrial action in contravention of s 46 of the BCI Act on 11 and 12 March 2019.

## Alleged contraventions of s 54 of the BCI Act — organising action with intent to coerce

1. Section 54(1) of the BCI Act provides, relevantly, that, “A person must not…organise…any action…with intent to coerce another person…to make…a building enterprise agreement”.
2. The “action” relied upon by the Commissioner is the conduct of the Employees that constitutes their contraventions of s 46 of the BCI Act. The Commissioner alleges that the action was organised by Mr Harradine. The Commissioner alleges that Mr Harradine took that action with intent to coerce PJ Walsh Constructions to make a building enterprise agreement with the Union.
3. Mr Harradine defends the alleged contravention of s 54 of the BCI Act on the basis that the Employees’ conduct was not unlawful, illegitimate, unconscionable or otherwise contrary to any legal standard.
4. The authorities concerning the phrase “intent to coerce” under the FW Act demonstrate that there are two elements:
5. The action must have been taken with intention to overbear the will or negate the choice of the other person.
6. The action must be otherwise unlawful, illegitimate or unconscionable.

(See *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16 at [20]-[23]; *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 at [38]-[41]; *Williams v Construction, Forestry, Mining and Energy Union* (2009) 179 IR 441 at [105]; *Fair Work Ombudsman v National Jet Systems Pty Ltd* (2012) 218 IR 436 at [12]-[33]; *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172 at [7], [70]-[72].)

1. The Commissioner makes the formal submission that neither of these elements is required to be established, but accepts that a single judge is bound by the authorities.
2. Mr Harradine concedes that the intention element is established.
3. Mr Harradine submits that the action taken by the Employees was not unlawful because they did not contravene s 46 of the BCI Act. However, I have ruled that the Employees engaged in unlawful industrial action in contravention of s 46. The second element is therefore established.
4. The Commissioner submits that even if the Employees did not contravene s 46 of the BCI Act, the element of illegality is satisfied because Mr Harradine trespassed on Watpac’s site. However, it is the legality of the actions of the Employees and Mr Harradine’s organisation of them that is principally significant. The circumstances in which Mr Harradine entered the site would not affect the legality of those actions. In the circumstances of this case, it would be insufficient to establish a breach of s 54 of the BCI Act to demonstrate that Mr Harradine trespassed on site.
5. In any event, I do not accept that Mr Harradine trespassed. Generally, in order to maintain an action for trespass to land, the occupier must be entitled to exclusive possession of the land: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (New South Wales Branch)* (2009) 178 FCR 461 at [63]. The Commissioner has not proved that Watpac had exclusive possession of the lunchroom and amenities area that Mr Harradine entered upon.
6. The Commissioner makes an alternative submission that, even if the actions of the Employees were not unlawful, their actions were illegitimate or unconscionable or amounted to undue pressure. The finding that the Employees’ actions were unlawful pervades the consideration of each of these issues. Having made the finding, I do not think that it can readily be divorced from when considering whether their actions were illegitimate, unconscionable or amounted to undue pressure. I do not propose to consider the alternative submission.
7. It is sufficient to conclude that the organisation of actions of the Employees and the actions themselves were illegal. I find that on 11 and 12 March 2019, Mr Harradine organised those actions with intent to coerce PJ Walsh Constructions into making a building enterprise agreement with the Union. That was a contravention of s 54(1) of the BCI Act.
8. The Union concedes that if Mr Harradine contravened s 54 of the BCI Act, the Union is taken to also have contravened that provision on 11 and 12 March 2019.

# CONCLUSION

1. I have found that the 11 March Employees and the 12 March Employees contravened s 46 of the BCI Act on those respective dates. I have also found that Mr Harradine and the Union contravened that provision on those dates.
2. Further, I have found that Mr Harradine and the Union contravened s 54(1) of the BCI Act on the same dates.
3. I will make declarations accordingly. I will hear the parties as to the questions of pecuniary penalties and costs.

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| I certify that the preceding one hundred and sixty-eight (168) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 10 July 2020

SCHEDULE OF PARTIES

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| --- | --- |
|  | QUD 228 of 2019 |
| Respondents |  |
| Fourth Respondent: | SHANE BYRANT |
| Fifth Respondent: | GRANT COOKE |
| Sixth Respondent: | CRAIG CRANNAFORD |
| Seventh Respondent: | MATT DANIELS |
| Eighth Respondent: | DWAYNE DESATGE |
| Ninth Respondent: | JOSEPH DUCK |
| Tenth Respondent: | JOHN EASTAUGHFFE |
| Eleventh Respondent: | DAMIEN HAYDON |
| Twelfth Respondent: | LAWRENCE HENAWAY |
| Thirteenth Respondent: | PETER LEWIS |
| Fourteenth Respondent: | VINCENT MARELLO |
| Fifteenth Respondent: | TROY RENWICK |
| Sixteenth Respondent: | MICHAEL ROACH |
| Seventeenth Respondent: | SHANNON TAMBO |
| Eighteenth Respondent: | ALFIO TORNABENE |